



Ending encryption

Enforcing traceability on popular messaging apps will encroach into user privacy

Barely a day before the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules 2021 came into force, WhatsApp moved the Delhi High Court against the rules – specifically the one that mandates that a “significant social media intermediary providing services primarily in the nature of messaging shall enable the identification of the first originator of the information on its computer resource as may be required by a judicial order”. Given the specification that a “significant social media intermediary” is one with more than 50 lakh registered users, WhatsApp’s messenger service would clearly be affected. WhatsApp’s contention is that for compliance and traceability, it would have to break its end-to-end encryption service that allows messages to be read only by the sender and the receiver. Its argument is that the encryption feature allows for privacy protections and breaking it would mean a violation of privacy. The question to be asked is whether the traceability guidelines (by breaking encryption) are vital to law enforcement in cases of harmful content. A release by the Ministry of Electronics and IT has said that the traceability measure will be used by law enforcement as the “last resort” and will come by only in specific situations, such as “for the purposes of prevention, detection, investigation, prosecution or punishment of an offence related to the sovereignty and integrity of India... or child sexual abuse material, punishable with imprisonment...” The assertion suggests that this requirement is in line with the Puttaswamy judgment that clarified that any restriction to the right of privacy must be necessary, proportionate and include safeguards against abuse.

But the Government, as the law stands now, can already seek access to encrypted data under Section 69 (3) of the IT Act, and Rules 17 and 13 of the 2009 Surveillance Rules that require intermediaries to assist with decryption when they have the technical ability to do so and when law enforcement has no other alternative. Besides, it can still seek unencrypted data, metadata and digital trails from intermediaries such as WhatsApp. The trouble with enforcing traceability is that without safeguards such as having any independent or judicial oversight, government agencies could seek any user’s identity on vague grounds and this could compromise the anonymity of whistle-blowers and journalistic sources, who can claim to be acting in the public interest. WhatsApp’s contention that “requiring messaging apps to ‘trace’ chats is the equivalent of asking us to keep a fingerprint of every single message sent... and fundamentally undermines right to privacy” is, therefore, not hyperbole. If anything, the Government needs to revisit its position on traceability commitments of intermediaries and instead revise the IT Act, 2000 in line with existing global best practices besides legislating the long-pending Data Protection Bill.

No comments

Some questions at post-match conferences are insensitive, but a player boycott is no solution

At 23, Naomi Osaka has the tennis world at her feet. With four Grand Slam titles and now ranked second in the world, Osaka has tremendous brand equity. She also speaks her mind beyond sport, be it on racism or on her mixed lineage of being born to a Haitian father and Japanese mother while growing up in the United States. It looked as though the baton of success had passed from the great Serena Williams to Osaka. Yet, the Japanese star’s fresh halo suffered a dent with her media boycott in the current French Open at Paris. Shooting the messenger is a petulant attribute that crops up in politics, sport and the arts. Often these are impulsive reactions to a bad day at work. The odd tennis press conference was skipped in the past with Serena and Novak Djokovic being guilty of such violations. But what makes it worse for Osaka is her premeditated stance revealed through her message before the French Open: ‘I am not going to do any press during Roland Garros.’ She also juxtaposed her cold-shoulder of the media with mental-health issues, hinting that journalists tend to exacerbate the fragile minds of athletes, especially those who lost a match. In one fell swoop, Osaka ignored nuance, dished out a lame excuse and trivialised the serious issue of mental health.

In a universe where athletes prefer social-media posts over media interactions, the official press-conference is the last remaining avenue for probing questions that elicit insightful answers. Player-journalist interactions are the only substitute for source-based inferences that colour the narrative. Closer home, M.S. Dhoni revealed his international retirement through Instagram and lapsed into silence. Sports bodies have sensed this diffidence and in the cricket World Cup or a Grand Slam event, the post-match press-conference is a contractual obligation. In this era of click-bait headlines, it is not that all Fourth Estate members are perceptive. There have been instances of the odd insensitive question but the athlete can always offer a counter or stick to a ‘no-comments’ response. Osaka deciding to constantly pay a fine for not honouring her media commitments at the French Open has set a terrible precedent and it is fitting that the consortium of Grand Slams have hinted at harsher measures including ejecting her from the tournament. Besides excellence on the turf, commerce off the field equally drives sport. Corporate sponsors, who get some play through advertorial material as background screen in press-conferences, are obviously aggrieved. Legends such as Rafael Nadal have also spoken about how sport evolves through the symbiosis between athletes and the media. It is a pity that Osaka has suddenly turned blind to this reality.

