A wolf in watchdog's clothing

Instead of soft-touch monitoring, the government has opted for predatory new rules.

Predatory Rules

1. The new rules introduced by the Centre last week to regulate all types of digital platforms, with the idea of redressing user grievances and ensuring compliance with the law, are deeply unsettling as they will end up giving the government a good deal of leverage over online news publishers and intermediaries. This holds troubling implications for freedom of expression and the right to information.
2. The soft tone notwithstanding, these rules force digital news publishers and video streaming services to adhere to a cumbersome three-tier structure of regulation, with a government committee at its apex.
3. This, in itself, is unprecedented in a country where the news media have been given the space all along to self-regulate, based on the mature understanding that any government presence could have a chilling effect on free speech and conversations.
4. That the new rules pertain only to digital news media, and not to the whole of the news media, hardly provides comfort, as the former is increasingly becoming a prime source of news and views.
5. Further, it is of significant concern that the purview of the IT Act, 2000, has been expanded to bring digital news media under its regulatory ambit without legislative action, which digital liberties organisations such as the Internet Freedom Foundation have flagged.

Cumbersome three-tier regulatory mechanism

1. The three-tier regulatory mechanism will seek to redress complaints with respect to the digital platforms' adherence to a Code of Ethics, which among other things includes the 'Norms of Journalistic Conduct', compiled by the Press Council of India, the Programme Code of the Cable Television Networks (Regulation) Act, as also a negative list of content that shall not be published (essentially what one would encounter under law as reasonable restrictions to free speech).

2. While there is not much that is wrong with the Code of Ethics per se, what is problematic is that it will take little to bring this regulatory mechanism to vicious life.
3. According to the rules, "Any person having a grievance regarding content published by a publisher in relation to the Code of Ethics may furnish his grievance on the grievance mechanism established by the publisher."
4. So, literally, anyone could force a digital platform to take up any issue. It has to be taken up first, under the new rules, by the digital platform's grievance officer.
5. If there is no resolution or if the complainant is dissatisfied, this can be escalated to a "self-regulating" body of publishers. This can then be escalated to the highest level, the government's Oversight Mechanism, according to which an inter-departmental committee will be set up to address the grievance.
6. Apart from imposing a compliance burden on digital publishers — many are small entities — this also opens the floodgates for all kinds of interventions. The potential for misuse is enormous.

The Compliance Burden

1. The new rules have increased the compliance burden for social media platforms too. The bigger of these platforms will have to appoint chief compliance officers, to ensure the rules and the laws are adhered to, and a nodal officer, with whom the law enforcement agencies will be coordinating, apart from a grievance officer.
2. Such platforms in the messaging space will have to "enable the identification of the first originator of the information on its computer resource" based on a judicial order. Thus, the rules require messaging apps such as WhatsApp and Signal to trace problematic messages to the originator.
3. While the triggers for a judicial order that requires such identification are serious offences, it raises uneasy questions about how such apps will be able to adhere to such orders, as their messages are encrypted end-to-end.
4. There is no denying that there are problems with online content, which the government has rightly highlighted now. Its release has referred to a 2018

Supreme Court observed that the government "may frame necessary guidelines to eliminate child pornography, rape and gangrape imageries, videos and sites in content hosting platforms and other applications", besides making a mention of discussions in Parliament about social media misuse and fake news.

Some amount of tightening of policy is inevitable given new challenges. But it would be wrong to imagine that by implanting itself in the grievance redress process or by making platforms share more information, the government can solve these problems. Regulation has an important place in the scheme of things, and no one advocates giving a free pass to the digital platforms. But then the laws to combat unlawful content are already in place. What is required is its uniform application. And given an environment where people are sensitive to content, the regulatory mechanism could become an operational nightmare. Worse, the casualties could be creativity and freedom of expression. The government would like to see itself as a watchdog of digital content in the larger public interest, but it comes across as a predator.

More about Big Government than Big Tech

Without discussion

1. The notification of these new rules, however, do not merely represent the executive branch superseding previous subordinate rules under the law with newer regulation.
2. They represent a dramatic, dangerous move by the Union Government towards cementing increased censorship of Internet content and mandating compliance with government demands regarding user data collection and policing of online services in India.
3. This has happened in the absence of open and public discussion of the full swathe of regulatory powers the government has sought to exercise and without any parliamentary study and scrutiny.

Curious stand

1. The government's gazette notification has further claimed that the rules were also issued under the legal authority to the specific procedure for blocking web content under Section 69A of the IT Act.

2. The ability to issue rules under a statute — i.e. to frame subordinate legislation — is by its nature a limited, constrained power. When the Union Government issues subordinate rules, it is limited to the substantive provisions laid out by Parliament in the original act passed by the latter — the executive branch is subordinate to what Parliament has permitted it and cannot use its rule-making power to seek to issue primary legislation by itself.

