

A case against censorship

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'The internet is amenable to regulation but not to censorship.'

Communications and IT Minister Kapil Sibal's controversial statements pertaining to regulating content on social networking sites has unleashed a storm of criticism. Users across social networking sites argue vehemently that any attempt by the Government to filter online content before it is posted, will not only be against the principles of free speech but also impractical to implement. Noted cyber law expert Pavan Duggal says pre-publication crackdown is difficult, even unwarranted and, instead, efforts should be made to strengthen the existing IT laws. That includes making majority of the cyber crimes non-bailable and amending and tweaking the legislation to keep pace with emerging platforms and newer devices. Edited excerpts:

Do you agree that there is a need to regulate content on social networking sites?

The earlier perception that the Internet is like the 'wild-wild West' has given way to a mature realisation that this space is amenable to regulation and consequently different nations of the world have been regulating Internet through national legislations in one form or the other. India is no exception, but the level of regulation or enablement has differed from country to country depending on the specific orientations of the respective governments.

The Internet, while being amenable to regulation, would not be amenable to censorship. You have isolated instances like China where they have very solid control over the network but even that experiment is not completely successful. Censorship to protect the integrity and security of the State, continue friendly relations with other nations or maintain public order or to incite the commission of an offence is understandable. But when censorship threatens to disrupt free speech online, chances are it may not succeed.

Which, do you think, is the case here?

The Minister has taken two contradictory approaches. He says the Government does not want to regulate freedom of speech, yet he wants to ensure that no defamatory content of any kind is posted. So the Minister seems to be looking at a pre-publication period vis-à-vis a post-publication period. If you look at laws across the world, you find that most laws target the post-publication period, which is what we have done under the Information Technology Act, 2000. If it is libellous, defamatory or against the nation, you pull it down and take action against the author. If the service provider cooperates, that is great. If not, take action against the service providers as well.

But to insist on a pre-publication phase where service providers are mandated to manually vet all electronic information before uploading it on their platform is impossible. The approach towards greater regulation of social media has to give way to a more balanced realisation that lets us look at the IT Act which is outdated. It was last

amended in 2008.

Are current provisions in the IT Act fully equipped to deal with offensive content?

Under Section 66 A of the amended IT Act, if you send any information from a communication device which is offensive or is of a menacing character, it is an offence punishable with three years imprisonment and fine. It is bailable, though. Further, this section also covers information sent, which a person knows to be false. Similarly, Section 67 of the IT Act does not define obscenity, but uses lofty words like publishing or transmitting information electronically, which is lascivious or which appeals to the prurient interests or the effect of which is to deprave and corrupt the minds of those who are likely to see, read or hear the same.

Under the IT Rules, 2011 that were notified in April they have come up with Information Technology (Intermediary guidelines). These rules now categorically state that the service providers or intermediaries shall have detailed terms and conditions which will specify that the users will not upload, publish, post, host, transmit or receive content of certain categories. After doing that, if someone believes that some information is offensive or defamatory, the affected person has a right to complain or the government has a right to notify, following which, the service provider is duty-bound to mandatorily act within 36 hours and work with the user to disable access to that content. If he fails to do so, the service provider becomes a co-accused.

The only real illustration of the kind of information that could be perceived as offensive is in Rule 2 of the IT intermediary guidelines. These include content that is defamatory, libellous, invading privacy, against sovereignty of India, violates patents and IPR of other parties etc.

Does the law need to be tweaked?

Most of the companies are in breach rather than in observance of the law and there have been no penal action for companies who have dared to not comply with the rules. But if these provision were to be implemented effectively, at least in semblance it is an existing position which is relatively better than other jurisdictions. It definitely provides remedy in the post publication scenario. Of course, it needs to be strengthened.

The current Information Technology Act, 2000 is outdated. Even in the 2008 amendments, it brought communication devices within its ambit, but just added the word 'communication devices along with computers' without realising that communication devices and smartphones are today the new paradigm. . Issues such as mobile privacy and mobile security are non-existent (in the law), so is cloud computing. I think it is the time to beef up the law.

The historical mistake we committed of making almost all cyber crimes as bailable offences has to be rectified. . There has been no conviction in the last few years, so the deterrence has gone out.

I also think there is an inherent problem with over-regulating social media. If any attempts are made to stifle freedom of speech and expression, the chances of social media having an impact upon political and social institutions of the country, cannot be ruled out.

And how do we tackle offences on social media platforms?

In the case of social media, players need to be given a clear picture of examples of online defamation. The issue is not to give the discretion to the service provider to determine whether or not something is defamatory, but to let the government come up with illustrations.

Where the Indian Penal Code defines an offence, it also gives illustrations. If those illustrations could be given, they'll be a guiding principle. Secondly, how do you ensure that global social media players, who don't have offices in India, actually comply with the Indian laws? The abuse section of the social media companies does not work.

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