

**INFORMATION TECHNOLOGY (INTERMEDIARY
GUIDELINES AND DIGITAL MEDIA ETHICS
CODE) RULES 2021 & OTT PLATFORMS: A
CRITICAL EVALUATION FROM THE
CONSTITUTIONAL PERSPECTIVE**

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“Dis-moi ce que tu manges, je te dirai ce que tu es.”

Meaning – Tell me what you eat and I will tell you what you are.

*- Anthelme Brillat-Savarin,
French Lawyer, 1826*

Abstract

Not only what you eat, but also what you receive through your five senses matters in deciding who you are. In today’s world, the young to old generations are using their eyes and ears on online platforms such as social media, YouTube, OTT etc. Amidst the pandemic, the consumption of OTT platforms and time spent on social media platforms has increased manifold. Online Curated Content streaming on OTT Platforms and unlawful content published on social media platforms also acts as food that plays a crucial role in affecting and changing the mind-set or opinion of an individual. However, this surge on these platforms also gave birth to various controversies and regulatory issues as the published and streaming content was feeding obscenity,

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violence, abusive and defamatory language to its consumers, which the current legal framework was unable to resolve. Consequently, different petitions were filed in various Hon'ble courts to regulate such content. The Indian Government in February 2021 came up with the hotly debated Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules 2021 to regulate OTT platforms and other different intermediaries. Though these rules have positive implications, concerns were also raised by various stakeholders. The underlying concerns that are needed to be chalked out for better regulation of the intermediaries and OTT platforms. The primary objective of this article is to analyse the IT Rules, 2021 and regulation on OTT platforms from the constitutional view point. The possible tussle between the IT Rules 2021, OTT platforms and the fundamental rights is the core focus point in the article. The article attempts to analyse the need for bringing the legislation and also puts forth their positive and negative aspects in an unbiased manner by comparatively analysing them with Constitutional principles and to provide suggestions.

Keywords: IT Rules 2021, Intermediaries, OTT Platforms, Constitution, Fundamental Rights,

Introduction

“Everything comes at a cost. Just what are you willing to pay for it?”

~ Serena Williams

The internet was set on foot in India by VSNL on August 15, 1995,¹ which revolutionized the lives of the people and subsequently became an essential component under Articles 19(1)(a) (freedom of speech and expression) and 19(1)(g) (freedom to practice any profession) of the Indian constitution

¹ Deepali Moray, *20 years of Internet in India: On August 15, 1995 public internet access was launched in India* (August 15, 2015, 07:48 AM), NEWS 18 INDIA, <https://www.news18.com/news/tech/20-years-of-internet-in-india-on-august-15-1995-public-internet-access-was-launched-in-india-1039859.html>.

by the Hon'ble Supreme Court of India in 2020.² Thus, creating the internet as a base, various start-ups set up and launched their respective online platforms to connect people (known and unknown) from each other. In the early 2000s, different online apps such as LinkedIn, Facebook, Twitter, YouTube, etc., gained prominence all over the world, thereby creating a considerable consumer base.³ Although these platforms had a good chunk of the population using them, their utilization time was restricted to less than two and a half hours before the outbreak of the COVID-19 pandemic. However, after the outburst, India saw an upsurge of nearly 87% users to the online platforms, which means that people started using online platforms more than four and a half hours a day.⁴

The entertainment industry also underwent significant revolution with the booming of the information technology and internet; and the realms of entertainment have changed from wired television connections to free or paid wireless audio and video hosting and streaming services. Such services are known as Over The Top (hereinafter referred to as OTT) services that provide users a range of content like short movies, web series, feature films, documentaries, etc., to watch for entertainment purposes. Unlike the content provided by film or television that is managed by CBFC, BCCC, and so on, the OTT platforms have no administrative body over them to control the content streamed and consequently enjoy their freedom. These services reach their targeted audience through the internet on the platforms like Netflix, Amazon Prime, Hotstar, etc., which might be accessed through any digital source or gadget. As per the

² Anuradha Bhasin v. Union of India (2020) 3 SCC 637.

³ Drew Hendriks, *The Complete History of Social Media: Then and Now* (January 22, 2021), SMALL BUSINESS TRENDS, <https://smallbiztrends.com/2013/05/the-complete-history-of-social-media-infographic.html>.

⁴ *Coronavirus: 87% increase in social media usage amid lockdown; Indians spend 4 hours on Facebook, WhatsApp* (March 30, 2020, 09:28 AM), BUSINESS TODAY. IN, <https://www.businesstoday.in/technology/news/story/coronavirus-87-percent-increase-in-social-media-usage-amid-lockdown-indians-spend-4-hours-on-facebook-whatsapp-253431-2020-03-30>.

reports, amidst the pandemic, these OTT platforms gained immense popularity. For instance, in India, there was a 30 percent rise in paid subscribers from 22.2 million to 29 million in just five months in 2020.⁵ Platforms like Netflix, Amazon Prime Video, Hotstar are some of the biggest gainers whose paid subscribers base surged drastically.

