The Future of Platform Regulation in India – A Roundtable Discussion on the Draft Intermediaries Guidelines

1. Background

On the 24th of December 2018, the Ministry of Electronics and Information Technology (MeitY) released the Draft Intermediaries Guidelines (Amendment) Rules, 2018. The Government argued that these amendments were being proposed to tackle growing disinformation, circulation of obscene content, and dissemination of terrorist content on the Internet.

Intermediaries are platforms that make use of the Internet to facilitate the sharing of information globally. The Information Technology Act, 2000 (IT Act) defines intermediaries to include – social media platforms, e-commerce marketplaces, search engines, cyber cafes etc. The IT Act provides for conditional 'safe-harbour' protection to these intermediaries as long as they behave like conduits of information and mere facilitators of data exchange. But the growing centralization and active involvement of these platforms in managing their services has kick-started a global debate on the future regulation of such Internet platforms, especially in relation to the proliferation of illegal content on their front-end.

As more Indians come online and use these centralized services for their everyday communication, the problems associated with illegal content are only going to grow. In this climate, it becomes imperative to deliberate on the future of platform regulation in India. Regulation which does not dilute basic human rights such as free speech and privacy, at the same time ensures that the Internet remains an open and safe space for human expression and innovation.

2. Key Challenges with the Draft Intermediaries Guidelines

Traceability

The draft guidelines have a provision that requires intermediaries to trace out the originator of information on their platforms should the Government require and provide timely assistance to law enforcement not later than 72 hours from communication.

One of the biggest threats of enforcing a traceability requirement will be to end-to-end encrypted platforms like WhatsApp and Signal. On such platforms, only the end-points to the communication have access to the content, by design service providers are not privacy to the communications on their platforms. Traceability threatens this category of encryption, compromising the digital privacy of millions of Indians. Notwithstanding the enforcement challenges with such a requirement, the Internet will always offer alternatives to bad actors for private communication, they may also design their own end-to-end encrypted channels of communication.

Access to data for law enforcement needs to be proportionate and must incorporate procedural safeguards, the IT Act via sections 69 and 69B already empowers the Government to intercept, monitor and decrypt data. In the absence of a surveillance reform law in India, the traceability requirement can be a death blow to online privacy.

Proactive Monitoring of Content

The draft guidelines have also proposed the mandatory deployment of content filters on intermediary platforms. These filters are required to purge all illegal content from intermediary platforms. This creates a number of problems, firstly, intermediaries are not required to purge content from their platforms without a court or government order, secondly, what is unlawful content is a matter of judicial application of mind and not private determination and thirdly, various studies show that online content filters are inaccurate in purging content. Such per-publication censorship mandates are a threat to free speech and expression online.

A number of intermediary platforms already use content filtering tools, and these are known to be very costly and ineffective in a number of situations. Whether these tools will achieve their intended results and whether codifying such a requirement will make platforms over-regulate speech are some important questions which need to be answered.

Permanent Establishment in India

The amendment makes another proposal to make intermediaries compulsorily register under the Companies Act, 1956/ 2013, have a physical address in India, and appoint a 24x7 nodal officer for coordination with law enforcement.

India today has upwards of 500 million internet users, so 50 lakhs would cover 1% of the country's user base. A large number of intermediaries will have a user base of 50 lakh. However, the guidelines are not clear about the kind of users they are referring to, daily active users, monthly active users or registered users. If left undefined, it will create a sense of arbitrarily imposed ambiguity which will give the government perennial benefit of the doubt over any legal cases that may involve this amendment.

Smaller players and various not for profit initiatives like Wikipedia might be disproportionately affected by such a permanent establishment requirement.

3. Roundtable Discussion in light of the Supreme Court Notice on Intermediary Guidelines

The Dialogue, in partnership with SFLC.in, are organizing a roundtable on the recent trends around intermediary liability and the present discourse around traceability, to be chaired by Dr. Narendra Jadhav, Member of Parliament, Rajya Sabha.

The roundtable will have voices from various sides of the debate including legislators, parliamentarians, Government, regulators, civil society, industry leaders and media. The stakeholder consultation will be a means to build capacity and share The Dialogue's and SFLC.in's learning and knowledge on the intermediary liability amendments.

4. Agenda

The agenda of the workshop will be as follows:

Date and Time: 17th October, 16:30 – 19:30 Hours

Moderators: Kazim Rizvi and Shashank Mohan

Format: Moderated Open House Discussion

Venue: Longchamps, Taj Mahal Hotel

Theme	Element	Time
Intermediary Liability and Traceability	**Proactive Monitoring of Content** 1. Defining 'Unlawful Content' 2. Conflict with Article 19(2) of the Constitution? 3. Role of AI – Recipe for biasness? 4. How will smaller companies, who may not be able to afford emerging tech to monitor content, deploy this? **Permanent Establishment** 1. Enforcing the 50 Lakh Limit. 2. What mechanism does the government intend to use when new(er) apps are rolled out and reach 50 lakh users? 3. Will it outlaw important global services which do not have a local presence or do not have the resources to set up such an entity? 4. Does it limit Indian companies' ability to operate in foreign markets?	75 Minutes

	Request for Traceability Requirement	75 Minutes
	1. Traceability vis a vis Right to Privacy and a blow to end to end encryption.	
	2. Traceability and Due process of law	
	3. Is Open Signal Protocol (Moxie - Perinn Solution) the answer? Need to develop advanced encryption technologies	
	Timelines and Reminders	
	1. Would repeated reminders enhance compliance of users?	
	2. Should the obligation be voluntary?	

5. Outcome(s)

The outcome of our roundtable will help in enhancing our government engagement and strengthening relations through the dissemination of evidence-based research. Our roundtables have emerged as an important element of our work that allows a platform for thought leaders, policymakers and the corporate sector to come together and deliberate over policy matters with the objective of driving progressive reforms.