

India Digital Freedoms Series

PLATFORMS AS GATEKEEPERS: THREATS TO DIGITAL SPACE

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PLATFORMS AS GATEKEEPERS: THREATS TO DIGITAL SPACE

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This brief on platform governance is part of the Centre for Internet & Society's Report on digital civic space in India, examining the effects of policy and legal frameworks on digital rights for Indian civil society. For more background and to read the rest of the report, [click here](#).

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I. INTRODUCTION

As the use-cases for the internet have grown monumentally over the past decade, so has the role of online platforms and intermediaries as gatekeepers.

Such evolving usage of the internet and its gatekeepers has understandably resulted in many new civic space developments over the past decade, including “*new models of collaboration, citizen journalism and civic participation*.”¹ However, in the past decade, the narrative of the internet as a facilitator of social change has dampened², in part due to alleged manipulation of democratic elections³, as well as the failure of prominent social media platforms to take down violent or disturbing content leading to offline harms⁴. Perhaps as a reaction to this, governments around the world, including India’s, have pushed to introduce stricter laws to govern the liability of platform gatekeepers.

The following analysis examines regulations governing intermediary liability regarding content shared on their services. In particular, it looks at instances of content taken down by intermediaries when prompted by government notices (also termed as legal takedown orders), the impacts on civil society, and the legal issues surrounding such takedowns. It also identifies instances where independent, autonomous actions of larger intermediaries, coupled with their ubiquity on the internet, further threatens user rights to digital spaces. The power invested in these digital gatekeepers enables them to both intentionally and unintentionally influence democratic processes and public participation. This chapter evaluates both the law and policy in place to constrain and regulate online platforms while also ensuring their survival as spaces that champion public engagement and discourse.

Intermediary Liability

Various regulatory frameworks govern the conditions under which intermediaries (e.g. internet service providers, messaging services and social media platforms) are liable or exempt from liability for user-generated content.

The proliferation of online intermediaries in today’s age has amplified citizen activism, by creating an online ‘space’ for civic actors to share their opinions, criticise government policies and coordinate politically. Regulations around intermediary liability govern what the gatekeepers of these spaces must do to avoid liability, and often have a direct impact on how this right to freedom of expression is exercised online. In short, if

1 “The Role of Internet Intermediaries in Advancing Public Policy Objectives”, OECD Publishing, https://read.oecd-ilibrary.org/science-and-technology/the-role-of-internet-intermediaries-in-advancing-public-policy-objectives_9789264115644-en#page5.

2 Yascha Mounk “Can Liberal Democracy Survive Social Media?,” NYbooks, <https://www.nybooks.com/daily/2018/04/30/can-liberal-democracy-survive-social-media/>.

3 Alexis C. Madrigal, “What Facebook did to American Democracy”, The Atlantic, October 12, 2017 <https://www.theatlantic.com/technology/archive/2017/10/what-facebook-did/542502/>.

4 “Christchurch shootings: 49 dead in New Zealand mosque attacks”, BBC, March 15, 2019 <https://www.bbc.com/news/world-asia-47578798>.

the law imposes onerous obligations on intermediaries to qualify for exemption from liability for third-party content, intermediaries will tend to over-censor speech.

In 2011, technology researcher Rishabh Dara tested the effect of a faulty legal system of intermediary liability on freedom of expression in the digital space. Dara sent flawed takedown notices to a sample of seven intermediaries. Of these, six over-complied with the mandate of the takedown notice, despite the apparent flaws. Dara noted that the relevant legal system “*created uncertainty in the criteria and procedure for administering the takedown thereby inducing the intermediaries to err on the side of caution and over-comply with takedown notices in order to limit their liability and as a result suppress legitimate expressions.*”⁵ Additionally, Dara found that the law did not have in place sufficient safeguards to prevent misuse of the process, and therefore resulted in the chilling of speech⁶. Several other studies demonstrate that onerous liability frameworks lead to censorship of legitimate expression⁷.

