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# The Concept of Originator in Terms of Information Technology Rules 2021 and its Implications on the Right to Privacy

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## ABSTRACT

*Right to privacy is always a contestable debate in India. Considering the large numbers of social media users in India, the aspects of privacy are likely to take twists and turns again and again. The new ethics code for digital media by the ministry of information technology has unfolded new layers of privacy for social media users. Various social media entities especially WhatsApp, Facebook and Twitter are getting heavily impacted because of the robust compliance mechanism incorporated into the new rules. The concept of originator has been introduced into the legal arena for the first time in India. The social media intermediaries are required to trace the first originator under certain circumstances. On the other hand, right to privacy has been incorporated as part of fundamental rights by the judiciary. This paper explores the idea of first originator and delves upon the concern that whether the same is in violation of right to privacy of its citizen. The position is clarified long back that no fundamental right is absolute in nature. As far as the concept of originator is concerned, as of now, it presents a blurry picture as to whether the same violates right to privacy and if yes, till what extent. The authors have attempted to analyse this arguable point in light of various interpretations by scholars as well as the judiciary.*

## I. INTRODUCTION

Social Media forms an integral part of people's lives. People of all ages are using social media platforms as means of communication. It has acquired a dominant position especially in contemporaneous times when almost everything shared on social networking sites is making a huge impact on people. India is considered as the world's 'largest open internet society' and attracts many social media platforms to run their businesses<sup>3</sup>. Currently, India has 53 Crore

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<sup>3</sup> LexCounsel Law Offices, *The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021: Impact on Digital Media* (2021). Available at: <https://www.ilntoday.com/2021/04/the-information-technology-intermediary-guidelines-and-digital-media-ethics-code-rules-2021-impact-on-digital->

WhatsApp users, 44.8 Crore YouTube users, 41 Crore Facebook users, 21 Crore Instagram users and 1.75 Crore Twitter users<sup>4</sup>. The problem arises when the instances of misuse of these platforms such as violating dignity of women, circulating fake news for inciting communal violence etc. start happening of a daily basis<sup>5</sup>. The digital means of communication and data sharing through the same has taken the highest leap and therefore, it is the need of the hour to regulate the conducts of such social media websites.

In light of the same, the Ministry of Electronics and Information Technology ('MeitY'), has enacted Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 ('IT Rules 2021') which was notified through publication on the Gazette<sup>6</sup>. The rules are made under Section 87 of The Information Technology Act 2000<sup>7</sup> ('IT Act'). These rules are created in the supersession of The Information Technology (Intermediaries Guidelines) Rules, 2011. Concerned social media intermediaries were given three months to comply with these new digital rules<sup>8</sup>.

The IT rules 2021 are drafted in a manner to serve a dual purpose<sup>9</sup>: (1) Increasing the accountability of social media platforms and (2) empowering the users of social media by establishing a three-tier redressal mechanism for efficient grievance resolution.

Various social media giants in India such as Facebook, Instagram, Twitter, Telegram and WhatsApp has raised concerns over these rules on intermediary<sup>10</sup>. Elegantly, Google and Facebook have made a statement that it aimed to comply with the new norms and will continue to discuss the related issues with the government<sup>11</sup>. Surprisingly, WhatsApp, owned by Facebook, has gone to Delhi High Court challenging the IT Rules 2021 as unconstitutional specifying that the new rules aimed at violating the right to privacy of its users<sup>12</sup>. Kazim Rizvi,

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media/ (Accessed: 20 June 2021).

<sup>4</sup> Press Information Bureau, Press Release dated 25 February 2021, available at: <https://pib.gov.in/PressReleaseDetailm.aspx?PRID=1700749> (Last Accessed: 21 June 2021).

<sup>5</sup> *Id.*

<sup>6</sup> Gazette Notification dated 25 February, 2021, G.S.R. 139(E), [https://www.meity.gov.in/writereaddata/files/Intermediary\\_Guidelines\\_and\\_Digital\\_Media\\_Ethics\\_Code\\_Rules-2021.pdf](https://www.meity.gov.in/writereaddata/files/Intermediary_Guidelines_and_Digital_Media_Ethics_Code_Rules-2021.pdf) (Last Accessed: 21 June 2021).