However, with an unprecedented surge in the popularity of OTT platforms, new challenges and controversies also mushroomed. The controversy to have a streamline balance between the artistic freedoms and reasonable restrictions with further compliance on the same. The controversy not only involved Indian shows, but the foreign streaming content was also inciting violence, hurting religious sentiments, and disseminating obscenity without abiding by the Indian laws.⁶

The Indian Government, in an attempt to resolve issues arising as a result of social media and OTT platforms, processed the complaints within the pre-existing legal framework i.e., Information Technology Act, 2000 (IT Act),⁷ Indian Penal Code, 1860 (IPC),⁸ etc. However, the same was felt insufficient, thereby in order to shut the opened floodgate of litigations; Indian Executive got compelled to enact these unprecedented regulations. The regulations were notified on February 25, 2020, in the form of rules as Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021⁹ (popularly known as 'IT Rules 2021') under Section 87 of the IT

⁵ Venkata Susmita Biswas, *2020: Rise of paid subscribers* (January 18, 2021, 07:18 AM), FINANCIAL EXPRESS, <https://www.financialexpress.com/brandwagon/2020-rise-of-paid-subscribers/2172942/>.

⁶ *Netflix's 15 most controversial movies, shows and documentaries* (September 04, 2020, 07:45:40 AM), THE INDIAN EXPRESS, <https://indianexpress.com/photos/entertainment-gallery/netflix-most-controversial-series-movies-documentaries-6580238/>.

⁷ The Information Technology Act, 2000, No. 21, Acts of Parliament, 2000 (India).

⁸ The Indian Penal Code, 1860, No. 45, Acts of Parliament, 1860 (India).

⁹ The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, Ministry of Electronics and Information Technology, Government of India.

Act.¹⁰ The rules are enacted to regulate internet streaming content, social media intermediaries, online news, and current affairs websites.¹¹

The IT Rules, 2021 though were brought to regulate the OTT platforms and social media platforms, it has to face the wave of criticism for abrogation of freedom of speech and expression guaranteed under Article 19(1)(a) and freedom to carry on trade, profession and business guaranteed under Article 19(1)(g) of the Indian Constitution. The mooted question dealt in this article is whether the IT Rules, 2021 are well-balanced so as to ensure effective regulatory mechanism of OTT Platforms without prejudice to the enjoyment of the guaranteed fundamental rights. The article attempts to analyse the background facts regarding regulating intermediaries and OTT platforms, overview of the IT Rules, 2021, positive and negative aspects of the IT Rules, 2021, possible legal challenges from the constitutional view point and to suggest the remedies to remove the gaps in the regulatory framework.

Need for Regulating Intermediaries and OTT Platforms

Though the question of regulation of social media is debatable, it is said that the cons of social media clearly outweigh the pros. For instance, the role of Facebook and other functioning intermediaries in Delhi riots,¹² role of Twitter and other platforms in US elections,¹³ etc. are evident enough to bolster the claim that social media can play a major role in sensitizing/instigating an individual or a group of individuals to perform something. Further, an increase in Child Sexual Abuse Material Content streaming on social media platforms without

¹⁰ The Information Technology Act, 2000, § 87.

¹¹ *Supra* note 12.

¹² Sourav Roy Barman, *Delhi Assembly panel links riots to social media messages* (September 01, 2020, 10:24:48 AM), THE INDIAN EXPRESS, <https://indianexpress.com/article/cities/delhi/delhi-assembly-panel-links-riots-to-social-media-messages-6578101/>.

¹³ Scott Nover, *2020 Was The Twitter Election* (November 09, 2020), ADWEEK, <https://www.adweek.com/media/2020-was-the-twitter-election/>

any check is also a crucial factor urging the government to determine the rules to regulate such intermediaries.¹⁴

Furthermore, after the commencement of the internet and subsequently OTT platforms equipped with ‘unregulated content’ in name of entertainment, compelled various sections of the society to raise their voices for censorship or regulation. Moreover, due to the narrower definition of ‘cinematograph’,¹⁵ ‘cable service’¹⁶, and ‘cable television network’¹⁷, the pre-existing laws applicable to films and cable television broadcasts are ill-equipped to deal with OTT platforms. Therefore, there was an urgent need for a better framework to regulate OTT platforms.

Recently, in 2020, various petitions were filed against a web series released by Amazon Prime Video – ‘Pataal Lok’. It was argued in the petitions that anti-social, vulgar, and violent content has been displayed and Section 67 of the IT Act has been violated.¹⁸ Attention was also drawn to the Indecent Representation of Women (Prohibition) Act 1986¹⁹ for depicting a ‘gang rape’ scene. It was also alleged that provisions of the IPC and State Emblem of India (Prohibition of Improper Use) Act, 2005²⁰ have also been violated. However, Hon’ble Allahabad

¹⁴ Ramesh Babu, *Sharp rise in child pornography cases worry experts* (January 24, 2021, 08:47 AM), HINDUSTAN TIMES, <https://www.hindustantimes.com/india-news/sharp-rise-in-child-pornography-cases-worry-experts-101611457879318.html>.

¹⁵ The Cinematograph Act, 1952, § 2(c).

¹⁶ The Cable Television Networks (Regulation) Act, 1995, § 2(b).

¹⁷ The Cable Television Networks (Regulation) Act, 1995, § 2(c).

¹⁸ *Punjab & Haryana HC Issues Notices On Plea Against Amazon Prime Web Series Pataal Lok* (June 16, 2020, 07:14 AM), LIVE LAW, <https://www.livelaw.in/news-updates/punjab-haryana-hc-issues-notices-on-plea-against-amazon-prime-web-series-pataal-lok-read-order-158404>.

¹⁹ Indecent Representation of Women (Prohibition) Act 1986, No. 60, Acts of Parliament, 1986 (India).

²⁰ The State Emblem of India (Prohibition of Improper Use) Act, 2005, No. 50, Acts of Parliament, 2005 (India).

High Court²¹ and Calcutta High Court²² rejected the petition asking the petitioners to reach competent authority first.

