India's Internet jam

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Abstract

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In a matter of three days, in August 2012, India's central government ordered internet service providers to block around 309 pieces of online content – mostly individual web pages, YouTube videos and Facebook groups. The blocking orders came days after people originally from northeastern India living in Bangalore began fleeing the city in fear of attack. Rumours that some Muslims in the city were planning violence in retaliation for recent clashes between the indigenous Bodo tribe and Muslim settlers in Assam spread quickly via text messages and through the media. The Nepali migrant community in Bangalore also received text messages from their families, warning them that they might be mistaken for northeastern Indians and also be targeted. Indian Railway, catering to the huge demand, organised special trains to Assam for the crowds of people.

Freedom of speech is enshrined in the Constitution of India, which came into force in 1950, and specifically in Article 19(1)(a), which guarantees that 'all citizens shall have the right to freedom of speech and expression'. While in the United States, it wasn't until the 1920s that the Supreme Court struck down a law or governmental action on freedom of speech grounds, in India, just one year after the constitution was adopted, government actions against both left- and right-wing political speech were struck down for violating Article 19(1)(a). Enraged, the Congress government then amended Article 19, expanding the list of restrictions to the right to free expression. These included speech pertaining to 'friendly relations with foreign states', 'public order' and 'incitement to an offence'. In 1963, in response to the 1962 war with China, the 'sovereignty and integrity of India' was also added, taking the number of categories of permissible

restrictions up to eight. While the constitution categorically stipulates that no further restrictions should be imposed, courts have on occasion added to the list through judicial interpretation without explicitly stating that they are doing so. Comparisons are often drawn between the constitution's 'reasonable restrictions' and the categorical prohibition enshrined in the US Constitution's First Amendment: 'Congress shall make no law … abridging the freedom of speech, or of the press' – a meaningless comparison as there are indeed many categories of speech that are seen as being protected under the US constitution and even speech that is protected may be restrained in a number of ways.

Today, there are a number of laws that regulate freedom of speech in India, from the Indian Penal Code (IPC), the Victorian legislation meant to codify crimes, to the Information Technology Act, which was amended in 2008 and in some cases makes behaviour that is perfectly legal offline into a criminal activity when online.

Sedition and social harmony

The Indian Penal Code criminalises sedition; speech intended to cause enmity between communities; speech intended to 'outrage religious feelings of any class'; selling, singing or displaying anything obscene; and defamation. It also prohibits 'causing someone, by words or gestures, to believe they're the target of divine displeasure'. Each of these provisions has been misused, as there are indeed many catagories of speech that are not seen as being protected under thw US constitution, and even speech that is protected may be restrained in a number of ways.

In recent years, sedition charges have been brought against human rights activists (Binayak Sen and Arundhati Roy), journalists (Seema Azad), cartoonists (Aseem Trivedi) and protesters (thousands of villagers in Koodankulam and neighbouring villages who demonstrated against a nuclear reactor in their area). It is usually the higher judiciary that dismisses such cases, while the lower judiciary seems to be supplicant to the bizarre claims of government, the police and complainants. Similarly, the higher judiciary has had to intervene in cases where books and films have been banned for 'causing enmity between communities' or for intentionally hurting the sentiments of a religious group.

Of the last six books banned by the Maharashtra government, all but one (RV Bhasin's *Islam: A Concept of Political World Invasion by Muslims*) have been overturned by the Mumbai High Court. In one case, the court criticised the government for using a violent protest (organised by the Sambhaji Brigade, one of many right-wing political groups that frequently stage demonstrations) as reason enough for banning an academic book on the Maratha king Shivaji. In its decision, the judge pointed out that it is the government's job to provide protection against such violence. Given India's history of communal violence there is indeed a need for the law to address incitement to violence – but these laws should be employed at the actual time of incitement, not after the violence has already taken place. But, as recent events have shown, the government is willing to censor 'harmful' books and films and less likely to take action against individuals who incite violence during demonstrations.

Online speech and the law

There are regular calls for the government to introduce legislation that deals specifically with online behaviour, despite the fact that the vast majority of the laws regarding sedition and social harmony apply online as well as offline. One example is the recent move to introduce amendments to the Indecent Representation of Women Act (1986) so that it applies to 'audiovisual media and material in electronic form'.

But the government's attempts to control online speech began long before the introduction of any internet-specific legislation. Indeed, when state-monopoly internet service provider VSNL censored content, it did so under the terms of a contract it had entered with its customers, not under any law. In 1998, a mailing list called Middle East Socialist Network was blocked on national security grounds. In 1999, Pakistani newspaper *Dawn*'s website was blocked during the Kargil conflict. In both of the latter cases, the government relied on the Indian Telegraph Act (1885) to justify its actions, though that act contains no explicit provisions for such censorship.