<sup>7</sup> Section 87(2) of IT Act, 2000.

<sup>8</sup> Rule 6 of IT Rules 2021.

<sup>9</sup> Dhruv Manchanda and Priyam Raj Kumar, *The Information Technology (Intermediary Guidelines And Digital Media Ethics Code) Rules, 2021: Impact On Digital Media - Media, Telecoms, IT, Entertainment - India* (2021). Available at: <https://www.mondaq.com/india/social-media/1063198/the-information-technology-intermediary-guidelines-and-digital-media-ethics-code-rules-2021-impact-on-digital-media-> (Last Accessed: 21 June 2021).

<sup>10</sup> Aashish Aryan, *New guidelines for social media intermediaries: Rules set for roll-out, concerns arise over lack of consultation* (2021). Available at: <https://indianexpress.com/article/business/new-guidelines-for-social-media-intermediaries-rules-set-for-roll-out-concerns-arise-over-lack-of-consultation-7201783/> (Accessed: 20 June 2021).

<sup>11</sup> Surabhi Agarwal, *Google, Facebook say ready to comply with revised IT rules*, *The Economic Times*. Available at: <https://economictimes.indiatimes.com/tech/technology/google-facebook-say-ready-to-comply-with-revised-it-rules/articleshow/82955590.cms> (Last accessed: 20 June 2021).

<sup>12</sup> *WhatsApp: Facebook-owned app goes to court over India privacy rules* (2021). Available at:

the founding director at the public policy think tank – The Dialogue, said that it is incumbent upon the parliament to draft a law which protect the user’s privacy while taking into consideration the economic realities<sup>13</sup>. However, MeitY specifically stated that the government respects its citizen’s right to privacy and diligently denied that it has no intention of violate the same when WhatsApp is required to disclose the originator of a particular message<sup>14</sup>. On the other hand, MeitY also claimed that the rules are in accordance with the law of the land and has been drafted after consultation with various social media intermediaries and with reference to the same, WhatsApp never objected in writing this move of government to trace the originator of the message<sup>15</sup>.

However, let us first understand what led to the government frame the rules and what is the concept of originator.

## II. WHAT LED THE GOVERNMENT TO FRAMING IT RULES 2021

The origin of the new IT Rules 2021 is deeply rooted into some unfortunate events and discussions related to the same in the parliament. For instance, mob lynching in India have caused more than 40 deaths in 2017 and 2018 primarily due to fake news<sup>16</sup>. The new rules on intermediaries are in response to the circulation of such baseless messages which caused mobs to lynch innocent people<sup>17</sup>.

In a suo-moto writ petition, the Hon’ble Supreme Court vide order dated 11 December, 2018 made an observation that the government of India may frame the necessary guidelines/SOP and implement them so as to eliminate child pornography, rape and gang rape imageries, videos and sites in content hosting platforms and other applications<sup>18</sup>. Furthermore, the Supreme Court, while hearing the petition of Facebook, acknowledged the fact that amongst various contents that is being shared on social media, some of them are harmful and can incite violence<sup>19</sup>. In the same order, the Apex Court also highlighted that in such circumstances wherein social media has become a large source of pornography or is being used by paedophiles

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<https://www.bbc.com/news/world-asia-india-57251612> (Last accessed: 21 June 2021).

<sup>13</sup> Bismah Malik, *India again tells WhatsApp to withdraw new privacy policy, firm says no accounts deleted yet*, *The New Indian Express*. Available at: <https://www.newindianexpress.com/nation/2021/may/19/india-again-tells-whatsapp-to-withdraw-new-privacy-policy-firm-says-no-accounts-deleted-yet-2304765.html> (Last accessed: 20 June 2021).