Elected autocrats, their pandemic responses

In the U.S., India and Brazil, messianic populism, polarisation and insularity have made the pandemic that much worse



PATRICK HELLER

A year and counting into the greatest health crisis the world has faced in over a century we can identify one overwhelming factor that separates the countries that have done relatively well from those that have been complete disasters: elected autocrats. By any measure the most dismal performers in the democratic world have been the United States, Brazil and India. Despite its vast wealth and resources and its low population density, the U.S. has one of the highest per capita death tolls in the world. Brazil has taken denialism to new levels and the novel coronavirus pandemic has been allowed to range so fiercely that the country has become a petri dish for new mutations. India’s first wave numbers were relatively mild (even accounting for underreporting) but the current wave is probably the worst and deadliest the world has seen.

The reactions

In all three cases it did not have to be this bad. Former U.S. President Donald Trump took the pandemic as a personal affront, initially refused to come to terms with the threat and wilfully downplayed the gravity of the pandemic. When Washington finally decided to take action, the response was crippled by policy incoherence, partisan attacks on Democratic Governors and open hostility to the scientific community.

Mr. Trump even provided a definition of his autocratic writ declaring in April 2020 that “when so-

mebody’s the President of the United States, the authority is total, and that’s the way it has got to be.”

Brazil’s right-wing populist President, Jair Bolsonaro, who came to office on a platform of being tough on crime and the politically correct, has been called the tropical Trump. He dismissed the pandemic as a “little cold”, boasted that real men had nothing to worry about, attacked public health officials as promoting a hoax and fired health ministers who defied him. Measures to combat the pandemic that have been taken in Brazil have come from governors and mayors and have been met with fierce opposition and public mockery from Mr. Bolsonaro.

Narendra Modi was never an outright COVID denier, and his government did take decisive measures, imposing a nation-wide lockdown in March 2020. But having failed to consult with experts or any of the Chief Ministers that govern India’s federal States, the welfare consequences of the lockdown were severe as tens of millions of urban migrants were forced into a mass exodus back to their villages. The pandemic subsided for some time, but even as experts warned of a second wave driven by new variants, the government celebrated its national triumph over the virus, dragged its feet on vaccinations and forged ahead with large-scale election campaign events and religious festivals even as the second wave surged. But of all the policy failures that have led to calls for the government to resign, none is more egregious or more revealing of Mr. Modi’s indifference than the Government’s decision to stay within its Budget allocations and charge States for vaccines. At the current rate, it will take the world’s largest producer of vac-



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cines more than a year to vaccinate its population.

As elected autocrats, Mr. Trump, Mr. Bolsonaro and Mr. Modi have three things in common.

First, they came to power as classic right-wing populists who branded themselves as incarnations of the people and peddled their personal virtues of strength and fortitude as substitutes for deliberation and policy making. Rulers powered by messianic faith have little patience for experts and science. All three have surrounded themselves with yes-men and ruled from the gut, peddling triumphalism (all three prematurely declared the pandemic vanquished), quick remedies (injecting disinfectants, the waters of the Ganga) and sheer macho bombast, as when Mr. Trump and Mr. Bolsonaro took a lap for surviving infection even as they received the best care in the world.

The line of nationalism

Second, autocrats feed on polarisation. All three have championed a virtuous nationalism – rooted alternatively in evangelism in Brazil and the U.S., or Hindutva in India – animated and weaponised by the demonisation of the other. Ethnicised nationalism works by demoting the “other” – Muslims, Blacks, immigrants, gays, secularists and all those who subscribe to ideals of civic nationalism – to

the status of the undeserving and the morally deficient. Membership in the community of the nation is essentialised. Mr. Trump demonised immigrants, channelled white supremacy and stoked fears of Blacks invading suburbs. Mr. Bolsonaro routinely smears his opponents as *banditos* or communists and has a long track record of making homophobic and misogynistic remarks. Mr. Modi has a long record of debasing India’s 200 million Muslims, and when re-elected in 2019, doubled down on his party’s platform of making India a Hindutva project, first by turning Kashmir (India’s only Muslim majority State) into a militarised colony of the central government and then pursuing laws that are perceived by Muslims as according them second class citizenship status. In diverse societies, ethno-nationalism can only fuel social polarisation, and a polarised society is a society that cannot mobilise the trust and solidarity that responding to a pandemic calls for.

The pandemic itself was shamelessly used to inflame identities, with Mr. Trump denouncing the ‘Kung Flu’, Mr. Modi’s minions raising the spectre of ‘corona jihad’, and Mr. Bolsonaro hurling homophobic slurs at mask wearers. More than anything else, this explains why the most common sense public health measures – wearing masks, restricting social interaction, testing and getting vaccinated – all became so politicised in the U.S., India and Brazil.

