

# Social Media Platform Regulation in India – A Special Reference to The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021

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**Abstract:** India has experienced the potential of social media platforms and witnessed the far-reaching consequences which these platforms may pose. The current Indian legal framework on social media platforms (hereinafter: SMPs) tend towards a co-regulatory model relying both on statutory framework and self-regulation of SMPs. The chapter analyses the regulatory framework of SMPs in India and the contentious “Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021” (hereinafter IM Rules, 2021) from the prism of fundamentals of free speech. The chapter discusses how the free speech may get affected by the imposition of additional responsibilities like; appointment of India based compliance officers, first originator traceability requirements, deployment of automated filtering software, identification of physical address from the users of accounts, and other restrictions on SMPs through the recently notified IM Rules, 2021. These rules are alleged to be flouting certain key legal principles and are argued to be the outcome of legislative overreaching. Therefore, the IM Rules, 2021 warrants scrutiny from the perspective of free speech in the backdrop of above raised concerns.

**Keywords:** Social Media Intermediary, Significant Social Media Intermediary, Digital News Portals, Social Media Regulation in India and Intermediary Rules, 2021

## Introduction

State and private investments in communication technologies have resulted in an increased access to the Internet across South Asia<sup>1</sup>. India has around 530 million WhatsApp users, 410 million Facebook users, 160 million Twitter users, 448 million YouTube users by January 2021.<sup>2</sup> India, therefore, is not an exception to the penetration of social media and its rising popularity and usage among the varied segments of the Indian society.<sup>3</sup> According to certain scholars, the growing number of social media users in South Asia in general and in India in particular will play a critical role in shaping the trajectory of digital platforms, cultures, and politics in the coming years.<sup>4</sup> The nature, modus operandi of social media platforms and their regulatory frameworks are scarcely being deliberated or debated among the Indian communication scholars to the desired extent despite the meteoric increase in the number of social media users. Given the influence that platforms like Facebook, Twitter, YouTube and Amazon now wield on a global stage and with the growing number of users on social media and episodes of its misuse to spread hate speech, misinformation and political propaganda etc.<sup>5</sup>, it has become crucial to granularly traverse and outline the role, nature, modus, and the regulatory framework of the digital intermediaries in India. Though, I firmly concede to the argument

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- 1 Aswin Punathambekar and Sriram Mohan, "Introduction" *Global Digital Cultures: Perspectives from South Asia*, eds., Aswin Punathambekar and Sriram Mohan (Ann Arbor, MI: University of Michigan Press, 2019), doc. 3, <https://doi.org/10.3998/mpub.9561751>.
  - 2 "Framework and Guidelines for Use of Social Media for Government Organisations", Department of Electronics and Information Technology, Ministry of electronics and Information Technology, Government of India, [https://www.meity.gov.in/writereaddata/files/Approved%20Social%20Media%20Framework%20and%20Guidelines%20\\_2\\_.pdf](https://www.meity.gov.in/writereaddata/files/Approved%20Social%20Media%20Framework%20and%20Guidelines%20_2_.pdf).
  - 3 Ankita Chakravarti, "Government reveals stats on social media users, WhatsApp leads while YouTube beats Facebook, Instagram", *India Today*, February 25, 2021, <https://www.indiatoday.in/technology/news/story/government-reveals-stats-on-social-media-users-whatsapp-leads-while-youtube-beats-facebook-instagram-1773021-2021-02-25>.
  - 4 Punathambekar and Mohan, *Global Digital Cultures: Perspectives from South Asia*, doc. 3.
  - 5 Shakuntala Banaji and Ram Bhat, "WhatsApp Vigilantes: An exploration of citizen reception and circulation of WhatsApp misinformation linked to mob violence in India", <https://blogs.lse.ac.uk/medialse/2019/11/11/whatsapp-vigilantes-an-exploration-of-citizen-reception-and-circulation-of-whatsapp-misinformation-linked-to-mob-violence-in-india/>.

advanced by the scholars in their seminal work “*Global Digital Cultures: Perspectives from South Asia*” that the platforms being capitalist and imperialistic in nature, will seldom allow for such granular probe into their experiential engagement with state, industry, and user practices coalescing on these platforms.<sup>6</sup>

