

INTERNATIONAL JOURNAL OF LAW
MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 4 | Issue 4

2021

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Analysis of Intermediary Guidelines and Digital Media Ethics Code, 2021

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ABSTRACT

This research paper attempts to analyse the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021. The author delves into the various legalities of these rules and how they affect the different verticals. The paper divides the analysis according to different verticals that will be affected by the Rules, namely, i) social media intermediaries like Facebook, Instagram, Twitter, ii) OTT platforms like Netflix, Amazon Prime and lastly iii) news and current affairs content providers like The Wire, LiveLaw. The author also looks into the intermediary rules of different countries, thereby providing a global perspective.

I. INTRODUCTION

Privacy On 25th February, 2021, the Ministry of Electronics and Information Technology (herein after referred to as “MeitY”) and the Ministry of Information and Broadcasting (herein after referred to as “MIB”), notified the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 (herein after referred to as “IT Rules, 2021”). These rules brought with them a wave of criticism from all the stakeholders who are directly and indirectly affected by these guidelines. As always, there were one set of people who found solace after a long wait for the much-needed legislation to regulate the over-the-top (hereinafter referred to as “OTT”) platforms like Netflix, Amazon Prime, AltBalaji, etc. The other set looked at these rules as camouflage for government surveillance and strategic censoring, which violated the fundamental right to freedom of thought and expression.

II. NEED FOR REGULATION OF OTT PLATFORMS AND INTERMEDIARIES

We have been through some unprecedented times in 2020 with the novel coronavirus. With the whole world shutting down offices and staying in their homes, we saw a major shift towards various online platforms. This gave us a reality check regarding the level of

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dependency we humans had developed towards the social media platforms and the ease with which it can be misused. We have seen a rise in cybercrimes against women and children online, as well as various instances of privacy breaches on famous social media platforms.

There was an urgent need for a legislative mandate that regulated these offenders and have some grievance redressal mechanism for the users. More so, there were various instances where these online intermediaries acted the part of the publisher of misinformation and aided in the spread of it, rather than simply being an intermediary.

III. HISTORY OF REGULATING

In December 2018, MeitY released the draft Information Technology (Intermediary Guideline) Rules, 2018 and asked for review through public consultation. They also evaluated and weighed it against the existing Information Technology (Intermediary Rules), 2011. But MeitY and MIB did not seek any consultation before notifying the IT Rules, 2021. They flouted the pre-legislative consultative policy set by the Ministry of Law and Justice back in 2014, by avoiding to consider any scrutiny from the various stakeholder by steering clear of the minimum 30 day period in this complex matter.

Back in April 2018, the MIB commission a ten-member board to “*frame and suggest a regulatory framework for online media/news portals including digital broadcasting and entertainment/ infotainment sites & news/ media aggregators*” but later in the same year, they were dissolved and the responsibility was turned to MeitY. Initially, MeitY identified this division of legislative jurisdiction between regulation over OTT platforms and social media platforms by MeitY and MIB respectively. In 2020, the Government of India (Allocation of Business) Rules, 1961 were amended to give the jurisdictional power to MIB on the regulation of OTT platforms and online news media.²

The Government in its official press release statement regarding the IT Act, 2021 said that “*Amidst growing concerns around lack of transparency, accountability and rights of users related to digital media and after elaborate consultation with the public and stakeholders, the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules 2021 has been framed in exercise of powers under section 87 (2) of the Information Technology Act, 2000 and in supersession of the earlier Information Technology (Intermediary Guidelines)*

² Outlook (ed), “Govt Brings OTT Operators under Ambit of I&B Ministry” (<https://www.outlookindia.com/November 11, 2020>) <<https://www.outlookindia.com/newscroll/govt-brings-ott-operators-under-ambit-of-ib-ministry/1974311>> accessed 15th April, 2021