While the Supreme Court addressed some of these concerns in 2015⁸, the Government of India has recently attempted to further change the existing law governing platform liability. The 2018 draft rules released by the Ministry of Electronics of Information Technology sought to mandate intermediaries to proactively monitor and remove “unlawful” content, to enable traceability of creators of content, and to respond swiftly to takedown notices⁹. Commentators have not only criticized these proposals as draconian in their impact on free speech online, but pointed to their infeasibility and probable unconstitutionality¹⁰.

5 Rishabh Dara, “Intermediary Liability in India: Chilling Effects on Free Expression on the Internet”, Center for Internet and Society, <https://cis-india.org/internet-governance/intermediary-liability-in-india.pdf>.

6 Id.

7 Daphne Keller, “Empirical Evidence Of “Over-removal” By Internet Companies Under Intermediary Liability Laws”, Centre for Internet and Society, Stanford Law School <https://cyberlaw.stanford.edu/blog/2015/10/empirical-evidence-over-removal-internet-companies-under-intermediary-liability-laws>.

8 See *Shreya Singhal v. Union of India*, Writ Petition (Criminal) No.167 Of 2012.

9 The Information Technology [Intermediaries Guidelines (Amendment) Rules] 2018.

10 Gurshabad Grover, Elonai Hickok et. al, “Response to the Draft of The Information Technology [Intermediary Guidelines (Amendment) Rules] 2018”, Centre for Internet and Society, <https://cis-india.org/internet-governance/resources/Intermediary%20Liability%20Rules%202018.pdf>; Chinmayi Arun, “On WhatsApp, Rumours, and Lynchings”, Economic and Political Weekly, February 9, 2019, <https://www.epw.in/journal/2019/6/insight/whatsapp-rumours-and-lynchings.html>; Torsha Sarkar, “A deep dive into content takedown timeframes”, Centre for Internet and Society, <https://cis-india.org/internet-governance/files/a-deep-dive-into-content-takedown-frames>.



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II. CONTENT TAKEDOWN AND CENSORSHIP

By the Government

In addition to regulation of intermediary liability, the Government of India has powers to send notices to intermediaries to take down specific content. Notably, the powers are such that users' content can be removed without notice, often without a chance of hearing or appeal, and without any judicial or parliamentary oversight. Flaws within the existing legal system of content removal disproportionately accord powers to the government to suspend content without abiding by the norms of due process, resulting in arbitrary takedowns and censorship. Additionally, the chief legal framework prioritizes “confidentiality” of the removals and the procedures surrounding it - allowing the government to circumvent the need to be accountable¹¹, and shrouding the mechanism in an arbitrary veil of secrecy.

The concerns and issues surrounding an opaque content removal mechanism have never been more prominent as in the case of the blocking of Dowrycalculator.com. Dowrycalculator.com was a website run by Tanul Thakur, who used satire to criticise the social evil of dowry in Indian marriages. In September 2019, crowd-sourced accounts pointed out that the website was blocked¹². On attempting to visit the website, a message was displayed which stated that the site was blocked upon orders from the Department of Telecommunications (DoT). Despite the fact that Thakur has, on multiple occasions, claimed ownership of the website, the government made no effort to either notify him of the blocking, or grant him a hearing to contest the website's removal. When Thakur tried to gather more information on the block by filing a right to information (RTI) request, the Ministry of Electronics and Information Technology (MeitY) denied Thakur's request, citing the confidentiality requirement¹³ under the content blocking framework.

In 2019, the Committee to Protect Journalists (CPJ) noted that the Indian government was forcing Twitter to censor information relating to, and accounts based in, Kashmir¹⁴. CPJ reported that the government had suppressed a considerable amount of news

11 Gurshabad Grover, “RTI Application to BSNL for the list of websites blocked in India”, Centre for Internet and Society, May 9, 2019 <https://cis-india.org/internet-governance/blog/rti-application-to-bsnl-for-the-list-of-websites-blocked-in-india>.

12 See: “Delhi HC issues notice to the government for blocking satirical Dowry Calculator website”, Internet Freedom Foundation <https://internetfreedom.in/delhi-hc-issues-notice-to-the-government-for-blocking-satirical-dowry-calculator-website/>, (quoting Thakur): “Last year, sometime in September, I found out that my website, DowryCalculator, was banned by the Department of Telecommunication. That information came through an unlikely source: a tweet. I got no notification of the ban – or the reason(s) for it – from the government.”