Still an attempt to traverse at least the regulatory framework and its effectiveness is certainly timely. The present study is a small endeavour to cursorily understand the regulatory framework of SMPs in India and the recently notified “Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules (hereafter: IM Rules, 2021) under the Information Technology (Amendment) Act, 2008 (hereinafter: IT Act, 2008). The IM Rules, 2021 are not duly promulgated legislation by parliament. These are brought by the central government by purview of the rule making power under section 87 (zg) of the IT Act, 2008 which enables central government to issue guidelines to be followed by intermediaries in order to enjoy immunity from liability. The striking feature of the new rules is the imposition of new responsibilities on intermediaries. The study is limited in scope and focusses specifically on SMPs regulations under the IT Act, 2008 (which is primarily a law to regulate e-commerce) and its corresponding IM Rules, 2021.

### *Social Media in India: A prolegomenon*

India’s experience with this medium of information and disinformation communication has been mixed. It has viscerally seen its potential and far-reaching consequences in terms of caste and religion-based polarisation and the consequent episodes of murders and mob lynching.<sup>7</sup> India has also witnessed the power of SMPs in upholding free speech. A study of social media landscape in a specific part of the country is indicative of the prevalence of the social media even in the hinterland of this vast and divergent country.<sup>8</sup>

Though the legislative and policy framework relating to social media platforms in India has started emerging recently, yet it has received due

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6 Punathambekar and Mohan, *Global Digital Cultures: Perspectives from South Asia*, Chap. 1, doc. 3.

7 Banaji and Bhat, “*WhatsApp Vigilantes: An exploration of citizen reception and circulation of WhatsApp misinformation linked to mob violence in India*”.

8 Shriram Venkatraman, *Social Media in South India* (London: UCL Press, 2017), chap. 2, doc. 25-55, doi:10.2307/j.ctt1qnw88r.8.

attention and consideration at the judicial level on the one hand and at the regulatory level on the other. Both the courts and sectoral regulators like Competition Commission of India have been continually active in deciphering, determining and validating the regulatory principles and the broad contours of social media platforms in India. At the time of this writing, there are multiple petitions challenging the legality of the social media platform regulations as well as antitrust complaints are lying sub-judice before various high courts and the competition commission of India, respectively. In order to assess the effectiveness of the platform regulations, gauging merely adequacy of the legislative and policy framework of social media platforms may not be a realistic approach given the fact that these platforms are continually evolving and intrinsically dynamic in nature. The focus, therefore, should be on gauging the promptness of the executive, judiciary, and sectoral regulators in taking up the task of enacting and ameliorating the existing framework within their jurisdictional contours. This expected promptness from the important pillars of democracy has always been debatable. The interfering role of executive in social media can very well be discerned by the often-invoked internet shutdowns, usually without well documented reasons, and usually with the tacit acquiescence of ISPs in abiding all directions of the government.<sup>9</sup> The recent farmer's protest and the invocation of internet shutdown orders speaks volumes about the governmental control on social media in India. Oxford Internet Institute identified India as one of the ten major countries of organised social media manipulation.<sup>10</sup>

Seventy percent of the Indian population is young and have recently got access to portable computing devices like smart phones, tabs etc. with poor social media literacy<sup>11</sup> The smart phone market in India has seen tremendous surge in sales of these devices. All smart phone users have social media accounts across all age groups and all regions in country. The hi-speed data availability at very reasonable cost has further proliferated

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9 Joshita Pai and Nakul Nayak, "Initial Inputs for The Project on Freedom of Expression and The Private Sector in The Digital Age", Centre for Communication Governance, National Law University, Delhi, <https://www.ohchr.org/Documents/Issues/Expression/PrivateSector/CentreCommunicationGovernance.pdf>.

10 Samantha Bradshaw and Philip N. Howard "*Challenging Truth and Trust: A Global Inventory of Organized Social Media Manipulation*", Project on Computational Propaganda, Oxford Internet Institute, University of Oxford (2018), <https://demtech.oii.ox.ac.uk/wp-content/uploads/sites/93/2018/07/ct2018.pdf>.