In 2000, the Information Technology (IT) Act was passed and the Indian Computer Emergency Response Team (CERT-In) was created, which (unlawfully) assumed the role of official online censor. Importantly, while the IT Act did make the publication of obscene content online illegal (though it already was under the IPC), it did not grant permission for authorities to block websites. Despite this, an executive order passed on 27 February 2003 granted CERT-In the power to block. Had this been challenged in a court, it may well have been deemed unconstitutional since, in the absence of a statutory law, an executive order cannot reverse the freedom granted under Article 19. And although the telecommunications sector in India was being liberalised around this time, as part of their licence agreements, all internet service providers (ISPs) have to agree to block links upon being requested to do so by the government. In 2008, when the IT Act was amended, it clearly stated that the government can block websites not only when it deems it necessary to do so but also when it is deemed expedient in relation to matters of public interest, national security and with regard to maintaining friendly relations with foreign states. The power to block does not, however, extend to obscenity or defamation offences.

At the same time, further categories of speech crimes were introduced, along with other new offences, including the electronic delivery of 'offensive messages through communication services' or anything 'for the purpose of causing annoyance or inconvenience'. This has often been abused, including by the chief minister of West Bengal, who issued proceedings against a professor for forwarding an email containing a cartoon that mocked him. Under this draconian and unconstitutional provision, the police do not need an arrest warrant and the punishment can be as much as three years' imprisonment, longer than even the punishment for causing death by negligence. The amendment also granted the government extensive powers to monitor and intercept online speech and data traffic, greatly extending the powers provided under colonial laws such as the Indian Telegraph Act (1885).

As legislation has been introduced, the penalties for online offences have increased significantly. For example, the penalty for the first-time publication of

an obscene ebook is up to five years in prison and a 1,000,000 rupee (US$18,800) fine, compared with two years' imprisonment and a 2,000 rupee (US$38) fine as stipulated in the IPC for publishing that same material in print version. New laws introduced in 2009 pertain specifically to blocking (section 69a), interception, decryption and monitoring (69 and 69b) and are in accordance with the constitution. However, the amendments were brought in without any attempt at transparency or accountability.

Power in the hands of intermediaries

In April 2011, despite critical submissions received during its public consultation, the government announced new 'intermediary guidelines' and 'cyber cafe rules', both of which have adverse effects on freedom of expression.

The rules, which were issued by the Department of Information and Technology (DIT), grant not only the government but citizens significant powers to censor the internet. They require all intermediaries – companies that handle content, including web hosts, telecom companies, domain name providers and other such intermediaries – to remove 'disparaging' content that could 'harm minors in any way'. They prohibit everything from jokes (if the person sharing the joke does not own copyright to it) to anything that is disparaging. In a recent case, in December 2011, thousands of people used the hashtag #=IdiotKapilSibal on Twitter to criticise the minister of communications and information technology, Kapil Sibal, who had requested that officials from Google, Microsoft, Yahoo! and Facebook in India pre-screen online content.

These guidelines and rules are badly drafted and unconstitutional, as they go beyond the limits allowed under Article 19 in the constitution. And do so in a manner that lacks any semblance of due process and fairness. They are inconsistent with offline laws, too: for example, because the guidelines also refer to gambling, the government of Sikkim can publish advertisements for its PlayWin lottery in newspapers but not online.

It's far easier to persuade officials to remove online material than it is to persuade them to remove books from a bookstore or artwork from a gallery. Police are only empowered to seize books if the government or a court has been persuaded that it violates a law and issues such an order. This fact is always recorded, in government or legal records, police files or in the press. By contrast, web content can be removed on the basis of one email complaint; intermediaries are required to 'disable' the relevant content within 36 hours of the complaint. A court order is not required, nor is there a requirement to notify the owner of the content that a complaint has been received or that material has been removed. The effect is that of almost invisible censorship.

This assertion – that it only takes one complaint – may seem far-fetched. But a researcher from the Centre for Internet and Society sent complaints to several intermediaries on a number of occasions, resulting in content being removed in a majority of cases. If intermediaries choose not to take action, they risk losing their immunity against punishment for content. In essence, the law is the equivalent of punishing a post office for the letters that people send via the postal service.

The amendments were brought in without any attempt at transparency or accountability

In 1984, Indira Gandhi was forced to sue Salman Rushdie for defamation in a London court in order to ensure one sentence was expurgated from his novel *Midnight's Children*. Today Gandhi wouldn't need to win a lawsuit against publishers. She would merely have to send a complaint to websites selling the book and it would have to be removed from sale. It is easier to block Akbari.in – the online newspaper run by Vinay Rai, who filed a criminal complaint against multiple internet companies in December 2011 for all manner of materials – than it is to prevent its print publication.