13 Rule 16 of the blocking rules of 2009, which act as the principle governing regulation for blocking in India, reads as: “Strict confidentiality shall be maintained regarding all the requests and complaints received and actions taken thereof.” Accordingly, the government utilizes this requirement to circumvent any attempts of procuring information around a particular instance of blocking.

14 CPJ Staff, “India uses opaque legal process to suppress Kashmiri journalism, commentary on Twitter,” CPJ Blog, October 24, 2019, <https://cpj.org/blog/2019/10/india-opaque-legal-process-suppress-kashmir-twitter.php>.

coming out of that region for the past two years, including from media outlets that questioned what safeguards were in place to ensure the freedom of press.

Additionally, CPJ studied the “takedown notices” sent by the government to Twitter to effectuate these censorship. These notices were retrieved from the Lumen database, a project based out of Harvard University’s Berkman Klein Centre. These notices are often legally and technically flawed, lacking critical details mandated by the law. For instance, reasons for requesting such removal or blocking of sites must be recorded in writing¹⁵. The notices retrieved, however, failed to state relevant reasons behind removal requests¹⁶. Further attempts at tracing information around such censorship has encountered challenges as a result of the confidentiality requirement.

More recently, the Government has used the same legal framework to ban entire apps¹⁷. The most prominent example of this has been the banning of TikTok. The prohibition of TikTok has had additional implications for Indian civil society, as it possessed the “*unusual quality of being both a creative outlet and a safe space where India’s marginalised sections from rural and urban spaces could express themselves*”¹⁸.

By Gatekeepers

In the past few years, a new thread of jurisprudence has emerged, examining acts of censorship by social media entities, independent of government, in the curtailment of political conversations¹⁹. Most of these entities, while following the application of local law, also follow their own internal norms of content moderation²⁰. In Twitter’s “hateful conduct policy”, for example, users may not “*promote violence against or directly attack or threaten other people on the basis of race, ethnicity, national origin, caste, sexual orientation, gender, gender identity, religious affiliation, age, disability, or serious disease*”²¹.

While such policies are usually public, particular instances of censorship (or the lack of it, in some cases) are often prompted by decision-making processes that are highly

15 Rule 8, blocking rules of 2009.

16 “Public database: Twitter accounts and tweets specified by the Indian authorities for blocking between August 2017 and August 2019 plus accounts from media reports and others discovered by CPJ -- The Committee to Protect Journalists” <https://drive.google.com/drive/u/0/folders/1VqH8KzgTtbvF8jT2rtuhgrrOgph9XvCT>.

17 Press Information Bureau (PIB), “Government Bans 59 mobile apps which are prejudicial to sovereignty and integrity of India, defence of India, security of state and public order”, June 29, 2019, <https://pib.gov.in/PressReleaseDetailm.aspx?PRID=1635206#:~:text=Government%20Bans%2059%20mobile%20apps,of%20state%20and%20public%20order&text=This%20Ministry%20has%20also%20received,to%20operation%20of%20certain%20apps>; PIB, “Government Blocks 118 Mobile Apps Which are Prejudicial to Sovereignty and Integrity of India, Defence of India, Security of State and Public Order”, September 2, 2020, <https://pib.gov.in/PressReleasePage.aspx?PRID=1650669>.

18 Shorbori Purkayastha, “TikTok Ban: A Loss of Expression for Millions of Indian Users”, The Quint, July 2, 2020, <https://www.thequint.com/podcast/tiktok-ban-a-loss-of-expression-for-millions-of-indian-users>.

19 Sarah Koslov, “Incitement and the Geopolitical Influence Of Facebook Content Moderation”, *Georgetown Law Technology Review* (2019) 4, <https://georgetownlawtechreview.org/wp-content/uploads/2020/01/4.1-p183-214-Koslov.pdf>.

20 Kate Klonick, “The New Governors: The People, Rules and Processes Governing Online Speech”, *Harvard Law Review* (2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2937985.