11 Mark Linscott and Anand Raghuraman, "*Aligning India's Data Governance Frameworks*", Atlantic Council, September 1, 2020. <http://www.jstor.org/stable/resrep25999>.

the number of users over last few years. Very few from these users have appropriate digital information literacy to understand the consequences of what they write, read and spread on social media. Even the educated masses in India have very bleak understanding of the legal consequences of misuse of this sphere.<sup>12</sup>

The present situation of social media illiteracy clubbed with not so efficacious legislative framework on social media in India brings home the question raised by one of the noted communication scholars: “as to who is representing India’s vast populace via these platforms where these data-based public platforms are misused through bots, web robots etc. to script content?”<sup>13</sup> In the political sphere, the rise of political bots has created a new layer of computational propaganda on social life, gaining a newfound influence on the shaping of public opinion.<sup>14</sup> Given the social media illiteracy of Indian populace, the deluge of misinformation can rightly be termed as global public health threat as propounded by noted anthropologist *Heidi Larson* quoted in the study “*Addressing Misinformation through Intermediary Liability Policy, Platform Design Modification, and Media Literacy*”.<sup>15</sup>

In an environment of scepticism like this, it is natural for politicians, policy bureaucrats, and the social media companies to shape the present framework in their favour.<sup>16</sup> The most recent and relevant instances of this misuse of the information ecosystem during the COVID-19 outbreak in India are the deletion of tweets of several influential persons targeting the

12 Ben Medeiros and Pawan Singh, “Addressing Misinformation on WhatsApp in India Through Intermediary Liability Policy, Platform Design Modification, and Media Literacy,” *Journal of Information Policy*, Vol. 10 (2020): 288, <https://www.jstor.org/stable/pdf/10.5325/jinfopoli.10.2020.0276.pdf?refreqid=excelsior%3A470ea419086d439103e5a165185e48ff>.

13 Payal Arora, “Politics of Algorithms, Indian Citizenship, and the Colonial Legacy” in *Mapping Global Digital Cultures, in Global Digital Cultures: Perspectives from South Asia, eds.*, Aswin Punathambekar and Sriram Mohan (Ann Arbor, MI: University of Michigan Press, 2019), chap.1, doc. 41, <https://doi.org/10.3998/mpu.b.9561751>.

14 Joyojeet Pal, “The Making of a Technocrat: Social Media and Narendra Modi” in *Mapping Global Digital Cultures: Perspectives from South Asia, eds.*, Aswin Punathambekar and Sriram Mohan (Ann Arbor, MI: University of Michigan Press, 2019), chap.7, doc.163-183, <https://doi.org/10.3998/mpub.9561751>.

15 Medeiros and Singh, “Addressing Misinformation on WhatsApp in India,” 277.

16 Niranjana Sahoo, “Mounting Majoritarianism and Political Polarisation in India” in *Political Polarization in South and Southeast Asia: Old Divisions, New Dangers*, eds., Thomas Carothers and Andrew O’Donohue (Carnegie Endowment for International Peace, 2020), chap.1, doc.9. <http://www.jstor.org/stable/resrep26920.7>.

government's mishandling of the second wave of COVID-19 outbreak in India<sup>17</sup> and the demand by the Indian government to remove references to the 'Indian Variant' of COVID-19 from all SMPs.<sup>18</sup> The deletion of individual's account or taking down protected expressions by a unilateral decision of SMPs calling it a "Bad Content" under their community standards, or at the behest of the government in the absence of clear and settled law violates the right to free expression which is guaranteed in the Constitution of India. Review mechanism of SMPs, their modus operandi and their impartiality also remains a matter of concern. SMPs are found to be favouring the ruling parties<sup>19</sup>, contrary to their claim that their content review decisions are made in the best interest of the community and not for commercial political reasons.<sup>20</sup> Recently, SMPs also claimed to have constituted oversight groups to hear appeals and challenges on content deletion and moderation, but the formation of these oversight groups generally remains contentious across the globe and India is not an exception.<sup>21</sup>

### *The Legal Framework of Social Media Platforms in India*

There is no duly promulgated legislation to govern SMPs in India. Talks to have an exclusive and omnibus law to cater to this unique and challenging platform of information communication have not yet started in India. Yet, there are a few statutes in force which do address the issues pertaining to SMPs directly and indirectly in India. Primarily, India relies on the Constitution of India for tenets on privacy and free speech on any medi-

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17 Jen Patja Howell, 'The Lawfare Podcast: India v. Platforms, June 3<sup>rd</sup>, 2021, <https://www.lawfareblog.com/lawfare-podcast-india-v-platforms>.