Another instance was where trending Indian original series, 'Sacred Games' also faced a suit on the grounds of defamation.²³ Several Indian politicians filed a complaint that the series contained defamatory statements about former Prime Minister Rajiv Gandhi.²⁴ The petitioners requested for content censorship of some scenes and dialogues in the series. However, the Delhi High Court followed its precedent of *Justice for Rights Foundation* and dismissed the petition.²⁵ The court continued to regard the cliché provisions of the IT Act to be adequate legislation for dealing with such complaints.²⁶ The Hon'ble Court was of the view that the show might be against individual interest but is not against the public interest. It took a liberal view and adhering to judicial restraint, restrained itself from formulating any new regulation for such platforms.

'Tandav' a web series by Amazon Prime Video was also criticized for hurting the religious sentiments of the Hindu community. Subsequently, the makers issued an apology and also removed various scenes from the series.²⁷ However, these steps were not

²¹ Akshita Saxena, *Allahabad HC Dismisses Pleas Against Streaming Of Web Series Paatal Lok And XXX-Season 2* (September 30, 2020, 01:02 PM), LIVE LAW, <https://www.livelaw.in/news-updates/allahabad-hc-dismisses-pleas-against-streaming-of-web-series-paatal-lok-and-xxx-season-2-read-orders-163729>.

²² 'Consider Grievances Raised': *Calcutta HC Disposes PIL Against Amazon Web Series 'Paatal Lok'* (July 26, 2020, 09:31 PM), LIVE LAW, <https://www.livelaw.in/news-updates/calcutta-hc-disposes-pil-against-paatal-lok-160537>.

²³ *Nikhil Bhalla v. Union of India*, WP (C) 7123 of 2018, Order dated 09.04.2019 (Del).

²⁴ Pritam Pal Singh, *Remark against Rajiv Gandhi in Sacred Games: Centre underlines freedom of speech* (December 8, 2018, 7:49:44 AM), THE INDIAN EXPRESS, <https://indianexpress.com/article/entertainment/entertainment-others/remark-against-rajiv-gandhi-in-sacred-games-centre-underlines-freedom-of-speech-5483933/>.

²⁵ *One down, three to go!* (April 24, 2019), INTERNET FREEDOM FOUNDATION, <https://internetfreedom.in/one-down-two-to-go/>.

²⁶ *Id.*

²⁷ *Amazon Prime Video issues apology over 'Tandav', edits 'objectionable' scenes* (March 02, 2021, 05:27 PM), THE NEWS MINUTE,

satisfactory as a result multiple FIRs were filed against producers, directors, actors as well as against Amazon Prime National Head – Aparna Purohit.²⁸ Amazon Prime National Head is been interrogated and the Hon’ble court decided to grant her interim protection against arrest on the condition that she has to cooperate with investigating agencies.²⁹ However, she failed, thereby the court rejected her bail application.³⁰

Besides, the necessity for OTT rules rises out of the way that the past laws have shown deficient in overseeing matters concerning OTT content. OTT stages qualify as ‘intermediaries’ under 2(1)(w) of the IT Act, 2000.³¹ Therefore, if they are overseeing outsider data, mediators don’t have the obligation regarding the substance distributed on the stage and are for the most part subject to the guidelines set by the stages themselves. Regardless, in fact, enormous quantities of the OTT stages appreciate making their substance, thusly moving away from hazard under this game plan. These aforesaid few cases (these cases have been selected from many such other cases to project the magnitude of the problem) featured concerns with respect to the current administrative system, and it was felt that there should be regulations to control and manage the web-based media mediators and OTT Platforms.

<https://www.thenewsminute.com/article/amazon-prime-video-issues-apology-over-tandav-edits-objectionable-scenes-144496>.

²⁸ Alok Pandey, *No Protection From Arrest For Amazon Top Executive In 'Tandav' Row* (February 25, 2021, 06:58 PM), NDTV INDIA, <https://www.ndtv.com/india-news/no-protection-from-arrest-for-amazon-top-executive-aparna-purohit-in-tandav-row-2378618>.

²⁹ *Tandav row: SC grants Amazon Prime Video India head Aparna Purohit interim protection from arrest*, (March 5, 2021, 02:23 PM), THE NEW INDIAN EXPRESS, <https://www.newindianexpress.com/nation/2021/mar/05/tandav-row-sc-grants-amazon-prime-video-india-headaparna-purohit-interim-protection-from-arrest-2272619.html>.

³⁰ Kamini Sharma, [Tandav] “Cheap And Objectionable”, ALL HC rejects bail application of aparna purohit. holds, submission of apology or withdrawal of scene after streaming would not absolve criminal liability, SCC ONLINE, (MAY 26, 2021, 12:45 PM), <https://www.sconline.com/blog/post/2021/02/26/tandav/>.

³¹ The Information Technology Act, 2000, § 2(1) (w).

IT (Guidelines for Intermediaries and Digital Media Ethics Code) Rules, 2021

On 25th February 2021, the Ministry of Information and Broadcasting (MIB), out of the blue, notified the Information Technology (Guidelines for Intermediaries and Digital Media Ethics Code) Rules 2021 (hereinafter referred to as ‘the rules’ or ‘IT Rules 2021’) under nearly two-decades-old pre-existing IT Act. The Rules will supersede the 2011 guidelines³² for the internet intermediaries.³³ The rules were notified at the time when giant tech companies are being served notices or sued by the government for disseminating fake news, rumours, religious disharmony, promoting hate speech, and inciting violence.

