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Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 And 2023 Amendment: Regulation of Media and It's Ethico-Legal Challenges

MRUNALINI RAMESH JADHAV¹

ABSTRACT

Technology is a rapidly growing part of today's society. It has not only changed the community's way of living but also the very existence'. As time progresses, humans continually develop new technologies to simplify their lives. In India, the Information Technology Act of 2000 stands as the sole legislation addressing technology-related issues comprehensively. Other laws, such as the Indian Penal Code, the Indian Evidence Act, and the Prevention of Money Laundering Act, among others, touch upon certain aspects related to technology within their respective scopes, but they do not provide a comprehensive framework for addressing technology-related matters. Now, by seeing the development of social media and all new technology, and raising problems, cyber security issues, the Indian government is trying to regulate this field and for that matter, the Ministry of Electronics and Information Technology ("MEITY") and the Ministry of Information and Broadcasting ("MIB") on 25.02.2021, notified the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021. The IT rules, 2021 mandate the retention of user data by intermediaries for use by government agencies and identification of 1st originator of the information on messaging platforms. And it also empowers the government to identify the fake news on the internet in respect of the government and block it without giving proper opportunity of being heard. These both rules are important to regulate the unregulated sector that is digital media. Because, the growth of digital media has been accompanied by a growing concern around issues such as fake news, hate speech, and privacy breaches, soft pornographic content, content that is likely to incite violence. By adhering to this code of ethics, digital media platforms will help to ensure that they are promoting responsible and ethical behavior and that they are not contributing to the spread of harmful content. But on the other hand the issue is related to the right to privacy, free speech. The rules are clearly infringing fundamental rights under the name of responsibility and ethics. The researcher

¹ Author is an Assistant Professor at KLE College of Law, Navi Mumbai, India.

has undertaken the topic to study and to evaluate the provisions made by the government to regulate the digital media along with their ethico-legal challenges.

Keywords: *Ethics, fundamental rights, Information Technology Rules, Technology.*

I. INTRODUCTION

With the increase in usage of social media platforms and after the shift of the massive industry to IT-based platforms, digital media giants and tech corporations have expanded their footprints in India. There were 692.2 million internet users in India at the start of 2023 when internet penetration stood at 48.7 percent.² India was home to 467 million Social media users in 2023 equating to 38.2 percent of total population.³ Total of 1.10 billion cellular mobile connections were active in India in early 2023, with the figure equivalent to 77.0 percent of total population.⁴ India has 119.5 Million active paid subscriptions across OTT platforms.⁵ The platform of Digital media is very vast and was unregulated. IT Rules, 2023 tried to control this platform by imposing some rules and regulations. It is important for the researcher to study, what was the need of new rules, how these will affect the society at large, does it provides more privacy to users or is defeating the privacy. As described earlier, there is no particular Act which will deal with Digital Media. IT Act, 2000 is the only act which is dealing with technological related issues. The platforms like intermediaries, OTT, Online gaming platforms are emerging nowadays. Government is trying to regulate such platforms and hence, the ministry has introduced Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 (Hereinafter referred as IT Rules, 2021). Many issues stem from these regulations. Essentially, several Supreme Court rulings have emphasized that regulations cannot change the scope or provisions of the enabling legislation. In this case, it appears that the regulations have introduced new elements that go beyond what is outlined in the IT Act. Nonetheless, that's a separate matter. The researcher will now assess certain provisions outlined in these regulations.

II. BACKGROUND OF REGULATION OF DIGITAL MEDIA IN INDIA

The internet is a great source of information and also a medium to connect with friends and family, but at the same time is a place of vulnerability. By keeping all this in a mind, the government of India has passed new rules under section 69 A (2), Section 79 (2) (c), and section

² Simon Kemp, Digital 2023: India, Published on 13th Feb 2023, Available at, <https://datareportal.com/reports/digital-2023-india>

³ Ibid

⁴ Supra 1

⁵ Shailesh Kapoor ,OTT 2.0 India is ready, Published on 18th March 2023, Available at, <https://www.google.com/amp/s/timesofindia.indiatimes.com/blogs/voices/ott-2-0-india-is-ready/>

87 of IT Act 2000. The government of India has felt the need to enact new rules under section 87 of the IT Act, 2000. This new rule broadly deals with 2 products of the internet. One is "Social Media" and another is "OTT (Over The Top) platforms".