18 Billy Perrigo, "India Is Demanding Social Media Remove References to the 'Indian Variant' of COVID-19. But What Should It Be Called?," *Time*, May 26, 2021, <https://time.com/6051039/indian-variant-social-media/>.

19 Sangeeta Mahapatra and Johannes Plagemann, "*Polarisation and Politicisation: The Social Media Strategies of Indian Political Parties*," (German Institute of Global and Area Studies (GIGA), 2019). <http://www.jstor.org/stable/resrep24806>.

20 Shubham Verma, "Facebook briefly hid posts calling for PM Modi's resignation by mistake, govt responds," *India Today*, April 29, 2021, <https://www.indiatoday.in/technology/news/story/facebook-hid-posts-calling-for-pm-modi-s-resignation-briefly-says-it-was-a-mistake-1796123-2021-04-29>.

21 Dipayan Ghosh, "Are We Entering a New Era of Social Media Regulation?," *Harvard Business Review*, January 14, 2021, <https://hbr.org/2021/01/are-we-entering-a-new-era-of-social-media-regulation>

um<sup>22</sup>, the IT Act, 2008<sup>23</sup> and the IM Rules 2021.<sup>24</sup> Apart from the statutory regulations, the SMPs have their own self regulations. The current Indian legal framework on SMPs tend towards a co-regulatory model relying both on statutory framework and self-regulation of SMPs.

*Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021: A critical Analysis (Illustrative, not exhaustive)*

As highlighted above, in the absence of an exclusive and omnibus legislation, SMPs are governed by the IT Act, 2008 and its corresponding IM Rules, 2021 in India which ought to be necessarily framed within the contours of the Constitution of India and its basic tenets.<sup>25</sup> IM Rules, 2021<sup>26</sup> are the new and elaborate rules which have replaced and repealed the Information Technology (Intermediaries Guidelines) Rules, 2011 (hereinafter called IM Rules, 2011), which according to some noted scholars were also not in consonance with the international best practices so far as the issues of safe harbour to Internet service providers and intermediaries'

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- 22 See Article 19 and Article 21 of the Indian Constitution envisaging certain inviolable rights to the citizens and any law, order, byelaw must be necessarily in consonance of the same.
  - 23 The Information Technology Act, 2008, "*An Act to provide legal recognition for transactions carried out by means of electronic data interchange and other means of electronic communication, commonly referred to as — electronic commerce, which involve the use of alternatives to paper-based methods of communication and storage of information, to facilitate electronic filing of documents with the Government agencies and further to amend the Indian Penal Code, the Indian Evidence Act, 1872, the Banker's Books Evidence Act, 1891 and the Reserve Bank of India Act, 1934 and for matters connected therewith or incidental thereto*". Available at: <https://www.meity.gov.in/content/information-technology-act-2000>
  - 24 The IT Rules, 2021 are purportedly made under Section 87(1) of the parent Act, more particularly Section 87(2) (y), (z), (zb) and (zg) of The Information Technology Act, 2008, <https://www.meity.gov.in/content/information-technology-act-2000>.
  - 25 The Indian Constitution is the paramount source of law in the country. The Indian Constitution is the groundnorm which is ought to be obeyed and any law/rule/byelaw needs to abide by its basic tenets.
  - 26 "Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021," Ministry of Electronics and Information Technology, Government of India, February 25, 2021, [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).

liability are concerned.<sup>27</sup> Though, a robust jurisprudence on the same evolved in a plethora of cases which reached to the apex court of the country and were decided with finality.<sup>28</sup> The IM Rules, 2011 were completely silent on the aspect of SMPs, OTT Platforms and Digital Media Platforms and there are no decided cases where the IM Rules 2011 were invoked by the apex court to regulate the SMPs in India.

