

CONSTRUCTION OF HIERARCHIES: A CRITICAL ANALYSIS OF THE INFORMATION TECHNOLOGY RULES, 2021

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INTRODUCTION

To the internet using population, the world would look like a very different place if social media intermediary platforms and OTT (Over-the-Top) content platforms were to be banned from usage. The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 hereafter referred to as IT Rules, while allowing the usage of such platforms, place upon them heavy-handed governmental controls in the guise of regulation. The nature of these regulations, as will be discussed below gives the State excessive control over digital forums with the ability to monitor and take down any content which transgresses the Code of Ethics and Guidelines promulgated by the government. By primarily reflecting upon the work of Gayle S Rubinⁱ and Alan Huntⁱⁱ this paper will attempt to unmask the socio-political implications of this piece of executive law making. Ostensibly the government is trying to safeguard internet users against so called ‘harmful content’. But the glaring question remains: Who is the government actually trying to protect and from what?

These regulations claim to protect women and children from graphically explicit obscene content that will not only negatively impact their minds but also contribute to an increase in violent crimes against their bodies. Yet in actuality this merely projects a paternalistic attitude that scapegoats’ sexual content as the cause for societal vices. It is an overreaching attempt by the State to influence societal standards and attitudes on morality. It leads to self-censorship by content creators and intermediary platforms who become weary of publishing anything which goes against the dominant ideological framework. It propagates a distinction between behavior that is considered socially acceptable, permissible, and desirable as opposed to deviant, undesirable behavior which should be frowned upon by society and is punishable by law.

The IT Rules additionally mandate that content should not undermine the unity of the Nation or the overall security of the State. However, this may have dangerous implications given the current political climate of the country wherein expressing views contrary to or critical of the government may be deemed as anti-national and seditious. This raises serious concerns regarding the freedom speech and expression of individuals as the IT Rules give the government the power to silence criticism in a bid to achieve hegemonic dominance and ideological control through the law.

A ‘CODE OF ETHICS’ FOR OTT PLATFORMS AND DIGITAL NEWS MEDIA

The IT Rules have for the first time in India brought OTT platforms and Digital News Media within the ambit of regulation by bringing them under the administrative charge of the Ministry of Information and Broadcasting.ⁱⁱⁱ OTT platforms will now be mandatorily required to classify their content based on age-ratings as well as mandatorily provide access to parental control/locking features for all content rated Adult or for viewers above the age of 13.^{iv} This is to ensure that a minor cannot access content which may be sexual in nature or meant for mature audiences. This reinforces Rubin’s exposition that society and law consider sexuality to be a morally corrupting influence.^v Thus, we see all efforts being made to deny the sexuality of minors and to protect them from ‘harmful’ knowledge.

In addition to the mandatory controls mentioned above, it is important to note that the Code of Ethics is broad and vague in its wording. It directs the exercise of ‘due care’ and ‘caution’ in the portrayal of religious or racial beliefs and practices but does not define the meaning or scope of the terms. This has the potential to stifle the voices of bold content creators and unduly restrict their freedom of expression. The Rules then go on to prescribe a framework outlining a three-tier process which has been formulated for the purpose of grievance redressal. The nature of this process arguably tips the scales of balance in favour of the government as it enables the administration to perform a quasi-judicial function which would have otherwise been performed by the judiciary.

Though the government lauds the grievance redressal mechanism for being minimally invasive due to its self-regulatory framework, a closer look will reveal that that they are anything but.

At the first rung of the grievance redressal mechanism, every OTT platform must now have its own grievance redressal officer who is required to respond to any objection raised within a time period no longer than fifteen days. If the consumer is not satisfied by the response received, they may appeal the decision by elevating their complaint to the second rung on the ladder which is a self-regulatory body.^{vi}

The independence of this self-regulatory body is supposed to be guaranteed by its composition which includes publishers, retired judges of High Courts or the Supreme Court, eminent persons who may come from the entertainment industry, media houses, broadcasting agencies, as well as experts in the field of human rights and child rights. These bodies have been empowered with extensive powers including the ability to direct censorship of content and reclassification of ratings, among others.^{vii} However, the catch here is that a self-regulatory body once formed will be registered only once the Ministry of Information and Broadcasting is satisfied of the propriety of the body. This raises doubt and fear in the minds of people regarding whether such bodies will require the presence individuals with particular ideological and political leaning in order to be registered.