The rules have been brought about in three parts. Part I basically deals with definitions. Part II deals with the regulation of intermediaries. The rules divide intermediaries into two parts viz. ‘social media intermediary’ and ‘significant social media intermediary.’ As per the rules, the ‘social media intermediary’ means 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* while significant social media intermediary means one that has the number of users greater than the threshold notified by the Indian Government.³⁴ On the very same date, the Central Government, side by side issued a notification, whereby it defined a ‘significant social media intermediary’. It stated that any social media intermediary that has fifty lakh registered users or more will be considered as a significant social media intermediary.³⁵

³² The Information Technology (Intermediaries guidelines) Rules, 2011, Ministry of Electronics and Information Technology, Government of India.

³³ N. Raja Sujith, Shreya Ellentala and Rahul Datta, *New Rules For Digital Media Intermediaries: How Far Is Too Far?* (March 12, 2021, 06:51 PM), LIVE LAW, <https://www.livelaw.in/law-firms/articles/new-rules-for-digital-media-intermediaries-171096>.

³⁴ Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, Rule 2(v), 2(w).

³⁵ *Platforms with over 50 lakh users to be ‘significant social media intermediaries’* (February 28, 2017, 07:12:09 AM), THE INDIAN EXPRESS, <https://indianexpress.com/article/technology/tech-news->

Part III of the rules primarily deals with ‘the publishers of news and current affairs content’ and ‘publishers of Online curated content.’ The definition of ‘online curated content’ in the rules is vast enough that OTT platforms fall under the same category. Consequently, Part III of the rules becomes a linchpin for regulating the OTT platforms. The said part is formulated with the prime intention to ensure adherence to the code of ethics by the OTT platforms that are laid down in the *Appendix* of the rules.

The rules provide for due diligence to be paid by Intermediaries in form of ten pointers while publishing any information.³⁶ It also states that the intermediary should inform its users that publishing any content in contravention to the rules mentioned on that intermediary would lead to termination of the access and usage rights from that user.³⁷ The rules also require for the intermediaries to appoint a Grievance Redressal Officer (GRO) to acknowledge the complaints filed within twenty-four hours and dispose them off within fifteen days. The rules also state that the GRO shall receive and acknowledge any order, notice or direction issued by the Appropriate Government, any competent authority or a court of competent jurisdiction.³⁸

For intermediaries, the rules also maintain that the significant social media intermediaries shall also deploy ‘adequate technology-backed mechanisms including automated tools or other mechanisms to proactively identify information that depicts or simulates in any form of rape, child sexual abuse or conduct, whether explicit or implicit, or any information which is exactly identical in content to information that has previously been removed or access to which has been disabled on the computer resource of such intermediary.’³⁹ The rules also provide for identification of first originator of the information as

technology/platforms-with-over-50-lakh-users-to-be-significant-social-media-intermediaries-7207876/.

³⁶ Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, Rule 3(b).

³⁷ Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, Rule 3(c).

³⁸ Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, Rule 3(2)(a).

³⁹ Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, Rule 4(4).

may be required by a judicial order passed by a court of competent jurisdiction.⁴⁰

The rules for intermediaries also mention that if any intermediary platform fails to duly abide by these rules, then the intermediary status under Section 79 of the IT Act⁴¹ would be snatched from that tech giant and it shall be liable for any punishment under any law for time being in force in India, including IT Act and IPC.⁴² Section 79 of the IT Act provides a 'safe harbour' to the intermediaries, which states that any unlawful information or content published on any intermediary shall make such intermediaries liable and no legal action shall be taken against them.

A. Code of Ethics

These rules provide for classifying the content based on Themes and messages, Violence, Nudity, Sex, Language, Drug and substance abuse, and Horror. The definitions of all these classifications mentioned are subjective in nature that would be determined by the MIB time-to-time.⁴³ The code further maintains that the platform adhering to the Constitutional provisions will take due caution while featuring any content related to (a) Content that affects the sovereignty and integrity of India; (b) Content that threatens, endangers or jeopardizes the security of the State; (c) Content which is detrimental to India's friendly relations with foreign countries; (d) India's multi-racial and multi-religious context; (e) Activities, beliefs, practices, or views of any racial or religious group in India.⁴⁴

⁴⁰ Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, Rule 4(2).

⁴¹ Information Technology Act, 2000, § 79.

⁴² Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, Rule 7.

⁴³ Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, Appendix II (B)(ii).

⁴⁴ Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, Appendix II (A) (b), Appendix II (A) (c).

Furthermore, the rule categorizes content into five different categories based on violence, nudity, sex, etc. as:

- “U” would be suitable for everyone irrespective of their age.
- “U/A 7+” would be suitable for those who are above seven years and can be watched by children below seven years with parental guidelines.
- “U/A 13+” would be suitable for those who are above 13 years and can be watched by children below 13 years with parental guidelines.
- “U/A 16+” would be suitable for those who are above 16 years and can be watched by children below 16 years with parental guidelines.
- “A” that would be restricted to adults only.⁴⁵

The rules not only categorized the content but also take its effective implementation into account and suggest platforms about access control mechanisms, including parental locks, which should be made available for content that classify as U/A 13+ or higher. The rules also suggest applying all efforts to restrict a child from accessing content classified as “A” and implement a reliable age verification mechanism for the viewers of such content.

B. Grievance Redressal Mechanism

In order to ensure adherence to the delineated code of ethics, the rules lay down a three-tier grievance redressal mechanism primarily based on self-regulating principles.⁴⁶ Level I of the Grievance Mechanism provides that any person aggrieved with content showcased on the OTT platform can lodge his grievance with the grievance officer, as appointed by the concerned publisher. The grievance officer must be based in India and shall act as the nodal

⁴⁵ Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, Rule Appendix (B) (i).