Third, once in power, the autocrats quickly personalised, centralised and insulated their power. All three have attacked the Constitution (literally in Mr. Trump’s case), demanded fealty from independent institutions, over-ridden the authority of expert institutions, tampered with data, assaulted the independence of the me-

dia, and elevated loyalty to the leader as the highest principle of service. This autocratisation explains the dismal failures of governance. The core tasks of a government in times of a pandemic – coordination across levels of government, clear and consistent communication of basic policies and health measures, support for frontline workers and maybe, most importantly, rallying all citizens to stand together – have all been subverted by the autocrats’ will to power.

A pushback

In the U.S., India and Brazil, this toxic combination of messianic populism, social polarisation, insularity and centralisation has made the pandemic that much worse and poisoned the waters of democracy. But democracies are not just about their leaders. Throughout the crisis, health-care workers and civil society organisations have stepped up where their leaders have failed, and democratic institutions have pushed back. Mr. Trump has been exposed by the media and shown the exit by the voters. The Brazilian Senate has launched a very public investigation into Mr. Bolsonaro’s handling of the pandemic and his poll numbers have plummeted. Mr. Modi has just been repudiated in State-level elections and the Indian Supreme Court has called out the incoherence of the government’s vaccine policy. But to take comfort in the hope that democracies will demand accountability, we must first remember, as the pandemic continues to ravage India and Brazil, that it is not only the virus, but also the hubris of autocrats, that kills.

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Power play to bring the digital ecosystem to heel

While there are problems in the system, ill-considered regulation such as the new IT Rules is not the way forward



RISHAB BAILEY & VRINDA BHANDARI

Rule 4(2) of the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 (<https://bit.ly/3c6uTyK>) imposes an obligation on significant social media intermediaries providing a messaging function, to ensure traceability of the originator of information on their platforms. A failure to implement this obligation can lead to intermediaries being held responsible for illicit content on their platforms. These rules have recently come into effect. Consequently, WhatsApp has filed a petition in the Delhi High Court (<https://bit.ly/3fyRPIU>) alleging that the mandate for traceability violates the privacy rights of Indian citizens, by rendering WhatsApp unable to provide encrypted services.

In response, the Government has, through a press release (<https://bit.ly/3cop6ov>), sought to question the substance and timing of WhatsApp’s petition. On scrutiny, however, it appears that the response is misconceived.

The Government primarily relies on the argument that: privacy is not an absolute right, and that the traceability obligation is proportionate, and sufficiently restricted. Notably, the new Rules mandate traceability only in the case of significant social media intermediaries that provide messaging services (i.e. those that meet a

user threshold of 50 lakh users, which WhatsApp does), subject to an order being passed by a court or government agency and only in the absence of any alternatives.

While it is indeed true that privacy is not an absolute right, the Supreme Court of India in the two K.S. Puttaswamy decisions (of 2017 and 2018) has clarified that any restriction on this right must be necessary, proportionate and include safeguards against abuse.

On traceability as a feature

However, as we argue in a recent paper (<https://bit.ly/3uwtm1J>), a general obligation to enable traceability as a systemic feature across certain types of digital services is neither suitable nor proportionate. Additionally, the Rules lack effective safeguards in that they fail to provide any system of independent oversight over tracing requests made by the executive. This allows government agencies the ability to seek any messaging user’s identity, virtually at will. However, anonymity from the government can be important, particularly in contexts of journalistic source protection and for whistle-blowers. Therefore, deciding whether to remove anonymity requires application of an independent judicial mind.

In applying the Puttaswamy tests to the Rules, one must examine not just whether the weakening of encryption systems will lead to some law enforcement gains, but whether these are worth the costs involved. Thus, one must consider the impacts of such a measure on the general digital ecosystem in terms of the overall cybersecurity and privacy problems such an obligation could create. There is near universal



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consensus that mandating the presence of backdoors or weakening encryption generally – which a traceability mandate would do – would compromise the privacy and security of all individuals at all times, despite no illegal activity on their part, and would create a presumption of criminality.

Other means exist

In any event, the Government already has numerous alternative means of securing relevant information to investigate online offences including by accessing unencrypted data such as metadata, and other digital trails from intermediaries. Therefore, the present Rules attempt to shorten the investigative process, even though, as we argue in our paper, law enforcement is not supposed to be an entirely frictionless process. Frictionless processes lacking sufficient checks will merely incentivise fishing expeditions by government agencies.