21 “Hateful conduct policy,” Twitter, <https://help.twitter.com/en/rules-and-policies/hateful-conduct-policy>.

opaque²². Given the importance accorded to social media companies as the “*modern public square*”²³ and the concentration of market power these entities hold as deciders of “acceptable speech”, such lack of transparency is hugely problematic.

Consider the following instances: Supreme Court Advocate Sanjay Hegde has represented people who were excluded from the National Register for Citizens (NRC), and been involved in a *habeus corpus* petition in Kashmir as well as mob lynching cases²⁴. In October 2019, Twitter suspended his profile on two counts of him sharing content that violated Twitter’s “hateful imagery” policy. The first piece of content shared by Hegde was the famous photo of August Landmesser refusing to do the Nazi salute in a crowd at the Blohm Voss shipyard. Taken in 1936, this photo has become a symbol of resistance against blind authoritarianism. The second content was a quote-tweet of excerpts from a poem by Gorakh Pandey, titled “Hang him”, written in protest against the hanging of two peasant revolutionaries.

Neither of these on their face seem to violate Twitter’s own internal rules of regulating speech. And yet, the social media company suspended Hegde’s account permanently and refused to reinstate it unless he deleted said pieces of content, based on opaque decisions presumably involving algorithms.

Such instances of arbitrary censorship on the part of Twitter, however, are not uncommon. Ambedkarite Dilip Mandal, whose account was also previously suspended, points out that the structural attributes of Twitter are hierarchical and translate into hegemony of the Indian status quo, including the upper caste and male users²⁵. As a result, critics of the status quo are often silenced, either by the algorithm being triggered by mass reporting²⁶, or by ideological capture at the level of

“Instances of arbitrary censorship on the part of Twitter are not uncommon. Ambedkarite Dilip Mandal points out that the structural attributes of Twitter are hierarchical and translate into hegemony of the Indian status quo, including the upper caste and male users.”

22 Karishma Mehrotra, “Processes and concerns: How does public policy in social media work?”, Indian Express, September 2, 2020, <https://indianexpress.com/article/explained/facebook-hate-speech-bias-content-moderation-bjp-wsj-report-6578318/>; Billy Perrigo, “Facebook’s Ties to India’s Ruling Party Complicate Its Fight Against Hate Speech”, TIME, August 27, 2020, <https://time.com/5883993/india-facebook-hate-speech-bjp/>.

23 *Packingham v Carolina*, 582 U.S. ____ (2017).

24 “Why Supreme Court lawyer Sanjay Hegde wants to fight Twitter,” Telegraph India, November 7, 2019, <https://www.telegraphindia.com/india/why-supreme-court-lawyer-sanjay-hegde-wants-to-fight-twitter/cid/17175>.

25 Id.

26 Id.

human decision-making regarding what content status stays up²⁷.

Contrast these instances of arbitrary takedowns of legitimate speech with the experiences of CSOs and activists who are subjected to online vitriol on a regular basis due to their work. Our interviews with different journalists revealed that they have been trolled by users all over the world due to their coverage of criminal self-styled 'godman' Asaram Babu, who had been convicted on charges of fraud and rape.

Another civil society activist revealed that she had faced intense trolling from affiliates across political parties over the course of her work, noting that the mere fact of her presence on social media led her to prepare to face the 'consequences' of the same. Another interviewee emphasized the same point, stating that being trolled was simply part of the social media space now.

These instances are representative of the experiences of many human rights activists whose work with vulnerable sectors of society provokes intense online vitriol²⁸. Yet such speech remains alive and present on these platforms, even as it very often likely meets the parameters of hate speech or incitement to violence.

Interviewees also experienced surreptitious or technical censorship of their content, which they attributed to decisions taken by the social media platform they used. For instance, one interviewee noticed the number of likes on a popular video of his on Facebook suddenly decreasing, which in turn, led to lowered visibility of the video²⁹. In another case, a journalist was unable to upload content documenting citizenship protests due to apparent "key-word" bans enacted by Facebook³⁰.

There is also some evidence that Facebook officials refrained from blocking right-wing content in India which violated their own community guidelines because of a possible regulatory or financial backlash at the hands of the Government or the ruling Bharatiya Janata Party³¹.