There is no penalty for frivolous complaints, such as those sent by researchers from the Centre for Internet and Society, nor is there any requirement for records to be kept of who has removed what. Such great powers of censorship without any penalties for abuse of these powers are a sure-fire way of moving towards greater intolerance, with the internet – that republic of opinions and expressions – being a casualty.

Censorship outside the law

Since 2011, governments and private companies alike have increasingly engaged in internet censorship. In April 2011, in response to a right to information request, the DIT released a list of 11 websites that had been officially blocked under the IT Act since 2009, when the amended act came into force. But, according to a recent Google Transparency Report, government requests for the removal of material far exceeds that number. The report reveals that the government (including state governments) requested that Google remove 358 items from January 2011 to June 2011. Of this number, only eight were considered to be hate speech and only one item was related to concerns over national security. The remaining material, 255 items (71 per cent of all requests), was taken down because of 'government criticism'. Criticism of the government is protected under the country's constitution but, nonetheless, Google complied with take-down requests 51 per cent of the time. It's clear, then, that governmental censorship is far more widespread than officially acknowledged.

In July 2011, Reliance Entertainment obtained a 'John Doe' order to protect its intellectual property rights with regard to its film *Singham*, which was scheduled for release that month. The order prohibited both online and offline infringement of copyright for the film and was sent to a number of ISPs, which then blocked access to file-sharing websites, even though there was no proof of the film having been available on any of them. According to Reliance Entertainment, they merely asked ISPs 'not to make the film available' on their networks, even though the order did not authorise it. But a right to information request pertaining to a similar case dealing with the distribution of the film *Dhammu* showed that the entertainment company's lawyers had in fact asked for dozens of websites – not just deep-link URLs to infringing content – to be blocked, despite publicly claiming otherwise. If web users encountered any information at all about why access to the sites was blocked, it was that the Department of Telecom had ordered the blocking, which was plainly untrue. In February 2012, following a complaint from the Indian Music Industry (a consortium of 142 mu-

sic companies), the Calcutta High Court ordered 387 ISPs to block 107 websites for music piracy. At least a few of those, including Paktimes.com and Filmicafe.com, were general interest entertainment sites. The most famous of these sites, Songs.pk, re-emerged shortly after the block as Songspk.pk, highlighting the pointlessness of the block. And outside the realm of copyright, in December 2011, the domain name CartoonsAgainstCorruption.com was suspended based on an unlawful complaint from the Mumbai police requesting its suspension, despite there being no powers for them to do so under any law.

Between August and November 2011, the DIT also went to great efforts to compel big internet companies including Indiatimes, Facebook, Google, Yahoo!, and Microsoft, to 'self-regulate'. This revealed the department's desire to gain ever greater powers to control 'objectionable' content online, effectively bypassing the IT Act. It's obvious, too, that by encouraging internet companies to 'self-regulate' the government will avoid embarrassing statistics such as those revealed by Google's Transparency Report.

New dangers

A way forward, at least for internet-specific laws, could be to rekindle the Cyber Regulations Advisory Committee – a multi-stakeholder committee required by the IT Act – and to practise at home what we preach abroad on matters of internet governance: the value of a multi-stakeholder system, which includes industry, academia and civil society and not just governments. The idea of a multi-stakeholder framework has gained prominence since it was placed at the core of the 'Declaration of Principles' at the first World Summit on Information Society in Geneva in 2003. It has also been at the heart of India's pronouncements at the Internet Governance Forum and the India-Brazil-South Africa Dialogue Forum. The Internet Governance Division, which formulates the country's international stance on internet governance, has long recognised that these decisions must be taken in an open and collaborative manner. It is time the DIT's Cyber-Law and ESecurity Group, which formulates the country's national stance on the internet, realises the same.

Freedom of speech means nothing in a democratic society if it does not allow everyone to speak. Despite the internet being a very elite space, the number of people who have used it to express themselves since its introduction in India in 1994 is vast, especially when compared to the number of people in India who have expressed themselves in print since 1947 when the country won its independence. Online speech is indeed a big shift from edited and usually civil discussions in the world of print media. Perhaps this gives us some indication of why there is some support among the mass media for government regulations on speech. Too many discussions of online speech laws in India descend into arguments about the lack of civility online. However, the press – and all of us – would do well to remember that civility and decency in speech, while desirable in many contexts, cannot be the subject of legislation.

But in India, the greatest threat to freedom of expression is not a government clampdown on dissent but threats from political and corporate powers with a range of tools at their disposal, including fostering a climate of self- censorship. The government has passed bad laws that have given way to private censorship.

And many of these laws are simply a result of gross ineptitude.

We cannot take sufficient comfort in the fact that, in India, censorship is limited and nowhere on the scale that it is in China or Iran. It is crucial that, from a legal, cultural and technological standpoint we do not open the door for further censorship. And currently, we are failing.

Biographies

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