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Designed to Paralyse

India's New Rules for Digital News Publications

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A government that does not see value in independent media has brought in rules for digital news publications, which, in the garb of introducing self-regulation, are designed to stifle vibrant and critical voices, and open the door to government interference.

Executive authorities in India often engage in certain actions simply because they can. A consequence has been a rapid slide in India's standing in several indicators: from media freedom to composite indices of democratic quality.

The 25 February notification of rules for internet-based information transactions came without any clear statement of purpose. It invoked sections of law permitting the framing of rules under the Information Technology Act (ITA) of 2000 but stepped beyond that warrant. In the absence of a credible explanation from official quarters, it seems reasonable to infer that the government has imposed new rules simply because it can.

Control is the obvious intent, raising an obvious question: why should control be such a priority for the Narendra Modi government at this time? Influence operations over social media have been an area where the ruling party and the government have consistently out-performed the opposition. Over-the-top (OTT) services, another area targeted by the new rules, are a cause for agitation by the moral police, but these serve the cause of the ruling party by keeping the pot of political grievance boiling. Perhaps then, the digital news media, a subject that occupies well over half the 25 February notification, is the main target of the new rules.

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India's overarching constitutional framework affords protection to freedom of speech as a fundamental right, and the media enjoys its autonomy within this broad rubric. Autonomy and external control are opposing principles, though perhaps only in matters of degree. The two could potentially be reconciled if the object of control were to imagine itself as a free subject, accepting certain controls of its own will.

The IT rules come in the garb of self-regulation, maintaining a pretence that the onus lies with internet-based media entities for policing themselves. The term the two ministers of the union government used in introducing the new regime was 'soft-touch regulation', a pretence that rapidly vanishes when the procedures envisaged are considered.

Three-tier regime of supervision

Digital media outlets engaged in news and current affairs are now compelled to adopt a three-tier regime of supervision over content, which is to come into force within 30 days of the publication of the notification on 25 February.

In the first tier, an internal process is mandated to deal with public grievances. An office for grievance redress is to be created as a matter of compulsion within all digital media organisations. Any complaint would have to be addressed within 15 days.

If satisfaction is not rendered by the internal grievance mechanism, the matter could be scaled up to the next, second, level: a rather badly misnamed "self-regulatory mechanism", which all relevant media entities would have to collectively create and empower. Every digital news publisher is ordained to be a member of such a self-regulating body, of which there could be "one or more." There is seeming freedom here, an option for news publishers to choose the club of their liking. But it verges on futility in terms of regulatory logic, because of the issues it raises of consistency in adjudication and enforcement.

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Though specific norms on the choice of individuals for positions in the self-regulating body are not laid down, the rules stipulate that it has to be headed by a retired judge of the Supreme Court, a high court, or "an independent eminent person" from a relevant field. It must have no more than six members, all with experience relevant to the task.

The self-regulating body must oversee content, to ensure adherence by all publishers to the code of ethics of the Press Council of India. It must address grievances that remain unassuaged at the first tier, but also "provide guidance to publishers." While disposing of appeals against inaction or wrongful action at the first tier, the body could warn, censure, or secure an apology and a disclaimer.

If the complainant is unhappy with the second level of redressal, there is a third and higher level available: an "oversight mechanism," where governmental control expresses itself overtly. Its appellate function is to be exercised by an "inter-departmental committee," chaired by an official of the Ministry of Information and Broadcasting. Oversight would for all operative purposes, be in the hands of a range of ministries with a presumed interest in media content: Defence, Home Affairs, External Affairs, Women and Child Development, and Law and Justice. The committee would have the authority to warn, admonish, or extract an apology or disclaimer from any news media site. Blocking content would be the final recourse, implemented after clearance from the secretary of the Ministry of Information and Broadcasting. In undefined situations of "emergency," the chair could, without reference to the committee, demand the removal of content and the secretary in the ministry would be obliged to act within two days.