The arbitrary manner in which intermediaries regulate content and respond to government pressure to censor legitimate and important expression, while allowing hateful, discriminatory speech to proliferate, is a growing problem encountered in many countries around the world. Domestic legal frameworks can address some of these issues; unfortunately, in India, these laws have often been used to exacerbate the problem, with the Government having broad powers of censorship.

27 Newley Purnell and Jeff Horwitz, "Facebook's Hate-Speech Rules Collide with Indian Politics", Wall Street Journal, August 14, 2020, <https://www.wsj.com/articles/facebook-hate-speech-india-politics-muslim-hindu-modi-zuckerberg-11597423346>.

28 Garvita Khybri, "How Threats on Twitter Manifest in Real Life: Indian Troll Tales", The Quint, August 28, 2018, <https://www.thequint.com/neon/gender/trolling-women-journalists-rana-ayyub>.

29 Gathered from conversation with a student on 12 March 2020.

30 Gathered from conversation with a journalist on 10 March, 2020.

31 Newley Purnell (n 27); Karishma Mehrotra, "Before 2019 polls, BJP flagged 44 'rival' pages, 14 now off Facebook", Indian Express, September 1, 2020 <https://indianexpress.com/article/india/before-2019-polls-bjp-flagged-44-rival-pages-14-now-off-facebook-6578139/>.

III. RELEVANT DOMESTIC LAWS

An imperfect legal and regulatory system underpinning the governance of digital spaces and social media platforms fundamentally endangers the development of these spaces and their participatory nature. Under the Indian legal framework, there are two primary provisions that regulate intermediary liability and censorship - section 69A (and its associated rules) and section 79 (and rules) of the Information Technology (IT) Act.

Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules, 2009

Under section 69A of the IT Act, the government has the power to issue blocking orders, whereby public access to content on the internet can be restricted. The grounds for issuance of a blocking order are enumerated in section 69A(1): “*the interest of the sovereignty and integrity of India, defence of India, the security of the state, friendly relations with foreign states or public order or for preventing incitement to the commission of any cognisable offence relating to the above.*”³²

Section 69A(2) gives the government the power to prescribe rules to delineate further procedures for blocking. Accordingly, in 2009, the government implemented the Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules, 2009 [“the blocking rules”].

Under these rules, a Central Government officer not below the rank of Joint Secretary, either on receipt of a court order or a request by the nodal officers of the designated organisations³³, may order an intermediary³⁴ or a Government agency to block access to any content. Rule 16 of the blocking rules mandates “strict confidentiality” to be maintained around the entire blocking procedure. By virtue of these rules, the blocking process is largely executive-driven and opaque³⁵.

The constitutionality of section 69A has been challenged in the landmark decision

³² These grounds are adopted from Article 19(2) of the Constitution of India.

³³ Section 2(g), the blocking rules: “organisation” means - (i) Ministries or Departments of the Government of ; (ii) state Governments and Union territories; (iii) any agency of the Central Government, as may be notified in the Official Gazette, by the Central Government.

³⁴ Section 2(w), Information Technology Act 2000: — intermediary, with respect to any particular electronic records, means any person who on behalf of another person receives, stores or transmits that record or provides any service with respect to that record and includes telecom service providers, network service providers, internet service providers, web-hosting service providers, search engines, online payment sites, online-auction sites, online-market places and cyber cafes.

³⁵ Torsha Sarkar and Gurshabad Grover, “Content takedown and users’ rights”, Centre for Internet and Society, February 14, 2020, <https://cis-india.org/internet-governance/blog/content-takedown-and-users-rights-1>.

of *Shreya Singhal v Union of India*³⁶, where the petitioners assailed the provision for not guaranteeing a pre-decision hearing to the originator of the information. The Court, however dismissed the challenge - finding that section 69A was narrowly drawn and had sufficient procedural safeguards, including the grounds of issuance of a blocking order being specifically drawn, and mandating that the reasons of the website blocking be in writing, thus making it amenable to judicial review.