<sup>14</sup> Press Information Bureau, *Press Release dated 26 May 2021*, Available at: <https://pib.gov.in/PressReleaseDetailm.aspx?PRID=1721915> (Last Accessed: 21 June 2021).

<sup>15</sup> *Id.*

<sup>16</sup> BBC News, *Why India wants to track WhatsApp messages*, 30 October 2021, Available at: <https://www.bbc.com/news/world-asia-india-50167569> (Last Accessed: 21 June 2021).

<sup>17</sup> *Id.*

<sup>18</sup> In Re: Prajwala Letter Dated 18.2.2015 Videos of Sexual Violence and Recommendations, Suo Moto Writ Petition (crl) No(s). 3/2015.

<sup>19</sup> Facebook Inc. v Union of India and Ors., Transfer Petition(s)(Civil) No(s).1943-1946/2019.

or used as a selling device for drugs and weapons, it is imperative that there is a properly framed regime to find out the person/institution/bodies who are the originator of such content/messages<sup>20</sup>. In light of the same, Supreme Court directed the MeitY to apprise the timeline in respect of completing the process of notifying the new rules. Ultimately, the MeitY came up with the current rules of 2021 after the hardship of going through the previous draft bills.

### III. SCENARIO PRIOR TO THE CONCEPT OF ORIGINATOR

IT Rules 2021 are likely to have major repercussions on user privacy as well as for media platforms such as WhatsApp or Signal that provides end-to-end encryption. According to the rules, the government has now mandated the social media companies to trace the originator of the messages in certain cases. Meaning whereby, the social media platforms would need to rework on their encryption model in order to comply with the rules<sup>21</sup>.

One of the biggest social media giant, WhatsApp, has strongly condemned the move of the government for mandating entities to keep track of the person who sent the particular message. End-to-end encryption ensures that only the person to whom that particular message or video or image is sent can read or listen, and no one in between, including WhatsApp, thereby secured from falling into the wrong hands<sup>22</sup>. WhatsApp claims that privacy and security is in their DNA<sup>23</sup>.

Against this intended encryption policy of WhatsApp, the IT Rules 2021 tends to vanquish by introducing the concept of originator of the content or traceability for that matter. Traceability requires messaging services to store information that can be used to ascertain the content of the messages. This leads to two drawbacks<sup>24</sup>: (1) In order to trace one message, the service providers will have to trace every message as there is no prediction about which message the government would want to see in the future. (2) In order to do so, messaging service providers would have to build a giant database of every message that is being sent which further leads to breaking the very end-to-end encryption and considerably weakening the security and privacy of the product.

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<sup>20</sup> *Id.*

<sup>21</sup> Nitin B., *How govt's new IT Rules to 'track originator of messages' can affect your privacy*, *The News Minute*, Available at: <https://www.thenewsminute.com/article/how-govt-s-new-it-rules-track-originator-messages-can-affect-your-privacy-144179> (Last Accessed: 21 June 2021).

<sup>22</sup> WhatsApp Security, Available at: <https://www.whatsapp.com/security/> (Last Accessed: 21 June 2021).

<sup>23</sup> *Id.*

<sup>24</sup> WhatsApp Security, *What is traceability and why does WhatsApp oppose it?* Available at: <https://faq.whatsapp.com/general/security-and-privacy/what-is-traceability-and-why-does-whatsapp-oppose-it/?lang=en> (Last Accessed: 21 June 2021).

Facebook collects various kinds of information from the users such as communication with the others, location of a photo or the date on which the file was created, information about the users provided by the others, device information and information pertaining to financial transactions<sup>25</sup>. Collection of information is done on the basis of services used. Moreover, Facebook shares the collected information to the third parties which provide advertising, measurement and analytic services without compromising personally identifiable information<sup>26</sup>. Also, it facilitates users with the option to access, rectify, port or delete their data if they wish<sup>27</sup>.