Rules 2011.³

IV. LEGALITIES OF THE IT ACT, 2021

The IT Rules, 2021 were passed by MietY in the exercise of the powers given to it under Section 87 of the IT Act, 2000. But various litigations have been initiated against the constitutionality of these rules. These rules are said to not have followed the due process provided under the IT Act 2000. Not only are they allegedly vague but also suffer from the excessive delegation of powers. This might ultimately lead to the exercise of judicial functions by non-judicial authorities. There are allegations of these rules violating the “golden triangle” of fundamental rights guaranteed under Articles 14, 19, and 21 of the Constitution and for being ultra vires the parent act. They also attempt to overrule the precedent laid down by the Supreme Court in **Shreya Singhal v Union of India**.⁴

1. Due Diligence Requirements by Intermediaries

Part II of the IT Act ,2021 has introduced significant due diligence requirements which need to be followed by an intermediary, a significant social media intermediary, and a news and current affairs content intermediary. These rules relate to compelling interception, monitoring, and decryption of communications. These rules seem to violate Article 19(1)(a) by seeking to impermissibly deprive intermediaries of their safe-harbour protection under Section 79 of the IT Act, and violates Article 21’s guarantee of privacy by requiring traceability by design. The following are some of the provisions which question the legality of the rules.

i. Content Take Down-

In Rule 3(1)(d), an intermediary should compulsorily take down any content from its computer resource, after it receives actual knowledge from either the Court or the Appropriate Government, that it said content affects “the sovereignty and integrity of India, the security of the state, friendly relations with foreign states, public order, decency or morality, contempt of court, defamation, incitement to an offence or information which violates any law which is in force.” This rule is in clear violation of Article 19, which provides for right to freedom of speech and expression. Any content which the Appropriate Authority deems to be in violation of any of the above mentioned, can take arbitrary action and remove the content without giving any chance for the person who made the content or

³ Ministry of Electronics and Information Technology through Press Information Bureau, Government notifies Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules 2021, (25th Feb,2021) available at <<https://pib.gov.in/PressReleaseDetailm.aspx?PRID=1700749>> accessed 25th March, 2021.

⁴ *Shreya Singhal v Union of India*, (2015) 5 SCC 1.

the intermediary for a fair and reasonable recourse as per audi alteram partem. The user whose speech is censored is not even notified about this take down, let alone be heard.

ii. Issue of Traceability-

Rule 4(2) requires any significant social media intermediary to sanction the traceability of originators of information on its platform. Enabling this traceability would mean breaking the end-to-end encryption which is the basis of the security protocol of messages apps like WhatsApp, Telegram, Signal. In an Expert Report submitted by Mr. Manoj Prabhakaran, he mentions how this mechanism of tracing the originator might work in the short term but it has limited effectiveness in long term as more effective alternatives⁵ may exist. The scope of this rule would require significant messaging apps include an originator protocol which might require them to change the entire technological architecture which would directly hinder the privacy of all their users. This vagueness in this rule does not give any specification about what alterations would be accepted by the Authority. If they use the Signal Protocol for expansive metadata for collection and storage, it would violate the data protection principle laid down by the Supreme Court in *K.S. Puttaswamy v. Union of India*. Coming to the legality of this rule, it is to be noted that the IT Act, 2021 was not notified under Section 69 and the legislative authority under Section 87(2)(y) of the IT Act, 2000.

By asking these platforms to incapacitate their encryption system by generating access through the back end, would undermine the privacy of all their users. This has been supported by the UN Special Rapporteur, David Kaye, who in his 2015 Report⁶ gave warning of using encryption weakening mechanisms as any back end incorporated fragility can be pierced by lawbreakers. India through these rules is envisaging to handle such a sensitive topic as traceability, without any technical expertise through an in-depth consultative process, without any data protection legislation.⁷

iii. Automated Censorship –

Rule 4(4) mandates significant social media intermediaries to customise technology-based

⁵ Manoj Prabhakaran, IIT Bombay ‘On a Proposal for Originator Tracing in WhatsApp’ (2021), available at <<https://drive.google.com/file/d/1vivciN8tNSbOrA9eZ8Ej0mCAUBzRWu5N/view>>, accessed 23rd March, 2021.