Further, the surveillance powers of the Government are in any case vast and overreaching, recognised even by the Justice B.N. Srikrishna Committee report of 2018 (<https://bit.ly/3iiB6M3>). Importantly, the Government already has the ability to access encrypted data under the IT Act. Notably, Section 69(3) of the Information Technology Act and Rules 17 and 13 of the Information Technology

(Procedure and Safeguards for Interception, Monitoring and Decryption of Information) Rules, 2009 (<https://bit.ly/3c83QTB>) require intermediaries to assist with decryption where they have the technical ability to do so, and where law enforcement has no alternatives. The newly notified Rules go well beyond current provisions in the law by seeking to punish relevant intermediaries for failing to adequately weaken encryption systems.

The Government’s press release appears to be well aware that this is in effect what would happen if the traceability mandate were to be imposed. However, it notes that it is the responsibility of intermediaries to find an alternative method to protect user privacy, with or without the use of encryption.

Scrutiny is a must

The press release also claims that the new Rules were introduced pursuant to consultation. However, this does not reveal the entire story. The traceability related provision in the draft version of the Rules released in 2018 faced significant opposition from numerous stakeholders, ranging from service providers, academia, and civil society organisations. The new traceability provisions are substantially similar, and carrying out a consultation merely to reject all the views that go against state interests is far from best practice. Ideally, and given the substantive changes made to the 2018 draft (including the addition of several entirely new parts such as those pertaining to regulation of digital news), the new Rules should also have been put through a period of consultation before being notified. Ideally, the rules should also be

accompanied by an explanatory memorandum explaining the rationale for regulation.

Of course, this entire discussion is notwithstanding the fact that the intermediary rules are not the manner or place to go about putting in place new substantive regulation to solve the myriad problems caused by the digital ecosystem. Indeed, the ability of the government to issue progressively more onerous obligations under the guise of “due diligence” requirements under Section 79 of the IT Act (which in essence, deals with the issue of take-down of illegal content) must be subject to judicial scrutiny.

Overall, however, it is clear that the move by the Government is part of a broader power play against foreign-based technology companies, and to generally bring the digital ecosystem to heel. While, undoubtedly, there are numerous problems in the digital ecosystem that are often exacerbated or indeed created by the way intermediaries function, ill-considered regulation of the sort represented by the new intermediary rules – which appear to have little basis in evidence or care for consequences – is not the way forward. Indeed, the only truly democratic and relatively long-term solution would be for legislative change along multiple avenues, including in the form of revising and reforming the now antiquated IT Act, 2000.

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LETTERS TO THE EDITOR

Letters emailed to letters@thehindu.co.in must carry the full postal address and the full name or the name with initials.

Denting federalism

The Prime Minister’s Office recalling the Chief Secretary of West Bengal raises certain basic questions about constitutional governance. Under the federal structure, the Centre should, as far as possible, help in the effective functioning of the various States. Contrarily the Centre’s action, making it impossible for the Chief Minister of West Bengal and the Chief Secretary (he has since joined the CM’s team) to effectively tackle important issues such as COVID-19 and relief measures after cyclone

Yaas, defies any respect for democracy. The Centre is negating the electoral mandate of the people of West Bengal by creating all sorts of problems for their elected government. This is a disguised form of using Article 356 of the Constitution. This was not the impression that Prime Minister Narendra Modi gave when he came to address a memorial lecture before an august gathering – he was the Chief Minister of Gujarat – at the Madras University Centenary Auditorium in October 2013. Mr. Modi made many

promises linked to his being elected to the main seat of power. One such promise that one vividly remembers is that not everything would happen in Delhi. He said that important national and international meetings would be held in other States so that they would equally grow and in turn would contribute to strengthening federalism. Unfortunately, the converse is happening.

N.G.R. PRASAD,
Chennai

Course correction

The current form of exploitative capitalism

needs reorientation rather than upgradation to bring relief to the people. It is futile to expect governments to rein in capitalists as political power is wielded by capitalism through proxies

using money power. It is counter movements such as trade unions which were a check during the Industrial Age. Only a well-informed popular movement, conscious of new tools of exploitation such as

intellectual property rights can bring about course correction in this digital age.

MANOHAR ALEMBATH,
Roanoke, Texas, U.S.

CORRECTIONS & CLARIFICATIONS:

In the story titled “When Nehru wanted globe-trotter diplomats in print” (May 30, 2021), the name of the person appointed to the post of Officer on Special Duty (OSD) for promotion of Hindi in the works of the ministry should have been given as *Harivansh* Rai Bachchan, and not *Haribans* Rai Bachchan, as published. In the last paragraph of the same story, there was reference to Bahasa *Indonesia*. It should be Bahasa *Indonesian*.

A Profiles page article titled “The chief investigator” (May 30, 2021) erroneously called Subodh Kumar Jaiswal as the second officer from the Maharashtra cadre to head the CBI. He is actually the third IPS officer from Maharashtra. John Lobo was the first. Mohan Ganesh Katre was the second.

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