Information floating on micro-blogging site, Twitter operates in a slightly different manner. Almost every activity on Twitter is public information including profile information, time zone, language, tweets, liked tweets and retweets<sup>28</sup>. Direct messages are also scanned potentially for abusive or prohibited content or for use of reported issues for the purpose of maintaining safety and integrity of the platform<sup>29</sup>. However, the account holders on Twitter can certainly change their privacy for information such as whether tweets are publicly available or whether only followers can tag them into a photo or can send direct message etc. Twitter only shares personal data with third party with the consent of the account holder and without consent if it believes that that it is necessary to comply with a law, regulation, legal process or government request. According to the privacy policy of these majorly used social media sites, it seems that they are committed towards protecting the privacy of the users and tend not to share the data without consent of the owners.

#### IV. 'TRACE THE ORIGINATOR' MECHANISM UNDER IT RULES 2021

IT Rules 2021 does not define the word originator. Reference can be taken from UNCITRAL Model Law on Electronic Commerce (1996). According to it, *Originator of a data message means a person by whom, or on whose behalf, the data message purports to have been sent or generated prior to storage, if any, but it does not include a person acting as an intermediary with respect to that data message*<sup>30</sup>.

User of social media entity includes the originator<sup>31</sup>. Rule 4<sup>32</sup> Provides that a significant social

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<sup>25</sup> Facebook Data Policy, Available at: <https://www.facebook.com/policy.php> (Last Accessed: 21 June 2021).

<sup>26</sup> *Id.*

<sup>27</sup> *Supra* Note 23.

<sup>28</sup> Twitter Privacy Policy, Available at: <https://twitter.com/en/privacy> (Last Accessed: 21 June 2021).

<sup>29</sup> *Id.*

<sup>30</sup> UNCITRAL Model Law on Electronic Commerce, United Nations (1999), Available at: [https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-04970\\_ebook.pdf](https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-04970_ebook.pdf) (Last Accessed: 21 June 2021).

<sup>31</sup> Rule 2(x) of IT Rules 2021.

<sup>32</sup> *Id.*

media intermediary<sup>33</sup> providing messaging services shall provide the relevant information pertaining to the first originator of the information as may be required by any judicial order or required by any competent authority as per The Information Technology (Procedure and Safeguards for Interception, monitoring and decryption of Information) Rules, 2009<sup>34</sup>.

An order shall only be passed for the purpose of<sup>35</sup>:

- Prevention, detection, investigation, prosecution or punishment of an offence related to the sovereignty and integrity of India, security of the state, friendly relation with foreign states or public order
- Incitement to an offence relating to the above or in relation to rape, sexually explicit material or child sexual abuse material, punishable with imprisonment for a term of not less than five years.

No such order shall be passed in cases wherein less intrusive means are effective in identifying the originator of information.

Significant social media intermediaries, while complying with order to identify first originator, are not obligated to disclose any contents of the message or any other information related to the first originator or other users<sup>36</sup>.

If the first originator of any messages is located outside India, the first originator of the message inside the territory of India shall be deemed to be the first originator<sup>37</sup>.

The significant/social media intermediary is obligated to inform the users of its platform not to indulge into information sharing, uploading etc. which is, inter alia, deceives or misleads the addressee about the origin of the message<sup>38</sup>.

## **V. WHETHER THE CONCEPT OF TRACING THE ORIGINATOR VIOLATES RIGHT TO PRIVACY**

The word privacy has been frequently discussed in ordinary language but yet, there is no single

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<sup>33</sup> Rule 2(v) of IT Rules 2021 defines Significant Social Media Intermediary as a social media intermediary having number of registered users in India above such threshold as notified by the central government. Rule 2(w) defines 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.

<sup>34</sup> The Information Technology (Procedure and Safeguards for Interception, Monitoring and Decryption of Information) Rules, 2009. Available at: <https://www.meity.gov.in/writereaddata/files/Information%20Technology%20%28Procedure%20and%20Safeguards%20for%20Interception%2C%20Monitoring%20and%20Decrypti on%20of%20Information%29%20Rules%2C%202009.pdf> (Last Accessed: 21 June 2021).