Information Technology (Intermediaries guidelines) Rules, 2011

LEGAL TAKEDOWN ORDERS

Section 79 of the Act governs the conduct of intermediaries online, of which content removal forms a subset. Section 79(3)(b), more specifically, mandates intermediaries to disable access to illegal content upon either receiving “actual knowledge” or a government notification to that effect. Similar to section 69A, this provision empowers the Central Government to further prescribe rules to provide due diligence norms that govern the intermediary. Accordingly in 2011, the Government adopted the Information Technology (Intermediaries guidelines) Rules [“the 2011 rules”].

Rule 3(4) of these rules prescribes further procedures for content removal. Under the scheme of this framework, the intermediary would be exempted from individual liability for unlawful content posted by its users, i.e., would be entitled to a ‘safe harbour’ protection. In order to claim such protection, however, the intermediary must take down any offending content within thirty-six hours of the existence of the content being made known to them.

The “actual knowledge” requirement under this framework has drawn a considerable amount of criticism. The open-ended nature of the provision means that anyone could send a notice to the intermediary, and if the intermediary failed to comply, it would be legally liable. As a result, some intermediaries were found to over-comply with the requirements of the law as a means of avoiding liability³⁷. The vague definition of what constitutes “unlawful content”, as defined in Rule 3(2), also adds to the ambiguity surrounding the framework.

In 2015, the constitutionality of section 79, Rule 3(2) and Rule 3(4) was challenged in *Shreya Singhal v Union of India*³⁸. In its judgment, the Supreme Court interpreted section 79 with two important caveats. Firstly, the thirty-six hour period mentioned would be applicable only when the intermediary became aware “from a court order or on being notified by the appropriate government or its agency that unlawful acts relating to Article 19(2) [we]re going to be committed [sic] then fail[ed] to expeditiously remove or disable access to such material.” Secondly, the court order or the government notification

³⁶ *Shreya Singhal v Union of India*, Writ Petition (Criminal) No.167 Of 2012.

³⁷ Rishabh Dara (n 5).

³⁸ *Shreya Singhal* (n 8).

should adhere to the grounds of “reasonable restriction” laid out in Article 19(2). Any act which is deemed unlawful beyond the applicability of Article 19(2) cannot be a part of a legal takedown order under section 79.

AMENDMENTS TO THE 2011 RULES

Beginning in 2017, the Indian government called for changes in the intermediary liability regime, citing issues of hate speech and misinformation on social media³⁹. Accordingly, in December 2018, the Ministry of Electronics and Information Technology (MeitY), introduced “The Information Technology (Intermediary Guidelines (Amendment) Rules) 2018” [“the 2018 rules”]. These rules sought to significantly change the liability structure of intermediaries in India. Among others, these changes included:

- Shortening the time allotted to an intermediary to respond to a state-issued takedown notice from 36 hours to 24 hours;
- Introducing a “traceability” requirement: when required by a “legally authorised” government agency, the intermediary would be obligated to enable the tracing of the originator of information on its platforms;
- Mandating intermediaries to deploy automated tools and technologies to proactively filter out “unlawful” speech from their platforms.

While these rules have yet to become the law, they have received much criticism for their concerning overreach and potential impact of their provisions. This has included, the chilling effect on free speech resulting from the traceability requirement⁴⁰, technical concerns surrounding the adoption of automated tools to filter out unlawful speech⁴¹, and the legal and practical implications of the shortened response timeframe⁴².

39 See: MeitY, Comments invited on Draft of Intermediary Guidelines 2018, <https://www.meity.gov.in/comments-invited-draft-intermediary-rules>: “A calling attention motion on “Misuse of Social Media platforms and spreading of fake News” was admitted in the Parliament (Rajya Sabha) in 2018 (Monsoon session). Hon’ble Minister for Electronics and IT, responding to the calling attention motion on 26/07/2018, made a detailed statement where he inter alia conveyed to the House the resolve of the Government to strengthen the legal framework and make the social media platforms accountable under the law.”

40 Trisha Jain “Why traceability, or some form of accountability, has become necessary,” Medianama, January 15, 2020, <https://www.medianama.com/2020/01/223-traceability-accountability-necessary-intermediary-liability/>.