*Regulating Social Media Intermediaries and Digital Media together: An Incongruous Approach*

As is evidently clear from the nomenclature of the IM Rules 2021, that these rules are not restricted in the application to internet intermediaries alone. Rather the rules are meant to provide guidelines for digital media also. This is, as is being contended in the Indian courts right now, out of the purview of the IT Act, 2008.<sup>29</sup> The rules are portrayed to be premised on a balanced approach and are meant to do predominantly two major things so far as SMPs are concerned: firstly, to provide the legal definition to the complex concept of social media and to classify social media platforms from significant social media platforms (the previous IM Rules 2011 were silent on it) and, secondly; to regulate the same by imposition of additional operational responsibilities with the hybrid model of self-regulation and governmental control.

While framing these rules the government claims to have taken into consideration the growing prominence of social media platforms in India and the relevant societal implications of the content being transmitted on these platforms on the one hand and the freedom of expression as

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27 Risabh Bailey, "Censoring the Internet: The New Intermediary Guidelines." *Economic and Political Weekly* 47, no. 5 (2012): 15-19, <http://www.jstor.org/stable/41419840>.

28 Pritika Rai Advani, "Intermediary Liability in India," *Economic and Political Weekly* 48, no. 50 (2013), <http://www.jstor.org/stable/24479053>.

29 The Wire Staff, "Why the Wire Wants the New IT Rules Struck Down", *The Wire*, March 9, 2021, <https://thewire.in/media/why-the-wire-wants-the-new-it-rules-struck-down>.

well as privacy on the other hand.<sup>30</sup> These rules are being portrayed as “progressive, liberal and contemporaneous.”<sup>31</sup>

But even prior to the notification of new IM Rules on February 25<sup>th</sup>, 2021, the concerns relating to freedom of speech and privacy were raised by the different sections of the society.<sup>32</sup> Concerns also arose about the way the IM Rules, 2021 were framed by the concerned ministry/ies of the Government of India.<sup>33</sup>

The new rules also bring many entities, including curated-content platforms such as Netflix and Amazon Prime as well as digital news publications, into the definition of intermediaries which were out of the purview of the definition of intermediaries in the previous IM Rules 2011. Therefore, new rules are inviting lot of criticism from different sections of the stakeholders for being incongruous in approach.<sup>34</sup>

### *Flawed Assumptions*

The IM Rules, 2021 seems to be based on the assumption that the social media intermediaries are no longer acting like mere conduits, rather they are accomplice with the publishers and content creators. This flawed assumption can also be inferred from the introductory remarks of the IM Rules, 2021 on the press information bureau website, where the language is aptly clear that SMPs owe accountability against its misuse and abuse

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30 Shishir Gupta, “I and B ministry starts work on self-regulation law for OTT platforms, online news,” January 16, 2021, *India News*, <https://www.hindustantimes.com/india-news/ib-ministry-works-on-self-regulation-law-for-ott-platforms-and-digital-media-101610774195596.html>.

31 “Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021,” Ministry of Electronics and Information Technology, Government of India, February 25, 2021, Press Information Bureau, <https://pib.gov.in/PressReleaseDetail.aspx?PRID=1700749>.

32 “India must resist the lure of the Chinese model of online surveillance and censorship #IntermediaryRules #RightToMeme #SaveOurPrivacy,” *Internet Freedom Foundation*, December 24, 2018, <https://internetfreedom.in/india-must-resist-the-lure-of-the-chinese-model-of-surveillance-and-censorship-intermediaryrules-rightto-meme-saveourprivacy/>.

33 “Latest Draft Intermediary Rules: Fixing big tech, by breaking our digital rights?,” *Internet Freedom Foundation*, February 25, 2021, <https://internetfreedom.in/latest-draft-intermediary-rules-fixing-big-tech-by-breaking-our-digital-rights/>.

34 Torsha Sarkar, “New intermediary guidelines: The good and the bad”, *Down to earth* February 26, 2021, <https://www.downtoearth.org.in/blog/governance/new-in-termediary-guidelines-the-good-and-the-bad-75693>.

by users.<sup>35</sup> Under this assumption, the intermediaries are over-burdened with the imposition of additional responsibilities like; appointment of India based compliance officers, first originator traceability requirements, deployment of automated filtering software and identification of physical address from the users of accounts, swift take down of content etc. This is not welcome by most of the social media giants in India.<sup>36</sup>

The above said obligations may undermine the right to free speech. The requirement of rapid removal and monitoring of user's content is one such obligation which may prompt the SMPs to over comply with take down requests to preclude any liability. The deployment of automated filtering software may also not prove effective because it is unlikely to identify the unlawful content in different cultural backgrounds through software. The obligation of originator traceability has its own privacy related ramifications (explained in more detail in the ensuing part).