In the Prajjwala Case, the Supreme Court, through a suo-moto writ petition on 11/12/2018, emphasized the need for the Indian Government to establish guidelines to combat child pornography, rape, and gang rape content on content hosting platforms.⁶ Subsequently, in an order dated 24/09/2019, the Supreme Court directed the Ministry of Electronics and Information Technology to set a timeline for finalizing these regulations.⁷ Additionally, in 2020, the Rajya Sabha presented a report on the issue of social media pornography and its impact on children and society. Furthermore, in the same year, the Government of India extended the regulatory scope to include OTT platforms under the Information and Broadcasting Ministry.

Similarly in the case of Tehseen Poonawala v. UOI⁸, the Hon'ble Supreme Court has said that, "the Indian Government may frame necessary guidelines to eradicate child pornography, rape, and gang rape imageries, videos and sites in content hosting platforms."

Regarding the regulation of digital media in India, similar to many other nations, it's a multifaceted and evolving process with numerous ethical and legal complexities. Digital media encompasses a broad spectrum of platforms and content, such as social media, online news outlets, streaming services, among others. In India, the primary legislation governing digital media and related activities, such as online conduct and criminal behavior, intermediary liability, and safeguarding sensitive personal data, is the Information Technology Act, 2000 (referred to as the 'IT Act'). However, the IT Act doesn't comprehensively cover the regulation of the entire digital media landscape. The IT Rules, 2021, introduced provisions aimed at regulating social media intermediaries, online gaming platforms, and addressing issues like the identification of fake news (misinformation).

III. DIGITAL MEDIA

The term **digital media** is frequently used to refer to products and services that provide information or entertainment in digital form, especially online via the Internet. Examples of new media include online news sources, videogames, blogs, and social media. The term may also be used to describe online content, especially content that is interactive; on-demand media that is accessible through a range of devices; and media that is responded to or shared in real-

⁶ Prajjwala, vs Union Of India, Rep. on 20 November, 2018

⁷ Ibid

⁸ Tahseen Poonawala v. UOI, SC, 2018

time. It is sometimes used to refer to content that is created, published, or distributed by individuals or non-traditional publishers, such as bloggers.⁹

There are various types of digital media for example- Audio, video, social media, advertising, news, literature and more.¹⁰ Digital media is wide platform of websites, tech devises etc.

IT (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 regulates digital media. These rules defines Digital Media as- “digitized content that can be transmitted over the internet or computer networks and includes content received, stored, transmitted, edited or processed by-

(i) an intermediary; or

(ii) a publisher of news and current affairs content or a publisher of online curated content”¹¹

So there is a difference between only media and digital media. There were already provisions regarding media like, Press Council of India Act of 1978 for the purpose of preserving the freedom of the press and of maintaining and improving the standards of newspapers and news agencies in India. Further, For screening films including short films, documentaries, television shows and advertisements in theaters or broadcasting via television the Central Board of Film Certification (CBFC) sanction is required. Program and Advertisement Codes for regulating content broadcast on the television, are issued under the Cable Television Networks (Regulation) Act, 1995. News channels are governed by a self- regulation mechanism; there is a News Broadcasters Association which has a Code of Ethics to regulate television content. But there was no enactment to regulate digital media. In 2021, Ministry of Electronics and Information Technology (Meity) in India announced the Intermediary Guidelines and Digital Media Ethics Code aim to regulate the social media, digital news media, and over-the-top (OTT) platforms in India.

This research paper only focuses on the regulation made by IT rules, 2021 regarding digital media.

IV. IT (INTERMEDIARY GUIDELINES AND DIGITAL MEDIA ETHICS CODE) RULES, 2021

IT rules, 2021 provides regulation for intermediaries, digital news, OTT platforms. Here

⁹ Winston and Strawn ,*What is digital media*, Available at, <https://www.winston.com/en/legal-glossary/digital-media>

¹⁰ Maryville University , *What is digital media? All you need to know about this booming industry* ,Published on 4th March 2020, Available at, <https://online.maryville.edu/blog/what-is-digital-media/>

