

I'd rather be censored for saying everything I believe in than be allowed to be free simply to say nice things about you, Kapil Sibal.
—Rakesh Jhunjhunwala, on Twitter



ANALYSIS
FEATURES
OPINION
REVIEWS
INTERVIEWS

STORY BEHIND THE NEWS

THAT'S THE UNKINDEST CUT, MR. SIBAL

There's Kolaveri-di on the Internet over Kapil Sibal's diktat to social media sites to prescreen users' posts. That diktat goes far beyond the restrictions placed on our freedom of expression by the IT Act. But, says Sunil Abraham of the Centre for Internet and Society, India is not going to be silenced online

Thanks to leaked reports about unpublished meetings that communications minister Kapil Sibal had with social media operators – or Internet intermediaries, to use legalese – such as Facebook, Google and Indiatimes.com, censorship policy in India has gained public attention, and caused massive outrage. According to The New York Times India Ink reportage, quoting unnamed sources from the Internet intermediaries, Mr. Sibal demanded proactive and pre-emptive screening of posts that people make on social media sites, ostensibly to filter out or remove “offensive” content and hate speech. In a television interview, however, the minister denied he wanted to censor what Indians thought and shared with others online. One is tempted to believe him. He was, after all, the amicus for the landmark People's Union of Civil Liberties (PUCI) wiretapping judgment of 1996, which is pivotal to protecting our civil liberties when using communication technology in India.

Last week, though, Mr. Sibal came out in public with his demands, saying that there was a lot of content that risked hurting the sensibilities of people and could lead to violence. “It was brought to my notice some of the images and content on platforms like Facebook, Twitter and Google are extremely offensive to the religious sentiments of people of this country...” “We will not allow Indian sentiments and religious sentiments of large sections of the community to be hurt,” he said. There was even a threat of state action if Internet companies did not comply with demands to screen content before it was posted online.

The NYT blogpost said, however, quoting executives from the Internet companies Mr. Sibal had reportedly met, that the minister showed them a Facebook page that maligned Congress president Sonia Gandhi and told them, “This is unacceptable.”

Google responded to Mr. Sibal by releasing its Transparency Report, saying that out of 358 items that it had been requested to remove between January and June 2011, only 8 requests pertained to hate speech, while as many as 255 complaints were against “government criticism”. Indian netizens raged against Mr. Sibal, and very quickly #IdiotKapil Sibal was ‘trending’ on Twitter, with thousands posting comments against attempts to ‘censor’ Internet content. Much has changed, in Mr. Sibal's reckoning, between 1996 and 2011.

So, what's all the fuss over ‘pre-screening’ and what's at stake here? Critics of Mr. Sibal say, our freedom of speech and expression is under threat. They see a pattern in the way the government has sought to impose rules and restrictions on Internet and telecommunications players, with demands on BlackBerry-maker RIM to give it access to its users' email and messenger content, on telecom players to install electronic surveillance equipment and let the government eavesdrop as it sees fit, and on the likes of Google and Yahoo to part with email content and users' details.

It all started with the amendments to the Information Technology Act 2000 in 2008. Together, they constitute damaging consequences for citizens, including the creation of a multi-tier blanket surveillance regime, inappropriate security recommendations, and undermining our freedom of speech and expression.

The amendments passed in 2008 – without any discussion in Parliament – did solve some existing policy concerns, but simultaneously introduced new ones. For instance, Section 66, introduced during this amendment, criminalises sending offensive messages through any ICT-based communication service. **Offensive messages are described as “grossly offensive, menacing character.... or causing annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred or ill will.”** These terms are not defined in the IT Act or in any other existing law, rules or case-law, except for a couple of exceptions such as what constitutes “criminal intimidation”. These limits on the freedom of expression go well beyond Article 19(2) of the Constitution, which only permits “reasonable restrictions...in the interests of the sovereignty and integrity of India, the securi-



Intermediaries Guidelines Rules were notified. Stakeholders from the technology industry, media and civil society had sent feedback to the Department of Information Technology under the Ministry of Communication and Information Technology in February, but DIT chose to ignore the feedback and finalised rules with serious flaws in them. For one, a standardised “Terms of Service” that focused on limits on free expression had to be implemented by all intermediaries – forcing a one-size-fits-all approach. Content that was “harmful to minors” was not permissible regard-

would not be informed, s/he would not be given an opportunity to file a counter-notice to challenge the intermediary's decision in court.

Four, the rules left it open for economically or politically motivated actors to seriously damage opponents online using fraudulent take-down notices, instead of treating abuse of the take-down notice system as an offence.

How the take-down system terrorises free expression on the Internet was illustrated when the Centre for Internet and Society, where this author works, undertook a research project. A pro-bono independent researcher who led the exercise sent fraudulent take-down notices to seven Internet companies in India. These included some of the largest and most popular Indian and foreign search engines, news portals and social media platforms. Although they all employ the most competent lawyers in the country, six of the seven intermediaries over-complied, confirming our worst fears. In one case, a news portal deleted not just the specific comment that was mentioned in the take-down notice but 14 other comments as well. Most importantly, it must be pointed out, the comment identified in the take-down notice was itself an excellent piece of writing that could not be construed as “offensive” by any stretch!

In the single exception to the rule, one e-commerce portal refused to act upon a take-down notice trying to prevent the sale of diapers on the grounds that it was “harmful to minors”, rightly dismissing the notice as frivolous. But that exception simply proved a rule: Private intermediaries use their best lawyers to protect their commercial interests, but are highly risk-averse and do not value freedom of expression, unless it affects their bottom-line.