In case of non-observance of these rules, intermediaries will lose the safe harbour provided under section 79 of the IT Act, 2008<sup>37</sup> and face criminal sanctions which may lead these SMPs to remove even lawful content as a precautionary measure.

Even the United Nations special rapporteurs have written to the government of India expressing concerns about the newly notified IM Rules, 2021, and asked the Indian government to carry out a detailed review and consult with all relevant stakeholders. They have shown serious concerns about due diligence obligations and expressed apprehensions of serious infringement of human rights because of the newly notified IM Rules, 2021.<sup>38</sup>

Prior to the notification of these new rules, intermediaries were provided with a comprehensive protection to any liability arising from third party publications or information made available by them. The purpose to provide exemption from liability helps the intermediary to operate

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35 "Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021," Ministry of Electronics and Information Technology, Government of India, February 25, 2021, Press Information Bureau, <https://pib.gov.in/PressReleaseDetailm.aspx?PRID=1700749>.

36 Aashish Aryan, "Twitter interim resident grievance officer resigns", *The Indian Express*, July 13th, 2021, <https://indianexpress.com/article/india/twitter-interim-grievance-officer-for-india-quits-amid-row-over-new-it-rules-7378424/>.

37 Rule 7 of the IM Rules, 2021.

38 Neha Alawadhi, "UN Special Rapporteurs write to govt against IT Rules, ask for review", *Business standard*, June 19<sup>th</sup>, 2021, [https://www.business-standard.com/article/economy-policy/un-special-rapporteurs-write-to-govt-against-it-rules-ask-for-review-121061801338\\_1.html](https://www.business-standard.com/article/economy-policy/un-special-rapporteurs-write-to-govt-against-it-rules-ask-for-review-121061801338_1.html).

without any intervention, but with the new IM Rules, 2021, there would be stringent norms to be adhered to by the intermediaries to avail of the safe harbour.<sup>39</sup> The IM Rules, 2021 in a marked departure from its predecessor IM Rules, 2011<sup>40</sup> delineates social media intermediaries (hereinafter referred to as SMIs)<sup>41</sup> and significant social media intermediaries (hereinafter referred to as SSMIs)<sup>42</sup> as a separate class within the ambit of definitional clause of IM Rules, 2021.<sup>43</sup> As discussed above, the IM Rules, 2021 brings in additional and onerous due diligence obligations to be followed by SSMIs.<sup>44</sup> The IM Rules also impose criminal sanctions for non-observance of the additional due diligence which appears as a disproportionate consequence, a restraint on free speech facilitated by intermediaries and may lead to chilling effect.<sup>45</sup>

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- 39 Garima Jhunjhunwala and Prashant Kumar, "Developments in India—Website Owner and Service Provider Liability for User-Generated Content and User Misconduct," *The Business Lawyer* 70, no. 1 (2014): 307-12 <http://www.jstor.org/stable/43665705>.
- 40 "Intermediary" means an intermediary as defined in clause (w) of sub-section (1) of section 2 of the Information Technology Act, 2008; "intermediary", with respect to any particular electronic records, means any person who on behalf of another person receives, stores or transmits that record or provides any service with respect to that record and includes telecom service providers, network service providers, internet service providers, web-hosting service providers, search engines, online payment sites, online-auction sites, online-market places and cyber cafes.
- 41 Rule 2(1) (v) '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.
- 42 Rule 2(1) (w) 'Significant Social Media Intermediary' means a social media intermediary having number of registered users in India above such threshold as notified by the Central Government. The present threshold for significant social media intermediary is five million, See notification: <https://www.meity.gov.in/writereaddata/files/Gazette%20Significant%20social%20media%20threshold.pdf>.
- 43 "Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021," Ministry of Electronics and Information Technology, Government of India, February 25, 2021, Press Information Bureau, <https://pib.gov.in/PressReleaseDetailm.aspx?PRID=1700749>.
- 44 Rule 4, "Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021," <https://pib.gov.in/PressReleaseDetailm.aspx?PRID=1700749>.
- 45 Rule 7, "Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021," <https://pib.gov.in/PressReleaseDetailm.aspx?PRID=1700749>.