¹¹ Rule 2 (i) of *IT (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021*

intermediaries include Social Media Intermediaries, Significant Social Media Intermediaries, online gaming intermediaries. Intermediaries means that a middle platform which connects two ends like, facebook, Instagram, whatsapp, twitter etc. Rules define ‘social media intermediary’ as an intermediary which primarily or solely enables online interaction between two or more users and allows them to create, upload, share, disseminate, modify or access information using its services.¹² Rule has also covered OTT platforms. OTT platforms means Over The Top platforms i.e. any service that is available via the internet instead of traditional networks such as cable or DTH. Rules are also governing the digital news by adding provision of identification of fake news. The Code of Ethics under the Rules apply to publishers of digital media including such as news and current affairs content providers and OTT platforms¹³. Let’s see all provisions and their ethico-legal effects one by one-

(A) Retention of User’s Data and Identification of 1st Originator by Intermediaries- According to Rule 4 (2)¹⁴-

“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 passed by a court of competent jurisdiction or an order passed under section 69 by the Competent Authority as per the Information Technology (Procedure and Safeguards for interception, monitoring and decryption of information) Rules, 2009, which shall be supported with a copy of such information in electronic form:

Provided that an order shall only be passed for the purposes of prevention, detection, investigation, prosecution or punishment of an offence related to the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, or public order, or of incitement to an offence relating to the above or in relation with rape, sexually explicit material or child sexual abuse material, punishable with imprisonment for a term of not less than five years:

Provided further that no order shall be passed in cases where other less intrusive means are effective in identifying the originator of the information:

¹² Rule 2 (w) *MINISTRY OF ELECTRONICS AND INFORMATION TECHNOLOGY NOTIFICATION* New Delhi, the 25th February, 2021, IT(Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021

¹³ Avimukt Dar and others, ‘*New Rules for Digital Media Platforms and Intermediaries*’ Induslaw (1 March 2021), Available at, 1 <<https://induslaw.com/app/webroot/publications/pdf/alerts-2021/Infolex-Alert-2021-IT-Rules-March-1-2021-v3.pdf>>

¹⁴ Rule 4 (2): *MINISTRY OF ELECTRONICS AND INFORMATION TECHNOLOGY NOTIFICATION* New Delhi, the 25th February, 2021, IT(Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021

Provided also that in complying with an order for identification of the first originator, no significant social media intermediary shall be required to disclose the contents of any electronic message, any other information related to the first originator, or any information related to its other users:

Provided also that where the first originator of any information on the computer resource of an intermediary is located outside the territory of India, the first originator of that information within the territory of India shall be deemed to be the first originator of the information for the purpose of this clause.”

provisions related to significant social media intermediaries and their obligation to enable the identification of the first originator of information upon judicial or governmental orders. The purpose of such identification is primarily for the prevention, detection, investigation, or prosecution of serious offenses, including those related to national security, public order, or offenses involving sexual abuse material.

a. Ethico- Legal Challenges-

According to this rule, the government seeks access to all data shared through intermediaries when deemed necessary. This implies that in cases of suspicion, intermediaries may be required to retain and provide user data to the government without clear guidelines on implementation or data protection measures. The rule raises concerns regarding the balance between privacy rights and public safety objectives. While aimed at combating issues like child pornography and harmful content, it potentially compromises individual privacy and data protection. Government has enacted this provision for public safety, to eradicate child pornography, to control harmful content i.e. hate speech, fake news, and incitement to violence, content which hurt religious sentiments, and to maintain social and cultural values. It is in public interest that who started the mischief leading to such crime must be detected and punished. Hence the role of who originated is very important¹⁵. On the other hand, everyone knows that ‘Data is the New Oil’. This provision raises the question of privacy and protection of data also. People will not get any private and secure space where they can freely communicate without fear of third parties reading or listening to their most private thoughts. The activities of private persons, the activities of journalists, civil or political activists could be at risk of retaliation for discussing certain rights and criticizing politicians or policies. So, IT rule 4(2) infringes upon the fundamental right to privacy without satisfying the three-part test set forth by the Hon’ble Supreme Court:

¹⁵ *Press Note on WhatsApp HC Case*, Available at, <https://www.scconline.com/blog/wp-content/uploads/2021/05/Press-Note-on-WhatsApp-HC-Case.pdf>

legality, necessity, and proportionality¹⁶ in *K. Puttaswamy v. UOI*. Where the legality says- there must be a valid law which gives you permission for invasion of privacy. There must be guarantee against the state action and infringement of fundamental rights must “be through the least restrictive alternatives”¹⁷

The 2021 IT Rules were introduced by the government to address the lack of regulation in the digital media sector; however, attempting to control digital media, this underscores the ethical complexities inherent in attempting to regulate digital media without adequate safeguards for individual privacy and rights.