<sup>35</sup> Rule 4 of IT rules 2021.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> Rule 3(vi) of IT Rules 2021.

definition of the same. Maybe there must not be a single definition due to the spheres revolving around it and getting unravelled on a daily basis. In times to come, various new layers will be undimmed which were rooted into our boundary of protection but wasn't acknowledged.

Privacy or particularly online anonymity is described as a protection of internet users' legal right to privacy<sup>39</sup>. However, the privacy related concepts are blamed today primarily because of identity theft, trolling, terrorism, illegal sharing of copyrighted material and like crimes which has created a privacy dilemma<sup>40</sup>. Information privacy is a fundamental right to a personhood and people are always conscious about the information sharing that it should be conveyed to an intended recipient only as otherwise, it is likely to be misunderstood or misconceived<sup>41</sup>.

Right to privacy is a fundamental right under Article 21 of the Constitution of India. It was confirmed by a nine-judge bench of The Supreme Court in the case of *K.S. Puttaswamy v. Union of India*<sup>42</sup> wherein they declared the right to privacy as an integrated part of part III of the constitution. However, emphasizing the limitations of this right, the court also observed in this case that *the right of an individual to exercise control over his personal data and to be able to control his/her own life would also encompass his right to control his existence on the internet. Needless to say that this right would not be an absolute right. The existence of such a right does not imply that a criminal can obliterate his past, but that there are variant degrees of mistakes, small and big, and it cannot be said that a person should be profiled to the nth extent for all and sundry to know*. In a similar sense, responding to the WhatsApp's lawsuit, the government clarified its stand that it is committed towards protecting the right to privacy of citizens but it is subject to 'reasonable restrictions' and 'no fundamental right is absolute'<sup>43</sup>.

Passage of the IT Act in the year 2000, saw the first of its kind to prescribe intermediary liability provision. Section 79 provides a safe harbour for intermediaries such as social media companies or e-commerce apps for offences by third parties as long as they had no knowledge or had exercised due diligence for prevention of the commission of such offence. However, the new IT Rules are enforced as the role of an intermediary in today's era are no longer limited to a mere bridge between the content creator and the receiver. The significance of the role of an

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<sup>39</sup> Gry Hasselbalch Lapenta and Rikke Frank Jorgensen, *Youth, Privacy and Online Media: Framing the right to privacy in public policy-making*, Available at: <https://journals.uic.edu/ojs/index.php/fm/article/download/5568/4373#author> (Last Accessed: 21 June 2021).

<sup>40</sup> *Id.*

<sup>41</sup> Stephen E Henderson, *Expectations of Privacy in Social Media* (2012) 31 Miss C L Rev 227.

<sup>42</sup> 2017 10 SCC 1.

<sup>43</sup> Ahilesh Sharma, *Right To Privacy Not Absolute, Says Government On WhatsApp's Lawsuit*. Available at: <https://www.ndtv.com/india-news/no-fundamental-right-including-right-to-privacy-is-absolute-government-on-whatsapp-lawsuit-against-new-digital-rules-2449742> (Last Accessed: 21 June 2021).



intermediary due to humongous data transmission has led to believe that the gap between providing absolute immunity and imposing strict liability should be narrowed.

The act of disclosing any electronic record, book, register, correspondence, information, document or other material without the consent of the person to whom they belong, is prohibited by a person who was conferred upon the power to secure the same under IT Act or any rules or regulations made thereunder<sup>44</sup>. However, the concept of tracing the originator under IT Rules 2021 does not clarify whether the information retained by the social media intermediary shall not be used without the consent of the owner. The duty imposed upon the intermediaries to trace the originator hinges upon the question that whether such liability infringes the right to privacy.

The reasonableness of state action and non-absolutism of the fundamental rights are two sides of the coin. Indian Constitution deliberately lacks an overarching limitation clause applicable to all fundamental rights for them, even the supreme court, while stating the requirement of reasonableness of state action, has not understood this to mean that there should be a single limitation test implied by such principle of reasonableness<sup>45</sup>. Each right has its own corresponding limitation established either through texts or judicial decisions<sup>46</sup>.