If a complainant is still not satisfied then, the decision of the self-regulatory body can be challenged before the third tier of the grievance redressal mechanism. The third tier of recourse is also available if the decision given by a self-regulatory body has not been complied with. Interestingly the second-tier process of referring the issues to a self-regulatory body may be skipped altogether as a complainant can go straight to the third-tier inter-departmental committee comprising of only representatives of the central government to appeal decisions made by the grievance redressal officer in tier-one of the mechanisms. Thus, it becomes evident that self-regulation is a mere garb. The process ultimately gives the inter-departmental committee composed solely of representatives of the central government the final says on any objection or complaint raised.

THE RELEVANCE OF ‘ETHICS’

With the central government sitting in the position of final deciding authority, the relevance of the issue becomes clear from recent controversies. Perspectives critical of the State, negative portrayal of the ruling party or the ideology that it supports, depiction of acts that shock the

morale of the dominant societal mindset have all faced the brunt of taking on the State. Various instances can be seen where objections have been raised against so called questionable content leading to its censure and modification. Even before the existence of the IT Rules, scenes from many popular shows and movies have been the center of controversy because they had been deemed to be offensive by certain sections of society. In most instances police complaints have been lodged against the makers and the publishers of the content ultimately resulting in the removal of the scenes objected to along with the issuance of formal statements of apology.

Last year F.I. R's had been filed against the officials of popular OTT platform Netflix as well as the makers of the show 'A Suitable Boy' for hurting religious sentiments due to an 'objectionable' scene where a Hindu woman and a Muslim man were kissing each other within the backdrop of a temple.^{viii} Morality here dictates that sexuality must be private and may be prosecuted for obscenity if publicly displayed.^{ix} The inter-mingling of sexual and identity politics further demonstrates Rubin's unequivocal proposition that sexuality is political.^x

Another Netflix film- Gunjan Saxena, which portrayed discrimination against women and the existing disparity between male and female officers in the Indian Air Force was objected to with a call for deleting key scenes of the movie. As these scenes were central to the theme of the movie and could not be deleted a disclaimer at the beginning of the film was inserted along with a 13+ age classification.^{xi} This is an instance where the progressive, non-discriminatory image that the State is trying to project for itself had come under scrutiny. Ultimately it was the State that prevailed because the otherwise accurate representation of historical circumstances in the film had to be denied through the disclaimer to protect the image of State institutions.

In another instance a petition had been filed before the Supreme Court of India alleging that the popular web-series Mirzapur available on the OTT platform Amazon Prime was harming the reputation of the State of Utter Pradesh.^{xii} It was deemed offensive that the district of Mirzapur has been portrayed as a place resplendent with crime and illegal activities. It is worthwhile here to point out that the same political party which is in power at the central government is also the ruling party in Utter Pradesh. Drawing from Alan Hunt, the law is being used as a tool to protect the material interests of the ruling class.^{xiii}

The ruling class tries to consolidate and sustain itself through hegemonic domination. Hegemony is a concept presented by Antonio Gramsci whereby the ideology of the ruling class

permeates into every aspect of societal behavior, influencing perceptions and values.^{xiv} Any attack on the dominant ideology threatens the existing hegemony is heavily resisted. This could be witnessed when criminal complaints had been lodged against other web-series called Tandav with the allegation of villainizing the Hindu religion and disrespecting Hindu deities.^{xv}

In spite of classifying content as adult and displaying disclaimers government agencies have been targeting ‘morally corrupting’ content, calling for removal of scenes or even complete banning of content. This was seen with respect to the show Bombay Begums which ironically tried to discourage drug use among minors.^{xvi} Intermediary websites and content creators are becoming extremely cautious sometimes even refraining from dealing with sensitive topics to steer clear of legal hassles. The far-reaching impact of this on the construction of social morality is that it creates discourse among viewers and society at large regarding what is normal and acceptable behavior, distinguishing it from behavior that is deviant, should be kept hidden from the innocent eyes of children and should not be graphically portrayed.

‘GUIDELINES’ FOR SIGNIFICANT SOCIAL MEDIA INTERMEDIARIES

The IT Rules define a Significant Social Media Intermediary as one which has a registered user base of fifty lakhs or more.^{xvii} If a platform due to its large user base falls within this threshold, then the Rules cannot be treated as mere guidelines by them, instead their compliance becomes mandatory.^{xviii} These compliances include appointing a Chief Compliance Officer, a Nodal Person of Contact, and a Resident Grievance Officer.^{xix} All these officers must be residents of India and have a permanent Indian address and phone number where they may be reached at all times. These positions are not only demanding but highly risky as not only do these individuals have to be available around the clock to coordinate with government agencies, if there is any lapse in compliance it is them who will be personally liable during legal proceedings.