Adjudicatory processes beyond this point are vaguely worded. The rules only require that the chair of the "inter-departmental committee" maintain records of all deliberations and place these before a "Review Committee" mandated to meet every two months to ensure consistency with the law. This fourth body in the regulatory architecture makes its appearance with a very perfunctory explanation: the "Review Committee" would be exactly as defined under the Indian Telegraph Act of 1951 to review the interception of messages.

Exploiting a crack in 'Shreya Singhal' judgement

Administrative whims of the kind expressed in the new rules are rarely restrained by legislative oversight. Nor has the judiciary, the final arbiter of constitutional governance, proved an effective watchdog. A case in point, from the very domain that the 25 February notification addresses, would be the *Shreya Singhal* judgment of the Supreme Court from March 2015. Despite a clear ruling that Section 66A of the ITA, which permitted arrests on grounds of "offensive, shocking or disturbing" material posted on social media, was violative of constitutional guarantees of rights, a survey close to four years later, found that police in various parts of the country were still citing it in effecting the arrest of social activists and media practitioners.

The ITA seeks to "provide legal recognition for transactions carried out by means of electronic data interchange and other means of electronic communication." Legal recognition could mean that the autonomy of an entity is acknowledged and then defined. Complete autonomy of course is a fiction for any entity that functions within society and is governed by the rule of law. But the new IT rules do little but assert an intent to control.

The rules that seek to control digital publishing, because that is in essence the intent, also highlight a significant anomaly in the regulatory regime, an area of blindness in the March 2015 *Shreya Singhal* judgment. It was a rare (and as it turns out, a briefly lived) triumph for the cause of free speech when the Supreme Court rendered its judgment holding Section 66A of the ITA unconstitutional, though that sense of triumph was diluted in some degree by its ruling that Section 69A stood the test of validity. (Section 69A empowers the government "to issue directions for blocking for public access of any information through any computer resource.") Both these sections were added to the ITA in 2008, in response to the growth of social media.

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Sections 66A and 69A may have been a knee-jerk reaction to the wave of public outrage generated by the 60-hour terrorist siege of Mumbai in November 2008. Section 66A was adopted in Parliament along with other amendments after the merest formality of a debate. It was scarred at the moment of birth by a certain looseness of language, almost inviting rampant abuse. The two sections were different though, in that 66A was couched in phraseology that was broad and ill-defined,; while 69A clung closely to the grounds listed in the provision of the Constitution, Article 19(2), that provides for certain "reasonable restrictions" on the right to free speech. This saved 69A in judicial review, only because the Supreme Court chose to ignore a serious infirmity in the appeals process.

Section 69A occupied a very brief part in a judgment that was more focused on the arbitrary language of 66A. In upholding the former, the Supreme Court chose to place its faith in the procedural safeguards involved, while overlooking a serious anomaly. Unlike the Criminal Procedure Code (CrPC), which allowed stakeholders in a newspaper threatened with forfeiture to appeal the decision at a high court, 69A provided no safeguard. Anybody seeking redress for a perceived wrong would have no recourse but to invoke the writ jurisdiction of the higher judiciary; since the "Review Committee" charged with safeguarding against abuse of the law is merely an extension of the bureaucracy.

This entire range of problems was dismissed as trivial by the Supreme Court. Amongst the grounds the Supreme Court cited was the distinct character of the digital media. The CrPC had been evolved to deal with the print media and these provisions did not adapt very easily to new technological domains. To the petitioners' argument that this system of differential rights across media violated Article 14 on equality before the law, the Supreme Court held that there was an "intelligible *differentia* between speech on the internet and other mediums of communication for which separate offences can certainly be created by legislation." The challenge on grounds of Article 14, for this reason, "must fail."

This tiny crack in the *Shreya Singhal* judgment has been fully exploited in the creation of a system of control for digital media that no other news media sector is subject to. The print media are loosely governed by guidelines framed by the Press Council of India (PCI), created by legislation as an autonomous body. Under pressure after the 2008 terrorist siege in Mumbai and the live coverage that took over public consciousness for 60 hours, television news operators created a self-regulatory body that continues to enjoy collective allegiance, except from a lobby of extreme government partisans who have broken away to form a supposed "nationalist collective."