GRAPHIC: KARTHIC R.

ty of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence.” If Mr. Sibal himself were to don his lawyer's coat again and launch a legal challenge to Section 66, in all likelihood, courts in India would strike it down as unconstitutional.

Section 79, which was amended, brought into being an intermediary liability regime. This was in part precipitated by the arrest of Avnish Bajaj, the former CEO of bazee.com in December 2004 for the infamous Delhi Public School MMS clip which was being sold on his e-commerce platform. Policy-makers were, however, convinced to follow international best practices and grant intermediaries immunity under certain conditions. Just as the postal department is not considered liable for the content of letters or telecom operators liable for the content of phone conversations, Internet intermediaries, too, were to be considered “dumb pipes” or “common carriers” of content produced and distributed by users.

Intermediaries therefore earned immunity from legal action so long as they acted upon take-down notices, or written requests for deletion of illegal content.

Section 79 was further clarified in April this year when the

website. All intermediaries were supposed to act upon take-down notices within 36 hours, something that a Google may be able to do, but an average blogger could not.

Two, the vague terms introduced in Section 66A were left undefined. Intermediaries were asked to sit on judgment on the question of whether an article, image or video was causing “inconvenience”.

Three, all principles of natural justice were ignored – the person responsible for posting the content

Proactive and pre-emptive screening of social media content, as Mr. Sibal has demanded, will only further compromise online civil liberties in what's already a dismal situation. In short, we move from a post-facto to a pre-emptive censorship regime. In fact, given the magnitude of the task of pre-screening in a nation with a 100 million Internet users and growing, such an intense censorship regime will mean not only that what Indian citizens say or post will be censored by private companies, but those private companies will, in turn, use machines to screen what humans are saying and doing! After all, otherwise, companies would require armies of human censors to screen the millions of posts that are made on Twitter and Facebook every minute.

But the Supreme Court has held that even the executive arm of government cannot engage in censorship prior to publication, let alone ordering private companies to do so. In any case, it's a policy that's bound to fail, for both technical reasons and for its failure to take into account human motivations. Machines, as we know, continue to be poor judges of the nuances of human expression and will likely cause massive damage to the idea of public debate. Humans, on the other hand, will begin to circumvent machine filters – for example, content labeled as PRON instead of PORN will go through.

Unnecessarily draconian crackdown on certain types of fringe content is likely to have the counterproductive result of the general society developing an unhealthy obsession for exactly such content. Despite the comprehensive Internet censorship controls in Saudi Arabia, for instance, pornography consumption is rampant, usually accessed via pirated satellite television and circulated offline using personal computing devices and mobile phones.

But all is not lost yet, perhaps. Faced with the barrage of criticism, Mr. Sibal has now called for public consultations on the issue of pre-screening content. There's hope yet for freedom of speech and expression in India. Thanks to the Internet, a throwback to 1975 simply does not look possible.

(Sunil Abraham is executive director of the Centre for Internet and Society, Bengaluru).

TWITTER, WHERE THE MIND IS WITHOUT FEAR

- **seemagoswami Seema Goswami**
Clean drinking water in villages. Primary education for all. Safe streets. No hungry people. Ah never mind. Let's monitor content on the Net
- **@PritishNandy**
This is my country. Freedom of speech is my birthright. You can go to hell sir.
- **daddy_san Caius Preposterus**
Govt. says pre-screening helps avoid censorship. That's like advocating abortions so those kids don't catch colds later.
- **acorn Nitin Pai**
The UPA government has a Stalinist approach to information policy. Unacceptable. Sibal must be sacked.
- **M A Deviah on Facebook**
Gaddafi, Assad and Mubarak could not do it but Kapil Sibal is trying.
- **@Jhunjhunwala Rakesh**
Don't think Sibal even understands the internet. This happens when you make a lawyer an IT Minister. Like hiring Mayawati for an item song
- **GabbbarSingh**
Dear Kapil Sibal, No software can pre-screen Sarcasm.
- **rajeev_mp Rajeev Chandrasekhar**
shaking my head at Govt n Kapil Sibals newest gaffe ! ..'guidelines' for content on the internet - which planet are these people living on?
- **ranvirshorey**
Anyone who would riot over anonymous content on the web is someone who would riot anyway. #fb

FREEDOM ON THE NET

- India's overall Internet Freedom Status is “Partly Free”, says Freedom House's Freedom on the Net 2011 report.
- India's score is 36 on a scale from 0 (most free) to 100 (least free), placing it at 14 among 37 countries in the 2011 report.
- Amendments to the Information Technology Act made in the wake of the 2008 Mumbai terror attacks expanded the government's censorship and monitoring capabilities.
- The OpenNet Initiative classified India as engaged in “selective” Internet filtering in the conflict/security areas and as showing “no evidence” of filtering in the political and social areas in 2007. Last week, it flagged Kapil Sibal's demand for pre-screening in its weekly ‘Threats to the Open Net’ report.
- Pressure on private companies to remove information perceived to endanger public order or national security has increased since 2009. Companies are required to have designated employees to receive government blocking requests.
- Prior judicial approval for communications interception is not required. Both central and state governments have powers to issue directives on interception, monitoring, and decryption. All licensed ISPs are obliged by law to sign an agreement that allows government authorities to access user data.
- The Indian Computer Emergency Response Team (CERT-IN) is the agency that accepts and reviews requests to block access to specific websites. All licensed Indian ISPs must comply with CERT-IN decisions. There is no review or appeals process.

INDIA'S NOT CHINA, YET

