

NEED FOR BALANCE: ON WEB CONTENT REGULATION

Relevant for: Security Related Matters | Topic: Role of Media and Social Networking Sites in internal security challenges

The Supreme Court's decision to take over the hearing of all pending cases relating to web content regulation, including the role of intermediaries and the traceability of encrypted messages, is both a challenge and an opportunity. The Centre has informed the court that it intends to notify by January 2020 new guidelines for intermediaries, a term that covers the Internet and other online service providers and includes social media platforms. Even while transferring to itself related cases pending in different High Courts, the court has rightly decided to hear them only after the Centre notifies its new guidelines for intermediaries. After all, it is for the executive to frame policy on this sensitive matter, while the question whether social media need weeding out of objectionable content will ultimately require adjudication. The challenge before the government and the court is to find a balance between requiring access to the originators of encrypted content and respecting individual privacy. It is also a unique opportunity to test the impact of the *K.S. Puttaswamy* verdict (2017) on the proposed legal framework. The judgment had declared privacy as a fundamental right and laid down a proportionality standard to test the validity of restrictions on that right. The government has voiced concern about the threat posed by social media content to the democratic polity through fake news and hate speech, to the country's security and sovereignty, as well as to society through undesirable online content such as child pornography and communal messaging.

The Centre's new draft of Intermediary Guidelines, originally issued in 2011, was made public last year, and comments invited from all sections. The Ministry of Electronics and Information Technology has received numerous responses, and inter-ministerial discussions have taken place. It is not yet known whether concerns voiced by Internet freedom activists and social media companies will be factored into the final notification. In particular, the provisions on the mandatory disclosure of "originators" of offending messages are a source of worry to social media platforms that use end-to-end encryption. Whether it is technologically feasible for the platforms to provide back-door access to law enforcement is itself in doubt. While the government's larger concern about the use of messaging technology and the potential for 'virality' of fake news and hate-mongering is quite valid, the threshold for law enforcing agencies to seek a 'key' to unlock the encryption ought not to be low. Vague appeals to 'security' and 'sovereignty', and a blanket claim of crime prevention contingency without narrowly defined circumstances in which intermediaries should be obliged to help the agencies, can have a devastating effect on privacy. Other requirements such as proactive removal of offending content through automated tools may also come close to infringing free speech and expression. The line between public interest and individual rights should be thick and clear.

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