

# THE DIGITAL CODE OF ETHICS

( A short article)

## SUBMITTED BY

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## ABSTRACT

The article attempts to examine the situation that called for enacting of Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021. It also explains the main provisions of these rules and how digital platforms are different from that of the conventional platforms. It tries to evaluate the Rules as to its advantages and disadvantages, including a short conclusion with certain suggestions on it.

## INTRODUCTION

Internet has made our lives more comforting from enabling us to put forward our thoughts to the world to giving us the glimpse of events occurring in the nook and corner of the Universe. All these delivered to our door step with just a click! On February 26<sup>th</sup> 2021, the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021<sup>1</sup> was brought out by the Central government exercising its powers under Section 89(2) of The Information Technology Act, 2000. The code is a supplant of the earlier Information Technology (Intermediary Guidelines) Rules, 2011 that intends to fringe on digital media, social media and Over-the-top platforms. With the Supreme Court calling it mere guidelines, lacking any provision of punishment or fine it is clear that the top court wants stricter regulation of the digital media. It is interesting to analyze how the news feed on our mobiles and posts on social media have become the top priority for the system as a whole.

## SITUATION THAT NECESSITATED THE CODE

There are quite a few factors that have helped us plunge into the digital drive. Being one of the largest online markets in the world, India hosts about 776.45 million Internet subscribers by the end of September 2020.<sup>2</sup> Taking a leap in this direction, Indians have become one of the largest users of many online platforms in the world. It is estimated that we will cross the 900 million mark by 2025.<sup>3</sup> This is possible also because the charges on internet in India is one of the cheapest in the world.<sup>4</sup> 1 gigabyte (GB) of mobile data costs \$0.26 in India compared with \$12.37 in the US, \$6.66 in the UK, and a global average of \$8.53.<sup>5</sup> Likewise, the increasing

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<sup>1</sup> Ministry of Information and Broadcasting, <https://mib.gov.in/digitalmedia/notification-dated-2522021-regarding-it-intermediary-guidelines-and-digital-media> (last visited Mar.13, 2021).

<sup>2</sup> Press Information Bureau, <https://pib.gov.in/PressReleaseDetailm.aspx?PRID=1687591> (last visited Mar.13, 2021).

<sup>3</sup> Ministry of Electronics and Information Technology, [https://www.meity.gov.in/writereaddata/files/india\\_trillion-dollar\\_digital\\_opportunity.pdf](https://www.meity.gov.in/writereaddata/files/india_trillion-dollar_digital_opportunity.pdf) (last visited Mar.13, 2021).

<sup>4</sup> Prasanto K Roy, Mobile data: Why India has the world's cheapest, BBC News, (Mar.18, 2019), <https://www.bbc.com/news/world-asia-india-47537201>.

<sup>5</sup> *Ibid.*

number of internet users, accelerated the digital advertising market making it one of the high investment areas. This created an ecosystem within the digital space giving scope for formulation of laws to manage it.

On various occasions the government also had a run-in with the global giants like Twitter regarding the removal of certain tweets. As online platforms provide smooth and quick medium for exchange of thoughts, it can be used to also spread hateful agendas, instigating innocents from any corner of the world. There have also been various complaints lodged by citizens across the states pertaining to certain shows on digital platforms. The local police may sometimes lack the expertise needed to deal with these complaints. Also that, digital platform per se is not a law and order issue. It is one of the possible causes and a precursor to a larger unrest in the society. It is important that it is dealt by experts in the field and sufficient mechanisms are in place for the citizens to put forward their grievances.

The existing laws on the subject matter such as Indian Penal Code,1860, The Indecent Representation of Women (Prevention) Act, 1986, Information Technology Act, 2000, The POCSO Act,2012 seemed inadequate in dealing with the new arena opened up by the digital platforms. The Supreme Court also had been insisting the government to formulate a law on the subject matter. Attempts made by several online platforms for providing a grievance redressal mechanism such as Digital Curated Content Complaint Council and Broadcast Content Complaint Council have failed to serve the purpose.