(B) Identification of Fake News and Constitution of Fact Checking Unit- According to Rule 3 (1) (b) (v)¹⁸-

An intermediary, including [a social media intermediary, a significant social media intermediary and an online gaming intermediary], shall observe the following due diligence while discharging its duties, namely:-

(b) the intermediary shall inform its rules and regulations, privacy policy and user agreement to the user in English or any language specified in the Eighth Schedule to the Constitution in the language of his choice and shall make reasonable efforts [by itself, and to cause the users of its computer resource to not host], display, upload, modify, publish, transmit, store, update or share any information that -

(v) deceives or misleads the addressee about the origin of the message or knowingly and intentionally communicates any misinformation or information which is patently false and untrue or misleading in nature [or, in respect of any business of the Central Government, is identified as fake or false or misleading by such fact check unit of the Central Government as the Ministry may, by notification published in the Official Gazette, specify];

This provision gets added by amendment in 2023. The fact checking unit (FCU) of the government to identify fake or false online content in respect of any business of the “central government” seems to freeze the citizen’s right to speak their minds freely about the government. However, it is not mentioned in IT rules how these would be achieved.

Basically, Code of Ethics for Publishers of News and Current Affairs: The IT Rules 2021 require the publishers of news and current affairs content to adhere to the Norms of Journalistic

¹⁶ *K.S. Puttaswamy v. Union of India*, (2017) 10 SCC 1

¹⁷ *Kerala State Beverages (M&M) Corp. Ltd. v. P.P. Suresh*, (2019) 9 SCC 710, at para 30.

¹⁸ The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021[updated as on 6.4.2023]

Conduct of the Press Council of India, the Programme Code under section 5 of the Cable Television Networks Regulation Act, 1995 and content which is prohibited under any law for the time being in force shall not be published or transmitted.¹⁹

The constitutional validity of this rule has been challenged in the case *Kunal Kamra v. UOI*²⁰. The Amendment was challenged by the petitioners primarily on the grounds of violation of Article 14, 19 (1)(a) and 19 (1)(g) along with it being ultra vires of Sections 79, 87(2)(z) and (z)(g) of the Information Technology Act, 2000²¹. Currently, the Supreme Court has temporarily halted the implementation of the Fact Checking Unit through a stay on a government notification, indicating that further legal review is pending.²²

a. Ethico-Legal Challenges-

This amendment empowered the government to block or remove any content which they think is false or fake in respect of any business of the central government. The government has given itself the power to constitute a fact checking unit, which will have powers to determine what is “fake or false or misleading”, with respect to “any business of the Central Government”. This provision raises the issue between the right to free speech and expression and the Nation's integrity. It seems that this provision is giving excessive power to the government and trying to silent the internet and critics of the government. I would like to quote insightful thoughts shared by John Mill in his book “On liberty”²³, on freedom of speech and personal liberty over censorship. In chapter II Mill offers several arguments in favor of free expression²⁴.

- First, because no one knows the truth, censoring an idea may be censoring the truth.
- Second, free competition of ideas is the best way to find truth.
- Third, because no one idea is the sum of truth, even those ideas containing only a portion of the truth will help society acquire knowledge. This argument implies that even false ideas are valuable, because they both test the truth and prevent it from slipping into dogma, and because they too may contain a germ of truth worth preserving.

Mill also explains the harm principle. suggesting that, government’s intervention should only

¹⁹ No. (I) of Appendix annexed to the IT Rules 2021.

²⁰ *Kunal Kamra v. UOI*, SC 2023

²¹ An analysis of *Kunal Kamra v. UOI*, Bar and Bench, Available at, <https://www.barandbench.com/law-firms/view-point/an-analysis-of-kunal-kamra-vs-union-of-india>, last seen on, 10/05/2024

²² *Supreme Court stays IT Ministry’s notification establishing fact check unit under PIB to identify fake news*, Available at, <https://www.thehindu.com/news/national/supreme-court-stays-it-ministrys-notification-establishing-fact-check-unit-under-pib-to-identify-fake-news/article67975405.ece>, last seen on 10/05/2024

²³ John Stuart Mill: *On Liberty*, the second edition, london: john w. parker and son, west strand .