Most social media intermediary platforms have made the requisite appointments and are complying with the new guidelines but of the many popular social media platforms Twitter has notably become the center of controversy for failing to comply with the IT Rules. Twitter has been stripped of its status as an intermediary platform. This means that it no longer enjoys the protection afforded by the ‘safe harbor’ provision of Section 79 of the Information Technology

Act, 2000. Had it still been regarded as an intermediary; Twitter would not face liability for content produced by third parties which has merely been published on their platform. But now it finds itself embroiled in litigation, constantly at loggerheads with the central government over 'objectionable' content shared on its platform.

The final verdict on whether Twitter may be considered as a social media intermediary platform and enjoy the legal immunities that come with the tag is a matter that must be decided by the Court. But for now, statements made by senior officials of the Ministry of Electronics and Information Technology make it clear that the government does not consider it to be an intermediary for failure to comply.^{xx} The most prominent aspect of their non-compliance is their failure to make permanent appointments to the newly mandated posts by the given date of 26th May 2021. Twitter has sought more time from the ministry and has expressed its willingness to abide by the rule of law in India. It cites the covid pandemic as the reason for its inability to make the appointments in a timely manner. But the government has also remained firm in its stance that it cannot grant Twitter an indefinite period of time to carry out the compliance requirements.

THE INTENTION BEHIND THE 'GUIDELINES'

The intention behind these compliances is to make sure that the intermediary platforms themselves start rigorously monitoring content that is published within their forum. Strict timelines have been imposed within which action must be taken. If any complaint is received regarding 'objectionable' content, the platform is required to respond within 36 hours and take down the offending material. The timeline is even more stringent if the offending content contains nudity, depiction of sex acts or even impersonation in which case it must be removed within 24 hours.^{xxi} The glaring issue is that any content can be flagged as objectionable as this is a term that is largely subjective and depends solely upon the perception of the user who feels offended. The grievance redressal team of the intermediary platform is required to exercise its judgement and reasoning while considering the nature of the allegedly objectionably content. Yet it is likely that the content will be 'voluntarily' taken down in the name of doing due diligence to absolve the platform of any future liability.

This could have a very serious effect on the way in which individuals use online platforms to express themselves. The increased layer of surveillance may discourage individuals from freely expressing their point of view. Social media is a forum where it is extremely difficult to pinpoint where something originated first but even this obligation has now been cast upon intermediaries. Intermediaries are now required to be able to identify where the offending content first originated so that this information can be used to detect and prosecute against offences.^{xxii} But this has serious implications upon the privacy of users. Private chats between users may no longer actually remain private if intermediaries are mandated to employ artificial intelligence which will be able to automatically detect obscene, sexually illicit, and illegal content.

Messaging platforms like WhatsApp have raised concerns that their platforms are protected using end-to-end encryption technology and so it may not even be possible for them to monitor the contents of private conversations between individuals in order to trace where a message first originated.^{xxiii} Thus, apart from the legal battle for data protection and privacy, the IT Rules pose a significant technological challenge as well. Furthermore, if intermediary platforms are required to overhaul the current mechanism based on which their applications work, this would require a large investment of funds which may not ultimately reap returns if consumers are inclined to shift to smaller platforms which better protect their privacy. So, it will be interesting to see whether big tech giants find it more profitable to challenge or comply.

CONCLUSION

The IT Rules give the State excessive power to monitor digital content and decide which content is suitable for dissemination. With digital platforms being increasingly used as forums to express one's displeasure regarding the government, its policies and ideology, it became essential for the State to be able to regulate the discourse in order to ensure its survival. But there is a difference between regulation and control. While it is certainly necessary to have mechanisms in place to address grievances, it is essential that the process be unbiased. However, what we see transpiring is a far cry from fair, with the State sitting in the position of both the petitioner and the judge. Government agencies, along with individuals affiliated to and closely associated with the government being predominantly the ones to raise charges against

objectionable content and government committees and ministries being in charge of deciding the outcome of those complaints.