‘The Internet does not exist in a legal vacuum, since all those involved (authors, content providers, host service providers who actually store the documents and make them available, network operators, access providers and end users) are subject to the respective laws of the Member States’.<sup>6</sup> Hence, it was imminent on the part of the government to provide a regulatory framework for the curated online content.

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<sup>6</sup> Commission of the European communities, <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:1996:0487:FIN:en:PDF> (last visited Mar. 26, 2021).

## LEGAL FRAMEWORK

The Constitution of India guarantees right to freedom of speech and expression under Article 19(1)(a). As no right is sacrosanct, Article 19(2)<sup>7</sup> imposes certain restrictions on the enjoyment of the right. Particularly ‘public order’, ‘decency or morality’ needs to be understood in this context.

Public order has been defined as a state of tranquility<sup>8</sup>. The freedom of speech and expression can be restricted to an extent of anything disturbing the peace of the society. If the content on the digital platforms can disturb the order, the state is empowered to impose restrictions. The Supreme Court in *Dr. Ram Manohar Lohia V. State of Bihar and Ors*<sup>9</sup> went on to say that public order is that which comprehends disorders of less gravity than those affecting security of the state.

The contemporary community standards test has been laid down<sup>10</sup> by the court to evaluate a material for its obscenity. If an average person finds that the subject matter taken as a whole appeals to the prurient interest and that taken as a whole, if otherwise lacks serious literary artistic, political, educational or scientific value<sup>11</sup> it can be called as obscene and hence covered under ‘decency or morality’ aspect of Article 19(2).

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<sup>7</sup> (2) Nothing in sub clause (a) of clause ( 1 ) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence.

<sup>8</sup> *Romesh Thappar v. State of Madras*, (1950) S.C.R. 594.

<sup>9</sup> (1966) 1 S.C.R. 709.

<sup>10</sup> *Director General, Directorate General of Doordarshan v. Anand Patwardhan*, 2006 (8) SCC 433.

<sup>11</sup> *Id* at 9.

Section 89(2) of the Information Technology Act, 2000 empowers the state to make rules for setting up standards, conditions and restriction and such other norms to be observed by a Certifying Authority.<sup>12</sup>

Above all, an Independent and a sovereign government is a prerequisite to recognize state as an international person.<sup>13</sup> The word ‘Sovereign’ comes from a Latin term *suprema potestas*, meaning ‘supreme power or authority’. The very existence of the state empowers it to formulate laws pertaining to all the subject matters that its citizens’ deal with, wherever the need be. And so is the internet and digital platform.

## INFORMATION TECHNOLOGY (INTERMEDIARY GUIDELINES AND DIGITAL MEDIA ETHICS CODE) RULES, 2021

The definition of Digital media<sup>14</sup> covers all the digitized content which received, stored, processed, edited and transmitted over internet by an intermediary and publisher of online news or curated content. The intermediaries must retain the information of a user for a period of *one hundred and eighty days* after the user cancels her registration.

The social media platforms must prohibit the publication of any content that is pedophilic, pornographic, defamatory, invasive of someone’s privacy, information that the user has no right upon, infringes any of the intellectual property rights, deceives the addressee of the origin of the message, patently false, threatens the sovereignty and integrity of India. The intermediary is advised to inform its uses of the above conditions and if an user is found to be violating , it can terminate access to the user immediately. Any information already hosted by the intermediary shall disable access to such information within *thirty-six hours* of receiving a court order or directions by government regarding the same. The user who created the content shall be served a notice explaining the reason for such action taken, and be given an opportunity to dispute such action. On receiving a written order stating the purpose of seeking information, an intermediary within *seventy-two hours* provide such information in its possession.