⁶ David Kaye, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (22nd May, 2015), available at <<https://digitallibrary.un.org/record/1304394?ln=en>>, accessed 20th March, 2021.

⁷ Payaswini Upadhyay, BloombergQuint, “Government Notifies New Rules For Social Media, Digital News And OTT Platforms” (25th February, 2021) available at <<https://www.bloombergquint.com/law-and-policy/government-notifies-new-rules-for-social-media-digital-news-and-ott-platforms>>

measures, including automated tools and other mechanisms for proactively identifying information that depicts any act or simulation of explicit or implicit rape or child sexual abuse or conduct, or previously removed information.

This rule exceeds the Supreme Court's decision in *Shreya Singhal v. Union of India* as well as the Order of the Hon'ble Supreme Court in *Re: Prajwala, SMW (Crl) No. 3/15*. This rule could double up as a 'function creep' which has been defined by Bert-Jaap Koops as "The definitions of the compound 'function creep' all share the characteristic that something's function is moving beyond its original purpose in a way that was apparently unforeseen by its developers, users, or the public."⁸ By enforcing this rule, the technological access made for catching offenders might get fall into the wrong hands and cause serious unforeseeable results. Such kind of access mechanism will not only violate the right to privacy but also restrict the individual's speech without giving a chance to be heard. Neither the intermediary nor the user (such as Petitioner Nos. 2 and 3) has a right to be heard or to appeal the order of the automated tools.

V. REGULATION OF OTT AND DIGITAL MEDIA

The Part III of these IT rules, 2021, lays down the code of ethics and procedure and safeguards in relation to digital media. Upon perusal by various scholars, it has been noticed that these rules are violative of Article 19(1)(a) and 19(1)(g) by giving overarching embargo over online speech and by forming an inconvenient adjudicating structure which is led by the executive pillar without any interference of the judicial body through appeals. This is going to have a direct chilling effect (as laid down in *Shreya Singhal*) on the content posted on social media and cause excessive self-censorship. The regulatory mechanism set up is ultra vires its parent Act. The Supreme Court in *Assam Co. Ltd. v. State of Assam*⁹, at page 208, it was held that: "It is an established principle that the power to make rules under an Act is derived from the enabling provision found in such an Act. Therefore, it is fundamental that a delegate on whom such power is conferred has to act within the limits of the authority conferred by the Act and it cannot enlarge the scope of the Act. A delegate cannot override the Act either by exceeding the authority or by making provision which is inconsistent with the Act. Any rule made in exercise of such delegated power has to be in consonance with the provisions of the Act, and if the rule goes beyond what the Act contemplates, the rule becomes in excess of the power delegated

⁸ Koops Bert-Jaap, "The Concept of Function Creep" (3rd March 2020).13 Law, Innovation and Technology, available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=354790> accessed April 1, 2021

⁹ *Assam Co. Ltd. v. State of Assam*, (2001) 4 SCC 202

under the Act, and if it does any of the above, the rule becomes ultra vires the Act.”

Though the parent IT Act deals with electronic data, its object and purpose are primarily to provide legal recognition of such electronic data. This Act cannot regulate content that goes beyond its reach. Therefore, the IT Act does not recognise digital news media as a separate category of entities and does not seek to subject them or their content to any set of special regulations. This Act does not have enough jurisdictional reach to delegate the legislation of such special regulation or control of digital media including online news platforms, which make these rules *ultra vires* the IT Act.