If an individual's opinions are aligned with the dominant ideological framework, then they essentially have nothing to fear. But if they try to challenge the hierarchy or the existing hegemony in any manner then they are faced with the full force of State repression. As Allan Hunt rightfully said, the law has the deceptive image of being there to protect the best interests of the entire community.^{xxiv} In reality it is for us to analyze whose views are being suppressed and what the law is actually being used to protect. Voices that are critical of the government are being censored and roadblocks are being created to prevent the dissemination of content that is considered to be immoral and obscene according to the prevailing standards of morality. In this manner the law is being used to maintain the power and dominance of the existing ruling class.

ENDNOTES

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- ⁱ Rubin G, 'Thinking Sex: Notes Towards a Radical Theory of The Politics of Sexuality', *Culture, Society and Sexuality: A Reader* (1999).
- ⁱⁱ Hunt A, 'Law, State, And Class Struggle' (1976) *Marxism Today*.
- ⁱⁱⁱ Rule 8(1), Information Technology (Guidelines for Intermediaries and Digital Media Ethics Code) Rules, 2021.
- ^{iv} Paragraphs II(B), II(C), II(D), Appendix, Information Technology (Guidelines for Intermediaries and Digital Media Ethics Code) Rules, 2021.
- ^v Rubin G, (1999), 144.
- ^{vi} Rule 10, Rule 11, Information Technology (Guidelines for Intermediaries and Digital Media Ethics Code) Rules, 2021.
- ^{vii} Rule 12, Information Technology (Guidelines for Intermediaries and Digital Media Ethics Code) Rules, 2021.
- ^{viii} "India: Case Against Netflix Over Temple Kissing Scene in Show". 2020. *Aljazeera.com*. <<https://www.aljazeera.com/news/2020/11/24/india-case-filed-against-netflix-over-temple-kissing-scene>> accessed 30 June 2021.
- ^{ix} Section 294 (a), Indian Penal Code, 1860.
- ^x Rubin G, (1999), 143.
- ^{xi} "Gunjan Saxena: Indian Air Force Raises Objection to Negative Portrayal in Janhvi Kapoor Film". 2020. *BusinessToday.in*. <<https://www.businesstoday.in/trending/entertainment/gunjan-saxena-indian-air-force-objects-over-negative-portrayal-in-janhvi-kapoor-film/story/412830.html>> accessed 30 June 2021.
- ^{xii} 'SC Issued Notice to Makers Of 'Mirzapur' Web Series on Amazon Prime' (*OpIndia*, 2021) <<https://www.opindia.com/2021/01/sc-issued-notice-to-makers-of-mirzapur-web-series-on-amazon-prime/>> accessed 30 June 2021.
- ^{xiii} Hunt A, (1976), 178.
- ^{xiv} Gramsci, A. *Prison Notebooks*, p. 12 (Lawrence & Wishart 1971).
- ^{xv} Arnimesh S, 'Hurtful to Hindus, Anti-Dalit' — BJP Leaders Want Amazon Show Tandav Banned, Makers Arrested' (*ThePrint*, 2021) <<https://theprint.in/politics/hurtful-to-hindus-anti-dalit-bjp-leaders-want-amazon-show-tandav-banned-makers-arrested/587105/>> accessed 30 June 2021.
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^{xvii} Rule 2 (v), Information Technology (Guidelines for Intermediaries and Digital Media Ethics Code) Rules, 2021.

^{xviii} Rule 6, Information Technology (Guidelines for Intermediaries and Digital Media Ethics Code) Rules, 2021.

^{xix} Rule 4, Information Technology (Guidelines for Intermediaries and Digital Media Ethics Code) Rules, 2021.

^{xx} Aryan A, 'Govt Decides: Twitter No Longer Enjoys 'Safe Harbour' Protection' (*The Indian Express*, 2021) <<https://indianexpress.com/article/technology/tech-news-technology/govt-decides-twitter-no-longer-enjoys-safe-harbour-protection-7380265/>> accessed 30 June 2021.

^{xxi} Rule 3 (2) (b), Information Technology (Guidelines for Intermediaries and Digital Media Ethics Code) Rules, 2021.

^{xxii} Rule 5 (2), Information Technology (Guidelines for Intermediaries and Digital Media Ethics Code) Rules, 2021.

^{xxiii} Gurumurthy A, 'Whatsapp Challenges Govt: Breaking End-To-End Encryption Will Lead to Security Issues but Timing of Petition Circumspect' (*Free Press Journal*, 2021)

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^{xxiv} Hunt A, (1976), 180.