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<sup>12</sup> Section 2(1)(g) Certifying Authority means a person who has been granted a license to issue an electronic signature Certificate under Section 24.

<sup>13</sup> Montevideo Convention on the Rights and Duties of States,1933.

<sup>14</sup> Rule 2(i).

The intermediary must provide for mechanism where in, any user or a victim can make a complaint to the designated Grievance Officer, who shall acknowledge the complaint within *twenty-four hours* and dispose it within *fifteen days*. In case where the complaint is about any full/partial nudity, the content shall be pulled down from the platform within *twenty-four hours* of receiving such a complaint.

The significant social media intermediary<sup>15</sup> is the one that has more users in India than the threshold fixed by the government. The Rules expect stricter compliance from them. It has to establish a physical contact address within India and publish the same on its website. Within *three months* from the fixation of threshold, a significant social media intermediary must appoint a Chief Compliance Officer who will ensure compliance of the Rules. Also appoint a ‘nodal contact officer’ who is a resident of India and will coordinate with the law enforcement agencies 24\*7. There should be a Resident Grievance Officer and the required mechanism for grievance redressal, just as the other intermediaries. The complainant must be enabled to track the status of the complaint lodged.

A significant social media intermediary, primarily into providing messaging services shall enable the identification of the originator of the message when required by a judicial order or directions passed by government under Section 69 of the Information Technology Act, 2000 but only when such order is passed in pursuance of an investigation into any offence connected to sovereignty, integrity and security of India, public order, incitement to an offence or an offence punishable with an imprisonment of five years or more. However, such orders shall not be passed when lesser intrusive methods are available to track the originator of the message. The Rules also mandate deploying automatic technology tools to identify any pedophilic or obscene content online.

Any non-compliance of the Rules shall attract punishment under Information Technology Act, 2000.

Part III of the Rules deals with regulation of all those publishers of online curated content and news whose content is available in India. Publishers must classify all of their online curated content into various ratings provided by the Rules, such as, ‘U’ for those suitable for persons of

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<sup>15</sup> Rule 2(v).

all ages, 'A' for those restricted to adults, 'U/A 7+' for those who are 7 years and above but can be viewed by children below 7 years with parental guidance and like wise 'U/A 13+' and 'U/A 16+'. Content can be classified based on its themes such as violence, nudity, drug and substance abuse etc.

A three tier structure has been proposed for checking the observance of the code of ethics and a platform to raise issues by the users. At all the levels, complaints are to be acknowledged within *twenty-four hours* of receiving it and be disposed within *fifteen days*. Those not satisfied with the decision may prefer an appeal to the next level within *fifteen days* of receiving the decision. Level-I is self-regulation within the digital media platform for which a Grievance Officer is to be appointed who is based in India. Level-II consists of self-regulating bodies from the group of publishers, that is registered with the Ministry of Information and Broadcasting. It shall be headed by a retired judge of the Supreme Court or High Court or an independent person experienced in media. It has the power to censure, reprimand and demand an apology from the publisher. Level III is a supervisory mechanism of the Central government that is provided by an Inter-Departmental Committee having representation from about half a dozen ministries and experts. It can ask the publisher to reclassify the content or to remove it altogether. When the situation calls, it can recommend an action to be taken under Section 69A of Information Technology Act, 2000.

## DIGITAL PLATFORMS v. MAINSTREAM PLATFORMS

'The intelligible differentia is clear – the internet gives any individual a platform which requires very little or no payment through which to air his views. The learned Additional Solicitor General has correctly said that something posted on a site or website travels like lightning and can reach millions of people all over the world'.<sup>16</sup> Medium of speech on internet inherently differs from the conventional medium.