⁴⁶ Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, Rule 9(3).

point of interaction between the Ministry (MIB), aggrieved complainant, and self-regulating body.⁴⁷ Moreover, the rules also provide for a time limit to be adhered to by the grievance officer. As per the rules, he must acknowledge receipt of the complaint within 24 hours and dispose of it of within 15 days.⁴⁸

If the grievance office fails to resolve the grievance within the stipulated time limit, then the grievance shall be escalated to Level II providing for the self-regulating body or self-regulating bodies as established by the publishers or their association.⁴⁹ Such a body has to register itself with the MIB, and the MIB shall take care that the body formulated is in accordance with the rules and agree to perform the functions as laid down by the rules.⁵⁰ The body has the power to warn, censure, admonish or demand an apology or disclaimer or reclassify the content, make appropriate modifications, and edit synopsis.⁵¹ In case the body satisfies itself with that there is a need to take appropriate action to delete or modify the content as it is likely to disrupt the public order by providing an incitement for cognizable offences, then it can also refer the case to the third tier.⁵²

Finally, the Third Level provides for an Oversight Mechanism in which there shall be an inter-departmental committee constituted by MIB for hearing appeals arising out of the decision taken by the self-regulating body, or where the self-regulating body fails to resolve the grievance

⁴⁷ Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, Rule 11(2)(a), 11(3)(b).

⁴⁸ Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, Rule 10.

⁴⁹ Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, Rule 12(1), 12(3).

⁵⁰ *Id.*

⁵¹ Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, Rule 12(4).

⁵² Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, Rule 12(4)(e).

within the stipulated time, or if a complaint is referred to it by the MIB or self-regulating body.⁵³ In addition to the powers similar to self-regulating body, this committee will have the power to take down objectionable content and even take *suo motu* cognisance of any issue pertaining to an OTT release. The joint secretary or an officer of above joint secretary rank of MIB shall be the Chairman of the committee.⁵⁴

Rule 16 provides emergency powers to MIB in cases where 'no delay is acceptable'. As per the rules, the secretary can issue directions for blocking online content without giving them an opportunity of being heard.⁵⁵ Thus, this way, the rules endeavour to provide a robust mechanism for regulation of intermediaries and OTT platforms.

IT Rules 2021: Too Much Boast, Little Roast

At a cursory glance, the much-awaited IT rules are likely to seem appropriate, but an in-depth study of the same provides a clear image of the underlying intricacies. However, let us first consider the positive aspects of these rules, then we would delve deep into the challenges and the unaddressed issues.

A. Positive Aspects

As per the Rules, the intermediaries are required to provide the information asked by any specialized government authorities for the prevention, investigation, detection, and prosecution of any cybercrime. Further, the intermediaries have to abide by the laws and are restricted from hosting any unlawful content in contravention to those legislations. Another positive aspect in the rules is that, in case, any

⁵³ Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, Rule 13, 14.

⁵⁴ Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, Rule 13(2).

⁵⁵ Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, Rule 16.

content in contravention to the laws is displayed then they are required to remove it within 36 hours of receiving an order.

Another significant aspect of due diligence is the grievance redressal mechanism, which requires mandatory appointment of a Grievance Redressal Officer (GRO) based in India and whose contact details must be easily accessible to the public. Moreover, the guideline will also make the online platform safer for women by increasing free and fair expression with minimised intimidation. The provision of retaining the information is also increased to 180 days from 90 days according to the Information Technology Rules, 2011. It will ensure due compliance for a long period of time.

Furthermore, the rules came up with the Code of Ethics that provides for self-classification of content by the OTT platforms, which was an urgent need of the hour. Instances such as the killing of a girl by her lover after getting inspired by 'Munna Bhaiya' – a character in Mirzapur web series streamed by Amazon Prime Video,⁵⁶ bludgeoning of grandmother by a class 12 boy after watching the online streaming TV serials,⁵⁷ gang rape of a ten years old girl by eight minors and one 18 years old boy after watching a pornographic content streaming on OTT platforms,⁵⁸ are enough in numbers to substantiate the claim that

⁵⁶ Tauseef, who was harassing and forcing Nikita to convert to Islam, decided to kill her after watching web series 'Mirzapur': Report (March 26, 2021), OPINDIA, <https://www.opindia.com/2020/10/nikita-murder-case-tauseef-inspired-by-mirzapur-web-series/>.

⁵⁷ *Inspired by Tv crime serials, Class 12 boy bludgeons grandmother to death in Punjab, sets body on fire*, (April 14, 2021, 10:40 AM), INDIA TV NEWS, <https://www.indiatvnews.com/crime/inspired-by-tv-crime-serials-class-12-punjab-boy-bludgeons-grandmother-to-death-sets-body-on-fire-697614>.

⁵⁸ Sunil Rahar, *18-yr-old, 8 minors held for gang raping Class-5 girl in Rewari village* (June 10, 2021, 01:24 AM), HINDUSTAN TIMES, <https://www.hindustantimes.com/cities/chandigarh-news/18yrold-8-minors-held-for-gang-raping-class-5-girl-in-rewari-village-101623268390215.html>.

streaming content on the OTT platform was playing a crucial role in adulterating the mindset of the individuals.

Furthermore, owing to India's multi-racial and multi-religious context, the rules suggested an exercise of due caution and discretion to the OTT platforms while featuring the activities, beliefs, practices, or views of any racial or religious group. The rules also provided a time stipulated three-tier robust grievance redressal mechanism (from the perspective of a consumer), which was much needed as the aggrieved persons have to raise their grievance in front of different authorities or file a petition in different courts, which used to consume their considerable amount of time and money. Moreover, due to over-burdened courts, the Hon'ble benches used to take significant time in considering the petitions, which already used to make the content disseminated to a major chunk of the population in the meanwhile due to the presence of high-speed data and easily accessible platforms.