i. Three-tier Grievance Redressal Mechanism-

Rule 9 provides for a Code of Ethics that goes ahead of the scope of necessity under the grounds in Section 69-A of the IT Act, 2000. These rules impose a self-regulation body at two levels (Rules 10-12) and a Government Oversight Mechanism and Inter-Departmental Committee (Rules 13-14). It is observed that the Inter-Departmental Committee provided in Rule 14 can ‘delete content’ without recourse to Section 69-A. Rule 16 further allows for blocking without an opportunity of hearing or passing orders under Section 69-A “in cases of emergency.” The three tier grievance redressal mechanism gives MIB the power to issue orders, directions, advisories etc. to publishers. It also places the Inter-Departmental Committee (constituted by the MIB) as the final adjudicatory authority in respect of complaints received at Level I and Level II.¹⁰

ii. Blocking in case of Emergency-

In addition to all of the rules, there is an ‘emergency power’ reserved with the Secretary of MIB to pass interim orders blocking any content without even giving an opportunity of hearing. This negatively affects the freedom of speech and expression of the users of these social media platforms. In *Anuradha Bhasin v Union of India*¹¹ the Supreme Court laid down-
“the right to freedom of speech and expression under Article 19(1)(a), and the right to carry on any trade or business under 19(1)(g), using the medium of internet is constitutionally protected”.

It also laid down that any curtailment of access to the internet can only be done within sufficient reasonableness and within the ambit of Article 19(2) and 19(6) of the Constitution. These rules have failed to establish any definitive parameters of an “emergent” situation. Moreover, there

¹⁰ Petition filed by LiveLaw in Live Law Media Private Limited and Others v. Union of India and Another,

¹¹ *Anuradha Bhasin v UoI* [WP(C) 1031/2019] and *Gulam Nabi Azad v UoI* [WP(C) 1164/2019] on January 10, 2020

is no provision afforded for the platform or user for being heard for removal of their content.

VI. VERTICAL AFFECTED

1. Social Media Intermediary

The term “exercise of due caution and discretion” has been believed to create ambiguity when the responsibility of the publisher is at the vortex of a discussion, it has been observed by attorneys at Indus Law¹² that the obligation of the publishers of content that is curated online is to exercise due caution and discretion when the content that is in question relates to activities, practices, beliefs or views of any racial or religious groups. Restrictions of the same nature are not imposed on publishers of news and current affairs content by the Norms of Journalistic Conduct of the Press Council of India and the Programme Code under the Cable Television and Networks regulation Act, 1995. However, a note must be made that the Norms of Journalist Conduct and Programme Code does in fact establish certain guidelines that must be followed by publishers when they publish content relating to religious or communal groups. It is to be nevertheless to be remembered that these rules/guidelines are rather specific and not as wide as the guidelines imposed on online curated content publishers as under the IT Rules, 2021. It does come as a surprise that the publishers of online curated content are required to discharge more responsibility with regards to the nature of the content when the difference between the nature of the news and current affairs content and online curated content is taken into consideration. The imposition that publishers are to exercise more responsibility is the overbearing employment of power over these publishers.

On February 26, 2021, a threshold of 50 lakh (5 million) registered users was announced for a social media intermediary to be considered and controlled as a "significant social media intermediary." These classifications give the government a lot of leeway in deciding which outlets need to follow which rules. This power is strengthened by Rule 6, which states that the government may require any intermediary to comply with the obligations placed on a “significant social media intermediary” under Rule 4, which gives the government even more control. The threshold to be met requires a sufficient “material risk of injury” in order to do so. This in itself is a nebulous threshold that allows the government to enact discriminatory compliance.