IT Rules 2021 mandates social media intermediaries to retain data of a user for one hundred and eighty days after any cancellation or withdrawal of user's registration<sup>47</sup>. Every user has a right to be forgotten. The High Court of Orissa in the case of *Subhranshu Rout @ Gugul v. State of Odisha*<sup>48</sup>, observed that *there is a widespread and seemingly consensual convergence towards an adoption and enshrinement of the right to get deleted or forgotten but hardly any effort has been undertaken in India till recently, towards an adoption of such a right, despite such an issue has inexorably posed in the technology dominated world.*

Nine-judge bench of the Supreme Court in *K.S. Puttaswamy* case<sup>49</sup> authoritatively held that *technology has made it possible to enter a citizen's house without knocking at his/her door and this is equally possible both by state and non-state actors. It is individual's choice as to who enters his house...that it should not harm the other individual or affect his/her right...that the only permitted exception is where there is a countervailing public interest which in particular circumstances is strong enough to outweigh it.*

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<sup>44</sup> Section 72 of IT Act, 2000.

<sup>45</sup> Aparna Chandra, *Proportionality in India: A Bridge to Nowhere?*, Available at: <https://ohrh.law.ox.ac.uk/wp-content/uploads/2021/04/U-of-OxHRH-J-Proportionality-in-India-1.pdf> (Last Accessed: 21 June 2021).

<sup>46</sup> *Id.*

<sup>47</sup> Rule 3(1)(h) of IT Rules.

<sup>48</sup> BLAPL No. 4592 of 2020.

<sup>49</sup> Supra Note 37.

Tracing the originator certainly essential in legitimate cases wherein the motive of the government is to curb the illegal and illicit activities harming the society. However, certain provisions of the rules are alarming as it presents a picture wherein innocent bystanders are likely to be victimised unnecessarily.

## **VI. CONCLUSION**

Identification of originator requires a hefty reliance on technological means. And reliance placed solely on technology can many a times produce false results due to technical glitches/fault. The alleged originator identified after the order has been passed by the adjudicating authority or any other competing authority may not be the real originator at all. There is no mechanism provided under IT Rules 2021 to follow the trail in case plea of innocence is pleaded by the alleged originator. The relevant questions like what if findings of social media sites about the originator are wrong are not at all answered by the legislature. Due to the lack of parliamentary oversight over the surveillance, bad actors can indulge into malpractices such as spoofing wherein they can escape the liability by falsely modifying the originator and thereby framing an innocent person. This will lead to crimes like data and identity theft and the implications on privacy of persons will be huge.

Moreover, in case an authority passes the order to trace the originator, the burden of proof for proving that the person was not the originator shall be on that particular individual rather than the government. Such discharge of burden by the innocent person against the technical results of service providers is highly difficult if not impossible. Moreover, the rules mentioned that in case the originator is located outside India, then the first originator in India shall be deemed to be the first originator. This provision is problematic in terms that it imposes arbitrary powers upon the authorities to label a person as originator who merely passed on a harmful message without even having the knowledge or intention to do so merely because he was somehow situated in India. The question still remains as how the privacy of such people who are likely to fall into this trap would be protected.

As far the right to privacy is concerned, it is not an unknown fact that no fundamental right is absolute. However, regulating the increasing digital world is undoubtedly important, but it should not be done at the cost of innocent persons and by violating their right to privacy.

Another crucial aspect is, the rules neither specifies the definition of the originator nor it prescribes a uniform mechanism to trace the originator. It is a grey area wherein no one, except the social media intermediaries, would understand the methodology adopted to identify the particular originator. Whether the particular findings of the intermediary would be shared and

challengeable is yet another challenging question. The alleged originator, if believed to be guilty, must be identified and held liable through a process in accordance with natural justice principles.

Pending the outcome of the law suit filed by WhatsApp and the like only time will tell whether or not the concept of originator violates, fully or partially, right to privacy and whether such violation can be circumscribed into the arena of reasonable restriction.

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