Directives and mandates

1. Unfortunately, with the present Internet content and social media rules, the Union Government has done precisely that.
2. Instead of specifying the basic due diligence requirements intermediaries had to perform in order to make use of Section 79 safe harbour provision, the executive branch has created new rules that apply only to "significant social media intermediaries" — a term that appears nowhere in the Information Technology Act.
3. It has included mandates for retention of user data by such intermediaries for use by government agencies and clauses on how popular messaging services have to enable the tracing of the original creator of a message (which is regarded as not possible for end-to-end encrypted messaging services without introducing flaws in their systems) even though the sections in the law cited by the government do not give them that power.
4. The rules have grown to include a chapter on how digital news sites have to be registered before the Ministry of Information and Broadcasting, and further laid out a mechanism by which streaming video sites featuring original content (which are generally not regarded as intermediaries for the purposes of Internet law) have to agree to a government-supervised "self-regulatory system".
5. This, even though digital news service registration is not required under the IT Act and streaming video content has not been included under the ambit of the Cinematograph Act.
6. In any other situation, the package contained in this gazette notification last week would be instead included in a bill sent to Parliament for its consideration — and which would be regarded as ambitious and controversial for any administration.

The message is clear

1. To understand these new Internet content control rules — for that is what they essentially are — you need to not only see what they directly give to the government, but what the government is seeking to get done behind a shadow of regulatory pressure.
2. It appears that the government wants to send a message to all Internet ecosystem players that they desire compliance with their desires — formal or informal — regarding what content should be taken down, along with the removal of any push back against overbroad demands for user data and other surveillance orders by government agencies.
3. The Government of India already has significant legal powers, with practically no institutionalised oversight or true checks and balances, to force censorship and surveillance on Internet platforms and other web services in India.

The Union Government, when issuing these rules, made reference to increased global interest in regulating Big Tech. However, in advancing Internet content control interests and increased requirements around government demands for user data, while not advancing surveillance law reform or enacting a strong statutory data protection framework, it appears that the interest is more in advancing Big Government and trying to force technologists to fall in line, no matter the cost to our fundamental rights in our Internet age.

Big brother is watching you

Bottom Line: The new guidelines to regulate digital content give the executive unbridled power without any checks and balances.

Citizen Empowerment

Under the guidelines, it appears as if the citizens have been empowered and that there is now a fair grievance redressal mechanism for users of digital platforms. The guidelines include social media sites, messaging apps, over-the-top streaming services (popularly known as OTT services), and digital news publishers.

Tricky new rule

1. While looking at the details of the Information Technology (Guidelines for Intermediaries and Digital Media Ethics Code) Rules 2021, it is clear that there

is an executive overreach and this is not an attempt to empower citizen's right to free speech and free expression.

2. The tricky new rule states that big social media companies will have to take down unlawful content within a specific time frame of being served either a court order or notice by an appropriate government agency.
3. There has been no satisfactory answer from the government on what basis it issues a takedown instruction, which is always euphemistically called a takedown request, to major social media platforms.

Content Takedown

Since Shreya Singhal v. Union of India (2015), the debate over the constitutionality of the content takedown regime under Section 69A of the IT Act (and the Blocking Rules issued under it) has been raging. For instance, constitutional lawyers have pointed out three important elements in the 'Blocking Rules'.

1. One, the Rules do not provide for an appeals process.
2. Two, there is a contradiction between Rule 15 that requires that Designated Officer to maintain records of blocking requests and actions taken and Rule 16 that stipulates that "strict confidentiality shall be maintained regarding all the requests and complaints received and actions taken thereof."
3. Three, for the last five years, he has been arguing that there is a need to file a review petition to seek clarity on a host of issues arising out of this judgment. The new rules pave the way for more opacity and secrecy rather than transparency and accountability.

Unbridled power for the executive

1. If the earlier regulatory framework was murky with many lines blurred and the onus of responsibility constantly oscillating between the originator and the intermediaries, the new guidelines give the executive unbridled power without any checks and balances.
2. From arbitrary takedown notices to selective shutting down of Internet services, the executive has been arming itself against the citizens, and the two important estates of the democracy — the legislature and the judiciary — are not sufficiently reflecting on the question of overreach.

3. The Government said: "Social media is welcome to do business in India. They have got good business and have also empowered ordinary Indians. But it is very important that crores of social media users be given a proper forum for the resolution of their grievances in a time-bound manner against the abuse and misuse of social media."

For those who are working on issues relating to individual privacy, the introduction of end-to-end encryption was seen as a technical solution to a truly vexatious issue. However, under the new rule, social media intermediaries must enable tracing of the originator of information on their platform if required by a competent authority. This is indeed a new panopticon.