It is also provided in Rule 3(1)(h) that Intermediaries must now keep data for 180 days (six

¹² Indus Law, Mondaq, “ New Rules For Digital Media Platforms And Intermediaries”(3rd March 2021) available at <<https://www.mondaq.com/india/media-entertainment-law/1042234/new-rules-for-digital-media-platforms-and-intermediaries>>

months!) for investigative purposes. And after a user's account has been removed, the data must be maintained. In the absence of a data protection law and any kind of control on how surveillance is carried out in India, it is critical to recognise this requirement and understand the repercussions of such a provision.¹³

2. OTT Platform

The new OTT content rules categorize type of content as 'U', 'U/A 7+', 'U/A 13+', 'U/A 16+' and 'A' (Paragraph II(B) of Appendix). The OTTs have to ensure access control measures for content classified as U/A13+ or higher and a reliable age verification mechanism for viewership of content classified as A (restricted to adults), so as to restrict minors from accessing such content (Paragraph II(C) and II(D) of Appendix). In addition to this, the Code of Ethics instructs OTTs to take India's multi-racial and multi-religious context into consideration while exercising due caution and discretion when featuring activities, beliefs, practices, or views of any racial or religious groups. This formally validates the issues which have been raised by certain groups and is likely to have a constricting effect on speech and artistic content. These amendments are ridden with procedural and substantive problems and are an ominous threat to creative freedom.

The newer OTT video streaming platforms do not have underlying legislation enacted by the Parliament like the Cable Television Network Act, 1995 and the Cinematograph Act, 1952 made for its older counterparts. This means that there are no safeguards to stop the executive branch from expanding the scope of the rules and censoring the content it finds troublesome.¹⁴ Parental locks for certain content and displaying the rating for all programmes will be required.¹⁵

In a move that poses a threat to the privacy and anonymity of internet users, the law contains a provision requiring significant intermediaries to provide a voluntary verification option for its users. This would involve users sharing phone numbers or sending photos of government-issued IDs to the companies. This provision could become a gateway for the use of sensitive personal data to profile and target users.

We have already seen such events unfolding before us wherein phone numbers collected for

¹³ Internet Freedom Foundation, Scroll, "Why India's new rules for social media, news sites are anti-democratic, unconstitutional", (21st February, 2021) available at <<https://scroll.in/article/988105/explainer-how-indias-new-digital-media-rules-are-anti-democratic-and-unconstitutional->>

¹⁴ Tatsam Mukherjee, Firstpost 'Over-censorship or welcome classification? What 'Intermediary Rules 2021' will mean for future of OTT content', (3rd March, 2021), available at <<https://www.firstpost.com/entertainment/over-censorship-or-welcome-classification-what-intermediary-rules-2021-will-mean-for-future-of-ott-content-9366791.html>>

¹⁵ *Ibid* v

security purposes, exam registrations, and account logins are used for profiling. This provision will also increase the risk from data breaches and put us at the mercy of the big social media and messenger app players. No evidence has been shown to prove that these measures will help fight misinformation yet it jeopardizes a central aspect of the internet, that is anonymity, which has proven useful for whistleblowing and protection from stalkers.¹⁶

3. *News and Current Affairs Content*

At the outset, the news and digital media platforms do not come under the scope of the Information Technology Act, 2000, as stated The Wire that has filed a writ petition questioning the constitutionality of the IT Rules, 2021.¹⁷ The online news platforms have been arguing that these Rules are just a disguise by the Ministry as an indirect attempt to regulate these content creators and bring them within its ambit.

The Rules provide a hazy definition for “publisher of news and current affairs content”, which seem to exclude digital copies of the newspaper. This distinction seems unfair to smaller size news outlets whose only source of business is through the internet. This murky definition gives the Government sufficient leeway to be ambiguous through the exercise of discretionary power afforded to them by these Rules.

There were certain unexpected rules which brought news and current affairs content providers under the ambit of these rules. These entities need to be registered with the government, irrespective of the size of these content providers. There are also content takedown rules for online news websites, online news aggregators and curated audio-visual platforms.