Furthermore, the rules also provide for the display of classification specific to each content or program prior to watching the program, together with a content descriptor informing the user about the nature of the content to facilitate the user in making an informed decision.⁵⁹ Inclusion of access control mechanisms, including parental controls for the content rated above U/A 13+, is a much-appreciated step as it provided parents a method to keep a check on the content watched by their children and restrict the inappropriate content.

Moreover, the Code of Ethics also mentions a clause stating platforms shall, to the extent feasible, take reasonable efforts to improve the accessibility of online curated content transmitted by it to persons with disabilities through the

⁵⁹ Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, Annexure II (C).

implementation of appropriate access services.⁶⁰ However, this point is yet hardly discussed anywhere. This clause is also a much-appreciated one as it not only provides a level playing field to the person with disabilities but shows that the government is also concerned with providing the best to them.

Negative Aspects Vis-À-Vis Constitutional Issues

Apart from these positive aspects, there are some underlying intricacies in the rules that it fails to address. The Hon'ble Supreme Court, while passing an order in the so-called 'Tandav web series case,' expressed its disappointment and dissatisfaction with the new IT rules.⁶¹ The Hon'ble Supreme court's seat headed by Justice Ashok Bhushan likewise caused to notice the way that the standards are simply rules and need compelling guideline for screening and furthermore don't accommodate suitable activity against those people who abuse them.⁶² Solicitor General of India, Tushar Mehta, responded by agreeing to the remarks made by the Hon'ble Apex Court.⁶³

On wherein one hand, the appraisals will help watchers settle on an educated decision, however what might be said about the watcher who keeps on watching a series or show regardless of

⁶⁰ Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, Annexure II (E).

⁶¹ Prabhjote Gill, Supreme Court challenges India's new rules for governing Netflix, Amazon Prime Video and other OTTs — no 'appropriate action' listed against those who violate regulations (March 5, 2021, 2:46 PM), BUSINESS INSIDER, <https://www.businessinsider.in/policy/news/sc-challenges-new-rules-for-netflix-amazon-prime-video-disney-hotstar-by-indian-government/articleshow/81346798.cms>.

⁶² Krishnadas Rajagopal, *Supreme Court says new rules to regulate OTT platforms lack teeth* (March 05, 2021, 11:28 PM), THE HINDU, <https://www.thehindu.com/news/national/sc-says-new-rules-to-regulate-ott-platforms-lack-teeth/article33995501.ece>.

⁶³ Samanwaya Rautray, *Centre promises to tighten new digital media rules after Supreme Court says they lack teeth* (March 06, 2021, 07:21 AM), THE ECONOMIC TIMES, <https://economictimes.indiatimes.com/news/economy/policy/centre-promises-to-tighten-new-digital-media-rules-after-supreme-court-says-they-lack-teeth/articleshow/81359441.cms?from=mdr>.

the notice? Would he be able to in any case enlist a complaint under this instrument? The principles don't determine the grounds on which grumblings can be enrolled against OTT platforms. Taking into consideration the diverse viewers and their sensibilities, there will be a multitude of complaints.

Nowadays, there is a practice prevalent in society to download or get access to the content with the help of pirated sites, tor browser, and Telegram (famous social media platform) are some of the most prominent ones.⁶⁴ The rules fail to answer what if the children download and consume adult content or the content not specified for them from these sites. For instance, even after the Central Government banned nearly 3500 porn sites, India is still the world's third-largest porn consumer.⁶⁵ In a similar way, these rules won't serve the purpose unless any concrete mechanism is laid down to stop children from accessing the content not created for them.

In relation to intermediaries, the Part II of the rules create separate classes of 'social media intermediaries' and 'significant social media intermediaries' that are to be determined by the government. It would grant wide discretionary power to the government in determining which social media intermediary will be exposed to what type of norms. This arbitrary classification within the same group of companies violates the right to equality enshrined under Article 14 of the Constitution of India.⁶⁶ Moreover, the Apex Court in *L.I.C. of India v. Consumer Education and Research Centre*,⁶⁷ stated that '*the doctrine of classification is only a subsidiary rule evolved by the courts to*

⁶⁴ Yasmin Ahmed, *Move over torrents, Indians now use Telegram to pirate movies and TV shows* (September 16, 2020, 03:47 PM), INDIA TODAY, <https://www.indiatoday.in/technology/news/story/move-over-torrents-indians-now-use-telegram-to-pirate-movies-and-tv-shows-1722374-2020-09-16>.

⁶⁵ TV Ramchandran, *IT Rules 2021 – Over the top?* (April 04, 2021), THE HINDU BUSINESS LINE, <https://www.thehindubusinessline.com/opinion/it-rules-2021-over-the-top/article34238342.ece>

⁶⁶ Constitution of India, 1950, art. 14.