*Originator Traceability: A Nemesis*

The inclusion of SMIs and SSMIs is a welcome step in the IM Rules 2021, but it also raises several doubts on the intention of the government especially on the aspect of regulating the SSMIs like WhatsApp, Telegram and Signal who are primarily involved in providing messaging services. According to IM Rules 2021 these messaging SSMIs are now required to enable the identification of the first originator of the information on its computer resource on a judicial order passed by a court of competent jurisdiction or an order passed under section 69 of the IT Act, 2008<sup>46</sup> by the competent authority as per the Information Technology (Procedure and Safeguards for interception, monitoring and decryption of information) Rules, 2009<sup>47</sup>, which shall be supported with a copy of such information in

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46 Section -69- Information Technology Act, 2008.- Power to issue directions for interception or monitoring or decryption of any information through any computer resource. -

(1) Where the Central Government or a State Government or any of its officers specially authorised by the Central Government or the State Government, as the case may be, in this behalf may, if satisfied that it is necessary or expedient to do in the interest of the sovereignty or integrity of India, defence of India, security of the State, friendly relations with foreign States or public order or for preventing incitement to the commission of any cognizable offence relating to above or for investigation of any offence, it may, subject to the provisions of sub-section (2), for reasons to be recorded in writing, by order, direct any agency of the appropriate Government to intercept, monitor or decrypt or cause to be intercepted or monitored or decrypted any information generated, transmitted, received or stored in any computer resource.

(2) The procedure and safeguards subject to which such interception or monitoring or decryption may be carried out, shall be such as may be prescribed.

(3) The subscriber or intermediary or any person in-charge of the computer resource shall, when called upon by any agency referred to in sub-section (1), extend all facilities and technical assistance to-

(a) provide access to or secure access to the computer resource generating, transmitting, receiving or storing such information; or

(b) intercept, monitor, or decrypt the information, as the case may be; or

(c) provide information stored in computer resource.

(4) The subscriber or intermediary or any person who fails to assist the agency referred to in sub-section (3) shall be punished with imprisonment for a term which may extend to seven years and shall also be liable to fine.]

47 Another set of corresponding rules made by central government under IT Act, 2008 for blocking etc. Information Technology (Procedure and Safeguards for interception, monitoring and decryption of information) Rules, 2009, <https://www.meity.gov.in/writereaddata/files/Information%20Technology%20%28Procedur>

electronic form.<sup>48</sup> The requirement of identification of the first originator of the message under the new rules, though is subject to certain provisos appended to the said rule and of course subject to judicial decisions in this regard,<sup>49</sup> is still problematic and seems to be a threat to the privacy of users of messaging services. The issue of traceability of the originator of a message on messaging platforms and the ineffectiveness of these platforms to facilitate traceability already reached the apex court via public interest litigation relating to linking of Aadhar<sup>50</sup> with social media accounts even prior to notification of these IM Rules, 2021.<sup>51</sup> Some of the studies have suggested that these platforms are vulnerable to falsification of originator information by bad actors to frame an innocent person for sending the illegal message.<sup>52</sup> The concern of traceability as envisaged under rule 4(2) of the IM Rules, 2021 further deepens in the presence of reliable studies questioning the reliability of the end-to-end encrypted platforms.<sup>53</sup>

### *An Inchoate Attempt*

The IM Rules, 2021 also invites criticism on account of being myopic, the rules focus solely on SMIs and have not attempted to define and differentiate other variants of intermediaries like telecom service providers, network service providers, internet service providers, web-hosting service providers, search engines, online payment sites, online-auction sites, online-market places and cyber cafes which form part of the definition of intermediary

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e%20and%20Safeguards%20for%20Interception%2C%20Monitoring%20and%20Decryption%20of%20Information%29%20Rules%2C%202009.pdf.