Part III of these rules gives the concerned Authority the power to issue takedown of any content published by these news and current affairs content online (that are not considered within the definition of ‘intermediaries’) and are given no explicit meaningful checks and balances against executive overstepping.¹⁸

VII. GLOBAL PERSPECTIVE

With the advent of the world of Internet, the regulation of the virtual space was the need of the hour. This was recognised by various nations, who took a different approach in making the online platform and intermediaries adhere to a strict or flexible framework. Some of the

¹⁶Udbhav Tiwari, Mozilla, “India’s new intermediary liability and digital media regulations will harm the open internet” (2nd March, 2021) available at <<https://blog.mozilla.org/netpolicy/2021/03/02/indias-new-intermediary-liability-and-digital-media-regulations-will-harm-the-open-internet/>>

¹⁷ *Ibid xi*

¹⁸ *Ibid xv*

countries have been analysed as follows-

i. Singapore

The legislation regulating the content of OTT platforms are direct and to the point. Back in 2018, the media regulatory body in Singapore legislated an ethical code to be followed by OTT and video streaming services. These content providers were to segregate their content on the same line as theatre released movies. They laid down a strict audience viewing label to be followed. This code also mandates the content providers to show the ratings and themes in the film, like violence, nudity, sexual behaviour, strong language, abuse of substances, etc. presented before the viewer decides to continue watching it. They also laid down certain do's and don't's for these OTT platforms. They also consider the national and religious sentiments which should not be affected by the content hosted online and ensure that these platforms strike a balance and show accurate facts of non-fictional events.

Singapore has also enacted the Protection from Online Falsehoods and Manipulation Act (POFMA), to handle and minimize the growing concerns over misinformation being spread on social media platforms. This law aims to remove fake news content uploaded by the user on social media platform and restrict any end-user access to the relevant statement. This law also includes any false statement communicated in Singapore but the user originated the content from any territory outside its limits. The statutory penalties are extremely exorbitant which might have a deterrent effect of the intermediaries and users.

ii. Germany

The allied "Network Enforcement Act" (Netzwerkdurchsetzungsgesetz - NetzDG) was adopted in 2017 by Germany as a reactionary measure to the lack of self-regulatory efforts by social media platforms. The legislation seeks to address this by regulating the conduct of online platforms by preventing the dissemination of offensive and aggressive content as defined under Sec. 1 (3) NetzDG. Online platforms can be fined up to the tune of €50 million for any failure to delete illegal content. Further, a draft law amending the Act was passed in Parliament which sought to enhance the nuances of the legislation. The amendments include:

- A review procedure for users to contest either deletion of a post or retainment of an illegal one, which mandates social networks to establish a counter-presentation procedure.
- More user-friendly reporting channels which facilitate use and are easily distinguishable from content.

- Enforcement of orders against social networks in terms of admissible data disclosure such as the identity of the offender.
- Raised standards in the submission of aforementioned transparency reports. These additional disclosures include changes from previous reports, extent of access to anonymised data to independent research institutions, so as to figure the groups that are consistently targeted with illegal content.

This draft was passed as a scheme to amend the Audiovisual Media Services Directive. The amended Directive anticipates compliance obligations to protect against illegal material on video-sharing platforms, as well as for small-scale and for certain specific theme sources, like online platforms for the distribution of games videos. This draft envisages to cover such providers within its ambit. 19

Furthermore, under German criminal law, there are several provisions that prohibit the assertion or dissemination of personal information that is either false or cannot be proved to be true.

iii. Brazil

The emergence of new services through innovation may be curbed if intermediaries are vested with the duty to monitor content and that would create a ‘permission-first culture’.²⁰ As an opposition to the Azeredo Bill, Brazil’s Federal Government and civil society²¹ collaborated to come up with a progressive legislation. ²² The adoption of ‘Marco Civil da Internet’ involved a multi-stakeholder engagement²³ along with a constitutional dimension by acknowledgment of fundamental rights as integral to any kind of internet regulation. An accommodation of the five major principles²⁴ governing intermediaries has been seen in the Brazilian regime, and this includes:

