



CENTRE FOR COMMUNICATION GOVERNANCE AT NATIONAL LAW UNIVERSITY, DELHI

INITIAL INPUTS FOR THE PROJECT ON FREEDOM OF EXPRESSION AND THE PRIVATE SECTOR IN THE DIGITAL AGE

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Indian Legal Environment

Our report on online intermediaries in India (attached) describes the constitutional framework that applies to censorship of speech in the country. It focuses, in particular, on freedom of expression jurisprudence and the way in which it has been interpreted to apply to gatekeepers, especially online intermediaries. Since the report was published before a significant Supreme Court judgment that changed the legal landscape of online intermediaries, we have also enclosed two opinion pieces discussing the judgment in some detail.

The legal framework applicable to intermediaries includes general law such as the Indian Penal Code and sector-specific law such as the Information Technology Act 2000 [IT Act] and the Indian Telegraph Act 1885. We have discussed this in the online intermediaries report as well as in our India report for the Freedom on the Net study carried out by Freedom House (also attached here).

This note begins with an introduction to key actors relevant to the Special Rapporteur's report. It highlights the key issues and legal norms that apply to

these actors in India to facilitate easy identification of issues for which more detail will be useful. Wherever possible, we are including work or comments that we have published in the past to provide you more detail.

The second part of this note highlights issues or areas of concern that the Special Rapporteur may wish to consider in greater detail in the context of his report. This includes, for example, an overview of issues like Facebook's Free Basics in India and YouTube's consent to a local version in Pakistan.

I. ACTORS

A. Content platforms/ providersPlayers

Popular platforms in India include Google, Facebook, Twitter, YouTube, Instagram, Amazon, Flipkart, Shaadi.com, Bharatmatrimony, Snapdeal and Indiatimes. Indian law, like several other jurisdictions, has norms that govern classic content-hosting platforms, whether ecommerce, social or more customised formulations (like the marriage-oriented versions of dating platforms that are widely popular in India).

Current Indian legal norms tend towards offering a safe-harbour to platforms such that they are not liable for content hosted. There is no obligation compelling platforms not to remove content or otherwise interfere with user's freedom of expression rights online. In addition to the online intermediaries report and the two op-eds, a paper is attached, which collectively outline the evolution of the law from strict liability to the safe harbour system that currently applies.

Questions like App-neutrality and the accountability of app-stores for content-based decisions about apps are likely to become significant in India soon. Similarly, it would be worthwhile to look at different content-search or aggregation services like Google Search and Google News since they are now making pro-active content-related decisions about issues like hate speech and revenge pornography.

The second-order, cross-border impact of online intermediaries also needs to be taken into account given that several major intermediaries are global companies. In this context, we have discussed Free Basics, the localisation of YouTube in Pakistan and other related issues below in section II.

B. Internet Service Providers

As our report on online intermediary liability explains, India follows a licensing system for Internet Service Providers. The licenses grant the government significant power to insist that the infrastructure be used in multiple ways that may affect the right to freedom of expression. This could include termination of services, blocking of content, surveillance or interception of information. Landing stations are similarly subject to such licenses and are required to have capacity for surveillance.

There has been some discussion of pro-active blocking of content such as pornography. At a meeting of the Cyber Regulation Advisory Committee, the Minister of Communications and Information Technology asked a private industry organisation, the Internet and Mobile Association of India, to prepare a list of pornographic websites that ISPs and landing stations could be asked to block. While it is not clear what action was taken after this meeting, this highlights the potential for the government to use its licensing power to get ISPs to affect freedom of expression in a manner that lacks transparency and accountability, and bypasses the constitutional courts. We are attaching an op-ed that discusses this in detail here for your reference.

II. ISSUES

A. Bringing people to the internet

The ongoing Free Basics Movement in India is primarily directed at bridging the digital divide, given India's low Internet penetration rate. India is ranked 49 out of 57 countries on Internet infrastructure and environment, and its Internet Penetration Rate adds up to only 18% in a population of over 1.29 billion. However, Free Basics would offer marginalised people access to a

walled-garden version of the Internet mediated by Facebook. This would limit their idea of an open and free Internet, and runs the risk of offering a large section of the Indian population access to limited, selective information which can be very dangerous in a democracy. The nature of private gatekeepers is such that there is no system holding Facebook accountable for its decisions about what will be accessible or not on this platform.

B. Internet Shutdown

Internet shutdown issues relate to access to the internet and internet services *at all times*. The Indian government has routinely cut access to the internet during times of public strife; the rationale being that internet services (like texting apps, social media) are used to coordinate and spread violence. Since 2012, India has witnessed at least 14 such shutdowns. These shutdowns may preclude broadband and mobile data internet access. Often, orders to direct these shutdowns are not based on extant legal provisions but a general directive by the Government. For reasons not well documented, ISPs acquiesce to such directives in all instances. We have attached three blogposts on the legality and legitimacy of one such shutdown that took place in India in August 2015.

