Online Pre-Censorship is Harmful and Impractical

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The Union Minister for Communications and Information Technology, Mr. Kapil Sibal wants Internet intermediaries to pre-censor content uploaded by their users.

Mr. Sibal is a knowledgeable lawyer, and according to a senior lawyer friend of his with whom I spoke yesterday, greatly committed to ideals of freedom of speech. He would not lightly propose regulations that contravene Article 19(1)(a) [freedom of speech and expression] of our Constitution. Yet his recent proposals regarding controlling online speech seem unreasonable. My conclusion is that the minister has not properly grasped the way the Web works, is frustrated because of the arrogance of companies like Facebook, Google, Yahoo and Microsoft. And while he has his heart in the right place, his lack of knowledge of the Internet is leading him astray. The more important concern is the IT Rules that have been in force since April 2011.

Background

The New York Times scooped a story on Monday revealing that Mr. Sibal and the MCIT had been in touch with Facebook, Google, Yahoo, and Microsoft, asking them to set up a system whereby they would manually filter user-generated content before it is published, to ensure that objectionable speech does not get published. Specifically, he mentioned content that hurt people's religious sentiments and content that Member of Parliament Shashi Tharoor described as 'vile' and capable of inciting riots as being problems. Lastly, Mr. Sibal defended this as not being "censorship" by the government, but "supervision" of user-generated content by the companies themselves.

Concerns

One need not give lectures on the benefits of free speech, and Mr. Sibal is clear that he does not wish to impinge upon it. So one need not point out that freedom of speech means nothing if not the freedom to offend (as long as no harm is caused). There can, of course, be reasonable limitations on freedom of speech as provided in Article 19 of the ICCPR and in Article 19(2) of our Constitution. My problem lies elsewhere.

Secrecy

It is unfortunate that the New York Times has to be given credit for Mr. Sibal addressing a press conference on this issue (and he admitted as much). What he is proposing is not enforcement of existing rules and regulations, but of a new restriction on online speech. This should have, in a democracy, been put out for wide-ranging public consultations first.

Making intermediaries responsible

The more fundamental disagreement is that over how the question of what should not be published should be decided, and how that decision should be and how that should be carried out, and who can be held liable for unlawful speech. I believe that "to make the intermediary liable for the user violating that code would, I think, not serve the larger interests of the market." Mr. Sibal said that in May this year in an interview with the Wall Street Journal. The intermediaries (that is, all persons and companies who transmit or host content on behalf of a third party), are but messengers just like a post office and do not exercise editorial control, unlike a newspaper. (By all means prosecute Facebook, Google, Yahoo, and Microsoft whenever they have created unlawful content, have exercised editorial control over unlawful content, have incited and encouraged unlawful activities, or know after a court order or the like that they are hosting illegal content and still do not remove it.) Newspapers have editors who can take responsibility for content published in the newspaper. They can afford to, because the number of articles in a newspaper is limited. YouTube, which has 48 hours of videos uploaded every minutes, cannot. One wag suggested that Mr. Sibal was not suggesting a means of censorship, but of employment generation and social welfare for censors and editors. To try and extend editorial duties to these 'intermediaries' by executive order or through 'forceful suggestions' to these companies cannot happen without amending s.79 of the Information Technology Act which ensures they are not to be held liable for their user's content: the users are. Internet speech has, to my knowledge, and to date, has never caused a riot in India. It is when it is translated into inflammatory speeches on the ground with megaphones that offensive speech, whether in books or on the Internet, actually become harmful, and those should be targeted instead. And the same laws that apply to offline speech already apply online. If such speech is inciting violence then the police can be contacted and a magistrate can take action. Indeed, Internet companies like Facebook, Google, etc., exercise self-regulation already (excessively and wrongly, I feel sometimes). Any person can flag any content on YouTube or Facebook as violating the site's terms of use. Indeed, even images of breast-feeding mothers have been removed from Facebook on the basis of such complaints. So it is mistaken to think that there is no self-regulation. In two recent cases, the High Courts of Bombay (*Janhit Manch v. Union of India*) and Madras (*R. Karthikeyan v. Union of India*) refused to direct the government and intermediaries to police online content, saying that places an excessive burden on freedom of speech.

IT Rules, 2011

In this regard, the IT Rules published in April 2011 are great offenders. While speech that is 'disparaging' (while not being defamatory) is not prohibited by any statute, yet intermediaries are required not to carry 'disparaging' speech, or speech to which the user has no right (how is this to be judged? do you have rights to the last joke that you forwarded?), or speech that promotes gambling (as the government of Sikkim does through the PlayWin lottery), and a myriad other kinds of speech that are not prohibited in print or on TV. Who is to judge whether something is 'disparaging'? The intermediary itself, on pain of being liable for prosecution if it is found have made the wrong decision. And any person may send a notice to an intermediary to 'disable' content, which has to be done within 36 hours if the intermediary doesn't want to be held liable. Worst of all, there is no requirement to inform the user whose content it is, nor to inform the public that the content is being removed. It just disappears, into a memory hole. It does not require a paranoid conspiracy theorist to see this as a grave threat to freedom of speech. Many human rights activists and lawyers have made a very strong case that the IT Rules on Intermediary Due Diligence are unconstitutional. Parliament still has an opportunity to reject these rules until the end of the 2012 budget session. Parliamentarians must act now to uphold their oaths to the Constitution.