¹⁹ Reed Smith, Technology Law Dispatch, “German government introduces new bill to amend Germany’s Hate Speech Act, establishing new requirements for social networks and video-sharing platforms”, (6th April 2020) available at <<https://www.technologylawdispatch.com/2020/04/regulatory/german-government-introduces-new-bill-to-amend-germanys-hate-speech-act-establishing-new-requirements-for-social-networks-and-video-sharing-platforms/>>

²⁰ Brazil Superior Court of Justice, Fourth Panel, Google Brazil, Special Appeal no. 1306157/SP, March 24, 2014

²¹ Dahl RA, *Polyarchy: Participation and Opposition* (Yale Univ Press 2007)

²² Altomonte, V. (2014). Marco Civil: a civilian reaction to surveillance on the Internet, in GIS Watch (77-80). Available at: <http://www.giswatch.org/en/country-report/communications-surveillance/brazil>

²³ Lemos, R. Steibel, F. Pereira de Souza, C. A., Nolasco, J. (2015). A Bill of Rights for the Brazilian Internet (“Marco Civil”) – A Multistakeholder Policymaking Case. In Gasser, U., Budish, R. and West Myers, S. (eds.) Multistakeholder as Governance Groups: Observations from Case Studies (January 14, 2015). Boston, Massachusetts: Berkman Center Research Publication 2015-001. Available at: <http://ssrn.com/abstract=2549270>

²⁴ Manila Principles on Intermediary Liability: Best Practices Guidelines for Limiting Intermediary Liability for Content to Promote Freedom of Expression and Innovation (2014). Available at: https://www.eff.org/files/2015/10/31/manila_principles_1.0.pdf

- a) Freedom of expression to allow unrestricted potential for imparting or receiving of information,
- b) Access to create a level playing field as well as ensuring net neutrality
- c) Privacy and data protection through allowing control over information thereby promoting interests of citizens
- d) Due process ensuring supremacy of law above arbitrariness²⁵, legal process guaranteeing fairness and impartiality through right to be informed of law as well as receiving of notice for alleged offence along with the right to a reasoned decision²⁶
- e) Free and Open internet²⁷ through ‘permission-less innovation’ without being restricted through proprietary technology or other rigid legal mechanism.

iv. South Korea

Since 1995, South Korea’s Information & Communication Ethics Office has had the legislative power to command information providers for deletion and restriction of content which “encroaches on public morals,” causes a “loss to the sovereignty of the republic” or is “information that may harm youths,’s character, emotions and sense of value”.²⁸

v. People's Republic of China

As in other countries, the default pre-safe-harbour position of Chinese law is that intermediaries who have the requisite knowledge of infringing activity on their services will be held jointly and severally liable. ²⁹

The Chinese intermediary liability regime for defamation is neither strict liability nor a true safe harbour. It is limited liability in a sense that intermediaries are held liable only for: (i) unlawful content that (2) they are aware of. However, instead of formulating an exemption rule (e.g. ‘shall not be liable for unknown or lawful content’), China created a liability rule that

²⁵ Dicey, A. V. (1959). *An introduction to the Study of the Law of the Constitution*. London, United Kingdom: Palgrave MacMillan 10th ed.

²⁶ 7 Digital Rights LAC Newsletter (2015). Draft Bill 215/2015, Infanticide to the newly-born digital rights in Brazil.

Available at: <http://www.digitalrightslac.net/en/proyecto-de-ley-2152015-infanticidio-contra-los-recien-nacidos-derechos-digitales-en-brasil/>

²⁷ European Commission (2015). Fact Sheet: Roaming charges and open Internet: questions and answers; MEMO/15/5275, 30 June 2015

²⁸ The Week, “Regulating social media and OTT services: Comparing rules from around the world” (25th February, 2021) available at <<https://www.theweek.in/news/biz-tech/2021/02/25/indias-new-social-media-laws-comparing-regulations-around-the-world.html>>