⁶⁷ *L.I.C. of India v. Consumer Education and Research Centre*, AIR 1995 SC 1811, 1822 : (1995) 5 SCC 482

*give practical content to the doctrine of equality, over-emphasis on the doctrine of classification or anxious or sustained attempt to discover some basis for classification may gradually and imperceptibly erode the profound potency of the glorious content of equity enshrined in Art. 14 of the Constitution.*⁶⁸

The rules also distinguish between online news portals and print media news, which is also an irrational classification of similar entities, thereby violating Article 14 of the Indian Constitution. Online News Portals will be subjected to the same regulations so as to be followed by social media intermediaries, subsequently to similar grievance redressal mechanisms, which provide enough powers to the government to delete, modify, and block content as well as ask for a compelled apology, thereby resulting in violation of Article 19(1)(a), freedom of speech and expression and Article 19(1)(g), freedom to practice any trade and profession enjoyed by the news media.⁶⁹ Owing to these very issues, subsequent petitions were filed by different news media portals, including The Wire, Quint, and Live Law.⁷⁰ India's largest News Agency, The Press Trust of India (PTI), even challenged the same stating the new rules allow the government to *virtually dictate content to digital news portals, and squarely violate media freedom.*⁷¹

Further, the identification of first originator of any unlawful information violates the right to privacy declared as a fundamental right under Article 21 of the Constitution of India by the Apex Court in *Justice K.S. Puttuswamy (Retd.) v. Union of India*.⁷² Owing to the same issues, WhatsApp also filed privacy

⁶⁸ *Id.*

⁶⁹ Constitution of India, 1950, art. 19(1)(a), 19(1)(g).

⁷⁰ *Delhi HC Issues Notice to Centre on The Quint's Petition Against New IT Rules* (March 19, 2021), THE WIRE, <https://thewire.in/media/delhi-hc-issues-notice-to-centre-on-the-quints-petition-against-new-it-rules>.

⁷¹ '*Violative of Constitution*': PTI Challenges New IT Rules in Delhi HC (July 08, 2021, 01:00 PM), THE QUINT, <https://www.thequint.com/tech-and-auto/violative-of-constitution-pti-moves-delhi-hc-on-new-it-rules>.

⁷² *K.S. Puttaswamy (Privacy-9J.) v. Union of India*, (2017) 10 SCC 1

lawsuit against these rules.⁷³ According to WhatsApp, the traceability clause would force private companies to collect who-said-what and who-shared-what for billions of messages sent each day to facilitate law enforcement agencies.⁷⁴ This way, even the person who has not created the content, shared it out of concern, or check its accuracy could get caught for investigation for sharing the same if the content becomes problematic in the eyes of the government in the future. It would act as a deterrence for people even in their privacy settings from sharing any content or information further, thereby violating their freedom of speech and expression (Article 19(1)(a)) and right to privacy (Article 21).

Moreover, the rules are mere guidelines rather than in the form of legislation backed by the consent of the Indian Legislators. If the OTT platforms would have governed at par with theatrical releases and regulated by CBFC, then it would have been a much cumbersome and time-consuming process. Consequently, the government came up with these “*soft-touch regulatory architecture rules*” that provide it legal and informal methods to monitor and regulate these platforms more closely.

Furthermore, the rules are in the form of self-regulation but the underlying clauses on which this mechanism thrives provides enormous power to the government. For instance, the rules tie up the mechanism with Section 69A of the IT Act.⁷⁵ Thus, providing an overriding power to the government to step in and block the content. The concerned section also provides for imprisonment up to seven years in any contravention to the

⁷³ Nandagopal Rajan, *WhatsApp moves Delhi HC against traceability clause in IT rules, calls it is unconstitutional* (May 26, 2021, 02:30:41 PM), THE INDIAN EXPRESS, <https://indianexpress.com/article/technology/tech-news-technology/whatsapp-moves-delhi-high-court-over-traceability-clause-social-media-rules-7330558/>.

⁷⁴ Nupur Thapliyal, *Whatsapp Moves Delhi High Court Challenging Traceability Clause Under New IT Rules As Being Violative Of Right To Privacy* (May 26, 2021, 04:48 AM), LIVE LAW, <https://www.livelaw.in/top-stories/whatsapp-moves-delhi-high-court-challenging-traceability-clause-as-being-violative-of-right-to-privacy-174704>.

⁷⁵ Information Technology Act, 2000, § 69A.

orders of the governments,⁷⁶ thereby also acting as deterrence for content makers violating their artistic freedoms.

Conclusion

Theatres, TV shows, and OTT are the three primary sources of entertainment for the masses in India as on today. However, owing to the technological changes, they all are being regulated through different frameworks and governed by respective bodies. As Winston Churchill once said, “*If you make 10,000 regulations, you destroy all respect to the law.*”⁷⁷ Broadcast media i.e., television, is regulated by Broadcasting Content Complaints Council (BCCC). Theatrical releases are regulated by Cinematographic Act, 1952 and certified by the Central Board of Film Certification (CBFC). But there is no specific law in India regulating OTT platforms except these recently notified guidelines. Thus, the Indian legislators must ponder over the issue and formulate one wholesome legislation backed with Parliamentary debate to regulate cinemas, TV shows, and also OTT platforms.

The Centre decided to bring all OTT platforms under the ambit of the Ministry of Information and Broadcast (MIB). Subsequently, MIB took the charge over the jurisdiction of online curated content from the Ministry of Electronics and Information Technology (MeitY).⁷⁸ Earlier, the jurisdiction of MIB was limited only to cinemas and radios and not to digital media. However, backed with recent IT rules 2021, the MIB would now enjoy enormous powers over OTT platforms without any specific law in place. This change of jurisdiction and informal backing of the powers raises censorship concerns.

⁷⁶ Information Technology Act, 2000, § 69A(3).

⁷⁷ *Thoughts on Business of Life*, FORBES QUOTES, <https://www.forbes.com/quotes/10331/> (last visited on July 29, 2021).

⁷⁸ Javed Farooqui, *Govt brings online news platforms, content providers under MIB* (November 11, 2020, 03:01 PM), EXCHANGE 4 MEDIA, <https://www.exchange4media.com/digital-news/govt-brings-online-news-platforms-content-providers-under-mib-108983.html>.