48 Rule 4(2) of the IM Rules, 2021.

49 Sunil Abraham, "Shreya Singhal and 66A: A Cup Half Full and Half Empty," *Economic and Political Weekly* 50, no. 15 (2015), <http://www.jstor.org/stable/24481877>.

50 Aadhaar number is a 12-digit random number issued by the 'Unique Identification Authority of India' to the residents of India after taking the biometric and iris information of the applicant, "Unique Identification Authority of India," Government of India, <https://uidai.gov.in/what-is-aadhaar.html>.

51 *Antony Clement Rubin v. Union of India* (T.C. Civil No.189 of 2020), <https://indiankanoon.org/doc/37202571/>.

52 Manoj Prabhakaran, "On a Proposal for Originator Tracing on WhatsApp," *An Independent Expert Report*, <https://drive.google.com/file/d/1vivciN8tNSbOrA9eZ8Ej0mCAUBzRWu5N/view>.

53 Manoj Prabhakaran, "On a Proposal for Originator Tracing on WhatsApp," <https://drive.google.com/file/d/1vivciN8tNSbOrA9eZ8Ej0mCAUBzRWu5N/view>.

as per section 2(1) (W) of the IT Act, 2008. In most of the advanced legal systems of the world the above-mentioned intermediaries are well defined which helps in regulating the same in a very systematic manner.

### *Regulating Overzealously*

Regulating digital news portals, who are just publishers of news and current affairs content and are completely different from publishers of online curated content like OTT platforms, appears to be an overreach and beyond the scope of the IT Act, 2008. The IM Rules, 2021 classify digital news portals as “Digital Media” and seek to regulate these news portals by imposing government control and code of ethics.<sup>54</sup> Many of these digital news portals have approached the courts and challenged the constitutionality of the IM Rules, 2021 for overreaching the IT Act, 2008 which nowhere provides any provision for regulating the non-intermediary entities like digital news portals.<sup>55</sup> At the time of this writing, the Delhi high court has issued notice to the central government to file a reply to the present petition and further directed the government to give reasons as to why the operation of the rules should not be stayed. The government’s reply is awaited in this regard. Another similar petition is also pending before the High Court of Delhi wherein Part III of the IM Rules, 2021 has been challenged for being ultra vires the IT Act, 2008 in as much as the classification of ‘publishers of news and current affairs content’ (‘digital news portals’) as part of ‘digital media’ is concerned.

The classification of digital news portals as digital media, which are integral to uphold the freedom of speech and expression in every democracy of the world, appears to be an overreach of the power vested with the central government under section 87 of the IT Act, 2008 for the reason that the objective of IT Act, 2008 is to facilitate e-commerce and validate electronic transactions only.<sup>56</sup> There does not lie any legislative backing in this move of the central government because these news portals are not intermediaries in strict sense under the IT Act, 2008. This makes these guidelines a camouflaged way of regulating online news portals through

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54 Rule 2(i) of the IM Rules, 2021.

55 *Quint Digital Media Limited and Anr. V. Union of India and Anr, 2021*, [https://www.livelaw.in/pdf\\_upload/the-quint-delhi-hc-petition-it-rules-390804.pdf](https://www.livelaw.in/pdf_upload/the-quint-delhi-hc-petition-it-rules-390804.pdf).

56 Karen Kornbluh and Ellen P. Goodman, "Safeguarding Digital Democracy: Digital Innovation and Democracy Initiative Roadmap." *German Marshall Fund of the United States*, 2020. <http://www.jstor.org/stable/resrep24545>.

a delegated legislation by bringing these portals under the aegis of the IT Act, 2008 without following the due process of parliamentary scrutiny.<sup>57</sup>

### Conclusion

Multiple petitions are pending on constitutionality and overreach of the IT Act, 2008 in framing these rules. WhatsApp has also reached the court challenging these rules on the ground of user's privacy.<sup>58</sup> Based on the illustrative analysis attempted in the preceding paragraphs, it appears that these rules are slightly disproportionate and lack the requisite democratic approach of SMPs governance and legislative backing. The IM Rules, 2021 trivialises the opportunity of bringing more comprehensive and realistic regulatory framework and then to providing a level playing field to the intermediaries especially the SMPs. Rather the rules have created an environment of fear and panic amongst the SSMIs.

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