²⁹ Kyung-Sin Park, *From Liability Trap to the World’s Safest Harbour: Lessons from China, India, Japan, South Korea, Indonesia, and Malaysia*, Oxford Handbook of Online Intermediary Liability

imposes liability: (a) for known unlawful content or (b) for unlawful content notified by the rightsholder. Such a liability-imposing rule suffers from the interpretation of the courts gravitating towards broad conceptions of knowledge and effective notification, unfairly holding intermediaries liable, and naturally incentivizing them into proactive censorship. Also, even if knowledge and effective notification are strictly interpreted, intermediaries are likely to act on lawful content as well as erring on the safe side of deleting the notified content.

vi. United States of America

The Communications Decency Act, 1996 provides for a safe harbour immunity to intermediaries and social media platforms against liability for hosting any content posted by a third party. Section 230 was recently in the news when ex-President of USA, Mr. Trump, asked for the deletion of this section after pointing accusations towards significant social media platform, Twitter for being biased against the Republican political ideologies, as this provision has made social media companies self-regulate.

They also have the Child Online Privacy Protection Act, 1998 which has the power to take down content that hosts content harmful for the non-adult viewership bracket, but this was declared unconstitutional. It is still illegal to host any content which is illegal. The primary goal of this statute is to place parents in control over what information is collected from their young children online.³⁰

VIII. CONCLUSION

After analysing the legality of the 'Information Technology (Guidelines for Intermediaries and Digital Media Ethics Code) Rules, 2021 and comparing various Global laws that regulate social media and digital media, I can conclude that these rules seem rushed as an attempt to curb free speech³¹, a *mala fide* attempt to dominate the online space³², and in urgent need of judicial review³³. The Supreme Court pointed out that the IT Rules, 2021 have no teeth as there are no provisions for prosecution or punishment, which leave these rules to be considered simply as guidelines.³⁴ There are various stakeholders who have initiated legal proceedings against these

³⁰ Federal Trade Commission Complying with COPPA; Frequently asked questions, <https://www.ftc.gov/tips-advice/business-center/guidance/complying-coppa-frequently-asked-questions-0#A.%20General%20Questions>

³¹ Sukumar Murlidharan, Business Line, "No Country for Free Speech" (22nd March 2021) available at <<https://www.thehindubusinessline.com/blink/know/it-rules-2021-set-to-take-over-digital-media-freedom/article34105537.ece>>

³² The Wire, 'A Mala Fide Attempt to Control Independent Digital Media', <https://thewire.in/media/editorial-digital-media-rules-information-and-broadcasting-ministry>

³³ The Wire, 'Why the New IT Rules Beg Urgent Judicial Review', (1st March, 2021), available at <<https://thewire.in/government/digital-platforms-intermediary-it-rules-india-freedom-of-speech-internet-control>>

³⁴ Free Press Journal, SC asks for law on OTTs, says the regulations suggested have 'no teeth', (6th March, 2021),

rules, to be in violation of their fundamental rights. Online news and current affairs platforms like LiveLaw, The Wire (The Foundation of Independent Journalism), The Quint and Pratidhvani have filed writ petitions in various High Court. Delhi High Court³⁵ has also issued notice to the Central Government on a petition challenging the IT Rules,2021 by The Wire. It is evident that these rules are lopsided and establish excessive delegation of power to the executive. This will inevitably be prone to misuse by political actor, leaving the religious user base of these social media platform at a disadvantage by restricting their right to free speech and expression. Only time will tell what courts will decide in the petition filed by the various contributors and stakeholders.

available at <<https://www.freepressjournal.in/india/sc-asks-for-law-on-otss-says-the-regulations-suggested-have-no-teeth>>

³⁵ The Scroll, '*Digital media rules: Delhi HC issues notice to Centre on petition challenging new guidelines*' (9th March, 2021) available at<<https://scroll.in/latest/988991/the-wire-moves-delhi-hc-against-centres-new-digital-media-rules-matter-to-be-heard-today>>