C. Impact of localizing internet services

Some websites are targeting content towards national audiences by creating localised versions of their sites. YouTube has created local versions of its site in India, Pakistan, Nepal, Sri Lanka etc. This kind of localisation raises concerns of acquiescence to censorship requests/orders by the State. Localisation may also restrict the ambit of content that is otherwise available to people from other countries, thereby limiting diversity of content in the concerned country.

D. Sexual Expression/Obscenity

In August 2015, the Indian Government blocked 857 websites, many pornographic in nature. After much furore by netizens, the Government lifted

its ban. Currently, only child pornography websites are banned. However, the Supreme Court of India is currently hearing arguments on two separate pleas to ban *all* pornographic websites, and to require intermediaries to pro-actively implement the ban. It is in this context that the Cyber Regulation Advisory Committee asked the Internet and Mobile Association of India, to prepare a list of pornographic websites for pro-active blocking by ISPs and landing stations.

It would be difficult to put a strict liability regime in place for intermediaries hosting obscene content. However, with Google's proactive censorship of Revenge Pornography and Facebook's controversial enforcement of its community standards, it is possible that some settlement is reached between the state and intermediaries over this issue.

E. Surveillance

Communications surveillance is permitted under the Telegraph Act, aside from exception provisions listed in the IT Act, for the purposes of defense, national security, sovereignty, friendly relations with foreign states, public order, and to prevent incitement to a cognizable offense. Section 69 of the IT Act allows surveillance for the purpose of "the investigation of any offence." News reports (referenced in the India report for Freedom on the Net 2015) suggest that targeted and mass surveillance are both on the rise in India. This is likely to lead to a chilling effect on speech, and potentially violates the right to privacy which has been read into the Indian constitution.

III. MATERIALS

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2. Chinmayi Arun, *The case of the online intermediary*, THE HINDU, Apr. 7, 2015, <http://www.thehindu.com/opinion/op-ed/shreya-singhal-case-of-the-online-intermediary/article7074431.ece>
3. Ujjwala Uppaluri & Sarvjeet Singh, *Supreme Court ruling on Section 66A: As much online as offline*, THE ECONOMIC TIMES BLOGS, March 25, 2015, <http://blogs.economictimes.indiatimes.com/et-commentary/supreme-court-ruling-on-section-66a-as-much-online-as-offline/>
4. FREEDOM HOUSE, *FREEDOM ON THE NET 2015: INDIA*, https://freedomhouse.org/sites/default/files/resources/FOTN%202015_India.pdf
5. Chinmayi Arun, *Gatekeeper Liability And Article 19(1)(a) Of The Constitution Of India*, 7 NUJS L. REV. 73 (2014), <http://nujslawreview.org/wp-content/uploads/2015/10/Chinmayi-Arun.pdf>
6. Chinmayi Arun, *Blocking online porn: who should make Constitutional decisions about freedom of speech?*, SCROLL.IN, Feb. 3, 2015, <http://scroll.in/article/703746/blocking-online-porn-who-should-make-constitutional-decisions-about-freedom-of-speech>
7. Nakul Nayak, *The Anatomy of Internet Shutdowns – I (Of Kill Switches and Legal Vacuums)*, CENTRE FOR COMMUNICATION GOVERNANCE AT NATIONAL LAW UNIVERSITY, DELHI, Aug. 29, 2015, <https://ccgnludelhi.wordpress.com/2015/08/29/the-anatomy-of-internet-shutdowns-i-of-kill-switches-and-legal-vacuums/>
8. Nakul Nayak, *The Anatomy of Internet Shutdowns – II (Gujarat & Constitutional Questions)*, CENTRE FOR COMMUNICATION GOVERNANCE AT NATIONAL LAW UNIVERSITY, DELHI, Sept. 1, 2015, <https://ccgnludelhi.wordpress.com/2015/09/01/the-anatomy-of-internet-shutdowns-ii-gujarat-constitutional-questions/>

9. Nakul Nayak, *The Anatomy of Internet Shutdowns – III (Post Script: Gujarat High Court Verdict)*, CENTRE FOR COMMUNICATION GOVERNANCE AT NATIONAL LAW UNIVERSITY, DELHI, Sept. 19, 2015, <https://ccgnludelhi.wordpress.com/2015/09/19/the-anatomy-of-internet-shutdowns-iii-post-script-gujarat-high-court-verdict/>