It is quite evident that neither censorship nor notified guidelines provide a permanent solution as the censorship would unleash havoc on artistic freedom, and it is also argued that the content on OTT platforms is available through subscription, which is completely upon the viewer to select to watch. Moreover, even after the censorship of the movies such as *Padmavat*,⁷⁹ *PK*,⁸⁰ etc., various disputes arose, thereby substantiating the claim that censorship would not be a conclusive solution in the regulation of OTT platforms. Further, the so-called guidelines neither provide for punishment and fines nor the mechanism to be followed by the person after being aggrieved by the Level III Oversight Mechanism.

Moreover, another concern is that most filmmakers do not have enough financial stability to portray their thoughts through cinema or television, and OTT platforms have come to their rescue. They are fearless to show any socio-political issue that is not generally streamed in cinemas. Thus, wherever required government control should be included but such governmental control should not curtail the freedom of speech and expression provided under Article 19 of the Constitution⁸¹ subject to reasonable restrictions imposed under Article 19(4).⁸²

Another concern is the determination of criminal liability of OTT platforms. For instance, Section 292(2) of the IPC provides punishment for dissemination of obscene content '*put into circulation in any manner*'⁸³ and Section 67A, 67B and 67C of the IT Act also provide imprisonment or fine or both '*for publishing or transmitting or causing to be published or*

⁷⁹ *Padmaavat and the long trail of controversies: A timeline of obstacles the film has faced* (January 24, 2018, 11:49 AM), HINDUSTAN TIMES, <https://www.hindustantimes.com/bollywood/padmavati-to-padmaavat-and-a-long-trail-of-controversies-a-timeline-of-obstacles-the-film-faced/story-MjHzviRwxD6sAiaPyEMSSK.html>.

⁸⁰ '*PK*' controversy: *Aamir Khan film sparks outrage in several Indian cities* (December 29, 2014, 05:28 PM), DNA INDIA, <https://www.dnaindia.com/india/report-pk-controversy-aamir-khan-film-sparks-outrage-in-several-indian-cities-2047859>.

⁸¹ Constitution of India, 1950, art. 19.

⁸² Constitution of India, 1950, art. 19(4).

⁸³ Indian Penal Code, 1860, § 292(2).

*transmitted in electronic form.*⁸⁴ It makes cumbersome for not only the law enforcement agencies but also layman to understand what Sections to be applied while examining the legality of the content streaming. Thus, the government should also come up with clear definitions to prevent any form of confusion.

Further, the government also has to clearly determine the criminal liability of the sites providing pirated content or the social media intermediaries providing premium content to the public at large. It not only infringes the copyright of the makers but also feeds inappropriate content to the inappropriate audience.

Under Article 77(3) of the Constitution of India,⁸⁵ the President has authority to implement rules for convenient business transactions and for allocation of the same among Ministers. It was exercised by the President on November 9th, 2020, to bring OTT platforms under the ambit of MIB.⁸⁶ Further, it can also be exercised to make good the existing lacunae in rules by the President.

So, the lacunas in the 2021 guidelines should be remedied, or in the opinion of the authors, one comprehensive legislation catering to the needs of consumers and such platforms by addressing all issues and covering all forms of expressions should be made so as to have equality before law along with equal protection of the law.

Although the suggestions and recommendations provided are not exhaustive in nature, they might play a crucial role in resolving most of the issues that intermediaries, OTT platforms and their consumers are likely to face. The instances elucidated and the views of the Apex Court while hearing plea on Tandav that *'few platforms show pornographic content at times and there*

⁸⁴ Information Technology Act, 2000, §§ 67A, 67B, 67C.

⁸⁵ Constitution of India, 1950, art. 77(3).

⁸⁶ Farooqui, *supra* note 91.

should be some mechanism to regulate them⁸⁷ are evident enough to showcase that the OTT Regulation is need of the hour. These rules backed with concrete and wholesome legislation passed by the Parliament of India to deal with intermediaries and OTT platforms shall act as a panacea in resolving the mushrooming disputes.

To sum up, the advocates of cyber sovereignty such as John Perry Barlow always argue against being regulated. John Perry Barlow in his work, 'A Declaration of the Independence of Cyberspace, 1996' stated the following:

'Governments of the Industrial world, you weary giants of flesh and steel, I come from Cyberspace, the new home of Mind. On behalf of the future, I ask you of the past to leave us alone. You are not welcome among us. You have no sovereignty where we gather.

We have no elected government, nor are we likely to have one, so I address you with no greater authority than that with which liberty itself always speaks. I declare the global social space we are building to be naturally independent of the tyrannies you seek to impose on us. You have no moral right to rule us nor do you possess any methods of enforcement we have true reason to fear.'

The demand for cyber sovereignty can have legitimate meaning as long as the usage of the cyber freedom is used for righteous purposes. The moment, the cyber sovereignty is misused,

⁸⁷ A few OTT platforms show pornographic content, there should be some screening of such shows: SC (March 04, 2021, 02:15 PM), THE NEW INDIAN EXPRESS, <https://www.newindianexpress.com/nation/2021/mar/04/a-few-ott-platforms-show-pornographic-content-there-should-be-some-screening-of-such-shows-sc-2272096.html>.

regulations are must. Hence, it is justified to regulate social media intermediaries and OTT Platforms through IT Rules, 2021, but with caution approach of not encroaching upon the fundamental freedoms guaranteed under Part III of the Indian Constitution and the ultimate objective of regulation shall be reasonable and contribute towards encouragement of creativity in a socially acceptable mode.