For the most of it, print media can convey an information only through alphabet whereas internet can do it with motion pictures. Hence the literacy divide is breached, making the digital platforms efficient to convey the message to larger number of people. The movies released in

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<sup>16</sup> Para 98, Shreya Singhal v. Union Of India, (2013) 12 SCC 73.



theatres have a pre-censorship but the OTT platforms are free from any form of censorship. This can lead to dangerous circumstances wherein OTTs may end up becoming the backdoor entry for obscene, hateful and pedophilic content. Its easier for the digital platforms to host morphed pictures and deeper infliction on privacy. On social media, all the users have the opportunity to write what may come on their minds in a filthy language. Where, it is almost impossible to find the abuser due to geographical constraints and the leisure of anonymity provided by online platforms things can go out of hands at times. If the internet spreads messages faster, so is the case with fake news and rumors. India has experienced instances of lynching triggered by such fake news spread online. The print media just does not give space for creating abusive content and spread it across without any limitations.

## EVALUATION OF THE CODE

The Infocomm Media Development Authority (IMDA) of Singapore issues licenses and regulations, enabling its customers ‘a more informed choice’ and ‘to bring clarity to the industry’.<sup>17</sup> Certification for the online curated content in the Code will ensure better management of the viewership. However, concerns as to the effectiveness remain as children are more acquainted with mobiles and computers, parents may get too casual with the parental lock clause. Also that, some of the most popular intermediaries providing messaging services like Whatsapp, has end-to-end encryption of the messages which makes it seem impossible to track the originator of the message. But a provision of that is important in handling fake news, hateful and instigating messages.

The best thing about the Rules is, it empowers the users of these digital platforms to register complaints in a structured, hazel free manner. Time bound acknowledgment, resolution of the issues raised are also promised. Provision of appeal is an add-on. But the situation can get bizarre once the floodgates for raising grievance are opened, with lakhs of complaints being raised on a daily basis, the provision can be exploited. Australia’s eSafety Commissioner, being the world’s

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<sup>17</sup> Infocomm Media Development Authority, <https://www.imda.gov.sg/regulations-and-licensing> (last visited Mar. 26, 2021).

first government organization working for online safety, sets a good example, in having been efficient to deal with the complaints about illegal online content.<sup>18</sup>

As the Rules try to cover all kinds of digital platforms under it, importance had to be given in fixing varied degrees of liability on the stakeholders. Instead, it tries to place an individual who may be the originator of an instigating message with a OTT platform that publishes a prohibited content, though both of them have committed a wrong, they can have different degree of reach and that must be kept in mind while punishing them.

The Rules also seem to be tilting the power center to the government, by enabling it to order for removal of any content online, though with some checks and balances. This power has to be used cautiously, as it provides ample scope for suppressing those who disobey the system and hence, violating the citizens' right to expression.

## CONCLUSION

While we engage ourselves on the internet for shopping, entertainment, educative and artistic content the Code of ethics becomes a harbinger in the digital era. It sets out a framework for the online platforms to function in India, tying all of its strings and making them answerable for what they hold. The demand for appointment of nodal contact officer and to have a physical address in India is a clear sign that the government wants to be well in control of these platforms. The Officers under the Rules being residents, it is easier to knock at their doors quite often.

India can take cue from Australia, Singapore that already have a mechanism in place. Initially, the very volume of complaints raised can cause hick-ups in the resolution mechanism. The system needs to be robust and intact. Technologies like artificial intelligence, edge computing can be used to scrutinize the data, at a faster pace. The government must also exercise its powers with some care of not exerting itself to gag the media of its unalienable right, for it will only make their existence meaningless. The code must, with all the faith, be only regulatory.

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<sup>18</sup> eSafety Commissioner, <https://www.esafety.gov.au/about-us> (last visited Mar. 26, 2021).

‘Certain issues do not involve protection of public order, but rather the protection of the rights of individuals (protection of privacy and reputation) and of an environment allowing creation of content to flourish (intellectual property), What is considered to be harmful depends on cultural differences. Each country may reach its own conclusion in defining the borderline between what is permissible and not permissible’.<sup>19</sup>

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<sup>19</sup> *Id* at 6.