Designed to paralyse the media

It is also a curiosity that despite the purported differences with all older forms of news transmission, the newly notified rules impose the guidelines stipulated by the PCI as a statutory norm on digital media. The code of ethics formulated by the PCI (called the "Norms of Journalistic Conduct") is a long, elaborate, and evolving piece of work, which is seemingly revised with every new situation that the body confronts in its adjudicatory process. It is rife with inconsistencies that remain to be ironed out. The only reason the PCI continues to enjoy a degree of credibility is that its rulings have no more than moral authority and compliance is entirely voluntary.

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In investing the PCI guidelines with the authority of statute and assuming on that basis the power to block and impose sanctions on particular modes of information sharing and dissemination, the government goes well beyond the scope of "reasonable restrictions" to free speech specified under Article 19(2).

Hiding in plain sight in the elaborate language of the rules is the reality of a system designed to paralyse critical media activity. Media practitioners will be placed under the burden of responding to a potential flood of complaints while reserving for the political executive the power of policing content. These worries are only compounded by recent executive actions, which reflect not so much the rising global concern over the propagation of inauthentic and extreme speech, but an intent to control the narrative for political advantage.

The strategy has perhaps been articulated, though unwittingly, in Prime Minister Narendra Modi's refusal all through his first term to "face a single uncensored interview or press conference." Alongside this shunning of traditional forms of media, other strategies were adopted to control the political narrative, involving a systematic and determined effort at colonising the digital media space.

After polling concluded in the 2019 general election to Parliament and the million-plus voting machines that register the popular will were being clustered for the count, the *Columbia Journalism Review* (CJR*)* posted an article rich with cross-references, titled "Results expected in India's 'WhatsApp election'".

Exit poll results released after seven rounds of polling in 2019, indicated a surprisingly comfortable win for Modi. Yet for all the issues at stake, the CJR commented, the most riveting aspect of the election was "the rampant proliferation of disinformation and hate speech online." It was a situation that "traditional media," a significant presence in the public sphere, bore part-responsibility for. By far the greater aggravation though had come from the social media platform Facebook and its wholly-owned messaging service WhatsApp.[1]

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After a victory that was even more decisive than forecast, Modi addressed the senior leadership and newly elected members of his party and its coalition partners. Alongside the call to duty — the main theme of his 75-minute speech — Modi issued several explicit warnings about the media. Print media and TV might seem a good way to project ideas onto the public stage, he said, but there was a risk of falling victim to their "magnetic power." The rampant media speculation that had emerged about the possible constitution of the cabinet, he warned, was "motivated by ill intentions and aimed at creating divisions."[2]

The signals were clear: the prime minister of the world's largest democracy would in his second term sustain the contentious relationship with the media established through the first, and perhaps double down on his social media strategy to influence public opinion. If there have been some cracks in the facade recently after two successive winters of protest on the streets of Delhi — first against amendments to the Citizenship Act and then the farm laws — the window has to be shut before further damage is done.

Constitutional challenges have been mounted to the new IT rules by several web-based media portals— *The Wire*, *The News Minute*, *Quint*, and *Live Law*. It remains to be seen if the judiciary will overcome its recent manifest reluctance to challenge the executive will, even in matters of deep constitutional import.

Footnotes:

1 The recently notified IT rules involve a compulsion on messaging platforms to reveal the identity of the "originator" of any information that is deemed unlawful or harmful to the public interest. If the person is beyond India's territorial jurisdiction, then the first to send out the information from within Indian borders would be held liable. It can safely be assumed that this provision will not be used to track and appropriately sanction, propagators of hate speech that could be turned to political advantage by the ruling party.

2 A recording of the speech is available at the Youtube site of the parliamentary news service, Rajya Sabha TV. The key remarks referenced here occur between 35' and 43'.