²⁴ Avid Schultz, *On liberty*, available at, <https://www.mtsu.edu/first-amendment/article/872/on-liberty>

be allowed when there is a compelling reason to prevent harm to others.

The IT Rules, 2021 aimed to fill the regulatory gap in the digital media sector, yet the absence of a data protection framework poses a substantial hurdle in effectively overseeing digital media. This challenge will get more severe by the risk of infringing upon users' fundamental rights, thereby necessitating careful consideration of the associated ethical dilemmas.

b. Regulation of Over the Top Platforms: -

Certain laws such as Information Technology Act 2000, Indian Penal Code 1861, and Indecent Representation of Women (Prohibition) Act 1986 have been made applicable to the content generated on OTT Platforms. As per these rules, the Ministry of Information and Broadcasting (I&B) shall regulate content on OTT and online platforms. Rules mandate the OTT platforms to create a self control over their content and classify the content as U (Universal), U/A+7, U/A+13, U/A+ 16, A (Adult) Platforms would be required to implement parental locks also.

i. Ethico- Legal Challenges-

Many OTT platforms are based outside India, which makes it difficult to enforce regulations on them. Excessive and strict regulation can inhibit creative freedom and curtail the scope of artistic expression. While artistic freedom is essential, some OTT platforms have been criticized for pushing the boundaries towards content featuring abuse, nudity, and soft pornography. This shift, often justified under the umbrella of artistic expression, raises concerns about the ethical implications, particularly when targeting a youthful audience. It's important to know the distinction between what may be deemed unethical and what is illegal. While the content showcased on OTT platforms might not necessarily breach legal boundaries, there's a growing sentiment in India that it may transgress ethical norms. The concern revolves around the impact on societal values and the potential influence on the younger demographic.

In the case of **Ajay Goswami vs. Union of India** The Hon'ble Supreme Court has said that, "Where art and obscenity are mixed, what must be seen is whether the artistic, literary or social merit of the work in question outweighs its "obscene" content."²⁵ The court is essentially proposing a balancing test. It suggests that when art and obscenity coexist in a piece of work, the judiciary should weigh the artistic, literary, or social value against the potentially obscene elements. If the artistic or societal merit is substantial and outweighs the obscenity, the work may be considered within the bounds of acceptability.

Similarly, in **Ekta Kapoor vs State Of M.P**, Hon'ble Justice Shailendra Shukla said, "Freedom

²⁵ Ajay Goswami vs. Union of India, AIR 2007, SC 493

is subject to reasonable restriction and if the material is against public decency and morality and the impugned material is obscene as per Section 292 of IPC, such freedom is liable to be curtailed under Article 19(2) of the Constitution.”²⁶

The Constitution of India guarantees the right to freedom of speech and expression under Article 19(1)(a). However, this right is not absolute, and the state can impose reasonable restrictions under Article 19(2) to balance individual freedoms with broader societal interests. Justice Shukla's statement emphasizes that if the material in question goes against public decency and morality, it may be subject to restriction. Deciding what constitutes public decency and morality is often subjective and context-dependent. Court underscores the delicate balance between freedom of expression and the need for reasonable restrictions, particularly when the content is deemed obscene as per Section 292 of the IPC and is against public decency and morality. This balance aims to protect individual freedoms while ensuring that the exercise of these freedoms does not harm the larger interests of society.

V. CONCLUSION

From the above discussion, researcher can say that, Government is creating a bureaucratic super-structure by silencing the internet, the digital media and the critics of the government which is giving undue powers to the executive. For new challenges in digital content, some strict policy measures are needed with the help of parliamentary deliberation. An open, safe, trusted, and accountable internet is not possible until we have a data privacy law. The use of OTT platforms is increasing day by day. These platforms have become a powerful means for creators to address diverse subjects openly.

However, the freedom on OTT platforms has raised concerns as well. While they offer a space for unrestricted expression, there's a growing trend toward content featuring nudity, explicit language, and other forms of explicit material. The increased freedom has led to concerns about the ethical implications of certain content. What may be acceptable in terms of content in one cultural context might be considered offensive in another cultural context. Striking a balance that respects cultural sensitivities and cultural values, morality and decency is a significant challenge. The current lack of comprehensive regulations for content on OTT platforms has made it important to discuss the necessity for a regulatory framework that balances creative freedom with societal norms.

²⁶ Ekta Kapoor vs State of M.P. on 11 November, 2020

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