41 Torsha Sarkar, “Rethinking the intermediary liability regime in India” Cyberbrics.info, August 12, 2019, <https://cyberbrics.info/rethinking-the-intermediary-liability-regime-in-india/>.

42 Torsha Sarkar, “Why should we care about takedown timeframes?” Center for internet society, April 10, 2020, <https://cis-india.org/internet-governance/blog/why-should-we-care-about-takedown-timeframes>.

IV. INTERNATIONAL STANDARDS

Although intermediary liability concerning internet service providers and IT platforms is a relatively new area, there are a number of helpful international guidelines and documents to encourage best practices for regulating intermediaries and promoting free expression in support of open civil society.

Among these are the Manila Principles on Intermediary Liability, adopted in 2015, a global civil society initiative and set of standards for censorship and takedown laws. Developed by the Electronic Frontier Foundation (EFF, a leading non-profit for digital privacy and innovation) and other NGOs, the Manila Principles aim to guide governments towards implementing laws that protect free expression, in line with international law. The six major principles outlined in this document are as follows:

The Principles

1. Intermediaries should be shielded from liability for third-party content.
2. Content must not be required to be restricted without an order by a judicial authority.
3. Requests for restrictions of content must be clear and unambiguous, and follow due process.
4. Laws and content restriction orders and practices must comply with the tests of necessity and proportionality.
5. Laws and content restriction policies and practices must respect due process.
6. Transparency and accountability must be built into laws and content restriction policies and practices⁴³.

All of these principles are relevant in the Indian context, which has not built many of these safeguards into its intermediary liability regime⁴⁴. Content takedowns have been requested by individuals, not just judicial authorities, in violation of Principle 2; there is a general lack of transparency around content restriction orders and policies (contravening Principle 6); there is a lack of opportunity and venue for intermediaries and individuals to challenge laws and content restriction orders, thereby violating due process protections (Principle 5); and India continues to hold intermediaries

⁴³ Manila Principles on Intermediary Liability, 24 March 2015, EFF, https://www.eff.org/files/2015/10/31/manila_principles_1.0.pdf.

⁴⁴ Akriti Bopanna and Gayatri Puthran, "Comparison of the Manila Principles to Draft of The Information Technology [Intermediary Guidelines(Amendment) Rules], 2018", Centre for Internet and Society, <https://cis-india.org/internet-governance/blog/akriti-bopanna-and-gayathri-puthran-comparison-of-manila-principles-to-draft-it-intermediary-guidelines-rules>.

liable for third-party content unless they follow overbroad and restrictive take-down regulations that have resulted in numerous free speech violations⁴⁵.

The 2018 IT rules further propose to force intermediaries to filter out “unlawful” speech from their platforms, which is dangerously close to requiring them to “monitor content proactively as part of an intermediary liability regime”⁴⁶.



India continues to hold intermediaries liable for third-party content unless they follow overbroad and restrictive take-down regulations that have resulted in numerous free speech violations.

⁴⁵ For more analysis on this, see Divij Joshi, Indian Intermediary Liability Regime Compliance with the Manila Principles on Intermediary Liability, Centre for Internet and Society, <https://cis-india.org/internet-governance/files/indian-intermediary-liability-regime>.

⁴⁶ *Id.* under Principle 1.

V. PLATFORM GOVERNANCE: THE WAY FORWARD

As internet companies assume more and more ubiquity in the manner in which individuals interact with the internet, platform governance will continue to raise numerous implications for civic space. The regulation of the internet necessarily requires a balancing of threefold objectives - state-related security and safety objectives, user objectives to ensure free expression, and business objectives of the platforms themselves. More often than not, current regulations skew this balance⁴⁷. There remains a critical lack of examination of the role of internet companies, their design choices⁴⁸ and policy decisions⁴⁹, responsible for skewing political conversations, harming democratic processes and reinforcing social hierarchies⁵⁰. Such examination is even more critical in non-Western markets, and fledgling and developing democracies.

The general consensus that strict intermediary liability standards for users' expression on platforms are incompatible with freedom of expression must also be balanced by various "due diligence" or "duty of care" standards (more recently proposed), to prevent actual harm, criminal activity, and some of the more destructive phenomena that have arisen with unregulated content on the internet⁵¹. Such attempts aim to inculcate a duty of care among intermediaries, given their weight and role as content hosts and curators amidst the proliferation of modern IT. These deliberations often turn on the extent of knowledge and control the intermediary had with respect to such content⁵².

This balancing act is a particular challenge in the Indian context, where disagreement around what constitutes hate speech or harmful expression, and the targeting and silencing of minority voices often infiltrates policymaking and the conduct of private entities⁵³. For this reason, it would be particularly beneficial to implement a framework that allows for more independent assessment of information and expression on intermediary platforms, grievance mechanisms and judicial forums to challenge

47 For instance, see the obligations imposed on social media platforms by the operation of Germany's NetzDG.

48 James Grimmelman. "The Platform is the Message", *Georgetown Law Technology Review* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3132758

49 Lina M. Khan & David E. Pozen, 'A Skeptical View Of Information Fiduciaries', *Harvard Law Review* https://harvardlawreview.org/wp-content/uploads/2019/12/497-541_Online.pdf

50 Telegraph India (n 24)

51 See, e.g., Joris van Hoboken & Daphne Keller, Design Principles for Intermediary Liability Laws, Transatlantic Working Group, 8 Oct 2019, https://www.ivir.nl/publicaties/download/Intermediary_liability_Oct_2019.pdf.

52 Daphne Keller, Systemic Duties of Care and Intermediary Liability, CIS, 28 May 2020, <http://cyberlaw.stanford.edu/blog/2020/05/systemic-duties-care-and-intermediary-liability>.

53 Equality Labs, "Facebook India - Towards A Tipping Point Of Violence Caste And Religious Hate Speech", <https://www.equalitylabs.org/facebookindiareport>

takedowns, and civil society working groups around issues like hate speech and disinformation, to avoid further politicization and manipulation of these phenomena to restrict speech.

With respect to the procedure under section 69A, there are demonstrable harms against public participation that arise out of an opaque, ad-hoc legal blocking and takedown regime. Similar to our recommendations with regards to internet shutdown, base-level standards of transparency and accountability should be introduced into the legal framework surrounding content takedown. As has been held in the case of *Anuradha Bhasin*, any government orders restricting speech and assembly must be made public to allow for judicial scrutiny. While that case was specifically restricted to legality of orders passed under section 144 of CrPC, a general reading of that judgment offers some hope that going forward, there will be more judicial reckoning extending this principle to online content regulation.

Lastly, public participation by civil society is both the recipient of the maximum level of harm caused by an irregular regulatory framework, and also one of the primary methods of reforming such a framework. For instance, Tanul Thakur, following his website being unduly blocked, has now approached the Delhi High Court, challenging the measure taken by the government. The proceedings are currently ongoing in the court, and the Internet Freedom Foundation (IFF), a key Indian digital rights CSO, has supported Thakur's endeavour.

Additionally, the 2018 rules, following the period of public consultation, have continued to receive much scholarly and civil society attention, by way of convenings, meetings and conversations, leading to the formation of an extensive, detailed body of work on how best to inform the Indian platform governance regime. Such attention seems to have had a spill-over effect on the final outcome of the rules, since the government has been reportedly seeking advice from the Law Ministry on the legality of such rules under the IT Act⁵⁴, with a focus on redefining some of the previously broad margins of "unlawful content"⁵⁵. Going forward, continuing attention from the CSO community in India will help to ensure a clear and pronounced voice of change against any possible harms arising from a flawed legal system governing intermediaries.

54 Surabhi Agarwal, "Revised IT intermediary rules in 2 weeks after law ministry's nod", Economic times, February 4, 2020, <https://economictimes.indiatimes.com/tech/internet/revised-it-intermediary-rules-in-2-weeks-after-law-ministrys-nod/articleshow/73921179.cms>

55 Amrita Madhkalya "Changes in draft on intermediary liability likely," Hindustan Times, January 15, 2020, <https://www.hindustantimes.com/india-news/changes-in-draft-on-intermediary-liability-likely/story-wTS2zCRnUiOMiFEbC8DuIO.html>

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