

## IT RULES 2021: BOMBAY HC GRANTS AN INTERIM STAY ON 'CODE OF ETHICS' FOR DIGITAL MEDIA

### 1. INTRODUCTION

The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 (“**IT Rules 2021**”) framed under the Information Technology Act, 2000 (“**IT Act**”) came into force on February 25, 2021. The IT Rules 2021 supersede the Information Technology (Intermediaries Guidelines) Rules, 2011 (“**2011 Rules**”), and in addition to expanding the due diligence requirements for the intermediaries, they have also introduced a ‘Code of Ethics’ (“**Code**”) and a grievance redressal mechanism for online news and current affairs publishers and publishers of online curated content. The Bombay High Court has granted an interim stay on those provisions of the IT Rules 2021 which mandated adherence to the Code by these publishers<sup>1</sup>, and provided for a three-tier structure to ensure observance of the Code by them<sup>2</sup>.

### 2. BACKGROUND

Section 79(2)(c) of the IT Act stipulates that for an intermediary<sup>3</sup> to be able to insulate itself from liabilities arising out of any content on its platform by availing of the ‘safe harbour’ protection under Section 79, such intermediary is required to observe due diligence and follow other guidelines that the central government may prescribe.

The 2011 Rules were framed in pursuance of this provision and by virtue of the substantive power that Section 87(2)(zg) of the IT Act gave to the central government. The 2011 Rules were limited in their applicability to intermediaries only.

The IT Rules 2021 replaced and superseded the 2011 Rules, and in addition to expanding the due diligence requirements for the intermediaries, they also introduced<sup>4</sup> the Code for publishers of digital media (online news and current affairs publishers and publishers of online curated content) and prescribed the setting up of a three-tier grievance redressal mechanism to address complaints arising out of the published content in relation to the Code. The first tier consists of self-regulation by the publishers themselves, the second is regulation by self-regulating bodies of the publishers and the third tier consists of an oversight mechanism along with an Inter-Departmental Committee<sup>5</sup>.

<sup>1</sup> Rule 9(1), IT Rules 2021.

<sup>2</sup> Rule 9(3), IT Rules 2021.

<sup>3</sup> Section 2(1)(w) of the IT Act, 2000 defines ‘intermediary’ as: “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”.

<sup>4</sup> Under Part III of the IT Rules 2021.

<sup>5</sup> Under Rule 14 of the IT Rules 2021. Though yet to be constituted, the IT Rules 2021 prescribe that it will consist of representatives from the Ministry of Information and Broadcasting, Ministry of Women and Child Development, Ministry of Law and Justice, Ministry of Home Affairs, Ministry of Electronics and Information Technology, Ministry of External Affairs, Ministry of Defence, and such other Ministries and Organisations, including domain experts that the Ministry of I&B may decide to include.

The Ministry of Electronics & Information Technology (“**MeitY**”) said that the IT Rules 2021 were framed not only under Section 87(2)(zg) but also under Section 87(2)(z) of the IT Act which gave the central government the power to frame rules to block content under the grounds<sup>6</sup> mentioned in Section 69A of the IT Act.

Part III of the IT Rules 2021<sup>7</sup> apply to two kinds of publishers of digital media: (i) publishers of news and current affairs content (“**NCA**”) and (ii) publishers of online curated content (“**CC**”) if such publisher has a physical presence in India or makes its content available in India as part of a systematic business activity.

As part of the Code, the NCA publishers are required to adhere to the Norms of Journalistic Conduct of the Press Council of India under the Press Council Act, 1978; the Programme Code under S. 5 of the Cable Television Networks (Regulation) Act, 1995, and also ensure that no content which is prohibited under any law for the time being in force is published or transmitted.

As part of the Code, the CC publishers are required to, *inter alia*, classify content and provide ratings<sup>8</sup> accordingly, have access control mechanisms<sup>9</sup> and ensure that no content which is prohibited under any law for the time being in force is published.

Soon after the IT Rules 2021 were enforced, they were challenged by various petitioners in different High Courts of the country. Different orders have been passed in these petitions with some granting interim protection to the petitioners<sup>10</sup> while others refusing any kind of interim stay<sup>11</sup>. Currently, challenges to the IT Rules 2021 are pending before High Courts of Kerala, Delhi, Karnataka & Madras.

Owing to the multiple challenges to the IT Rules 2021, a transfer petition was preferred by the central government before the Supreme Court (“**SC**”). However, no order was passed by the SC in the matter and hence proceedings before the different High Courts continue, as of now.

Of the two petitions in which the present interim order has been passed by the Bombay High Court (“**Bom HC**”) one was filed by ‘*The Leaflet*’, a legal news web portal co-founded by Senior Advocate Indira Jaisingh<sup>12</sup>, while the other was filed by Mumbai-based senior journalist Nikhil Wagle<sup>13</sup>. Both these petitions were clubbed and heard together as they had similar prayers.

### 3. ISSUES

The petitioners primarily contended that Rules 9, 14 & 16 (“**Relevant Rules**”) of the IT Rules 2021 are patently beyond the scope of Article 19(1)(a) of the Constitution of India (“**Constitution**”), as they are outside the ambit of the reasonable restrictions under Article 19(2) of the Constitution, and also expressly transgress the limits of the rule-making power available to the central government under Section 87 of the IT Act. It was also submitted that not a single provision under the IT Act envisages the controls and restrictions imposed by these Relevant Rules. The key issues discussed in this interim order are below:

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<sup>6</sup> Sovereignty and 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.

<sup>7</sup> Rule 8 onwards.

<sup>8</sup> “U” or “U/A 7+” or “U/A 13+” or “U/A 16+” or “A”.

<sup>9</sup> Such as parental locks.

<sup>10</sup> Kerala High Court in *News Broadcasters Association v. Ministry of Electronics and Information Technology*, W.P. (C) No.13675/2021.

<sup>11</sup> Delhi High Court in *Quint Digital Media Ltd. v. Union of India* W.P. (C) 3659/2021 & in other similar petitions by news portals.

<sup>12</sup> W.P. (L.) No.14172 of 2021.

<sup>13</sup> PIL (L.) No. 14204 of 2021.

- (a) Whether the Relevant Rules are violative of the fundamental right to speech and expression as guaranteed by the Constitution under Article 19(1)(a) and outside the ambit of reasonable restrictions permitted by Article 19(2) of the Constitution? (“**Issue 1**”); and
- (b) Whether the Relevant Rules are beyond the scope of the IT Act by virtue of them being beyond the rule making power available to the central government under Section 87 of the IT Act? (“**Issue 2**”).

#### 4. ISSUE 1

##### 4.1 The Relevant Rules “bring about a chilling effect qua the right of freedom of speech and expression”: Bom HC

The Bom HC, in no uncertain terms, observed that the indeterminate and wide terms of the Relevant Rules bring about a chilling effect qua the right of freedom of speech and expression of writers/ editors/ publishers because they can be hauled up for anything if the Inter-Departmental Committee (under Rule 14) so wishes.

The Bom HC observed that if the IT Rules 2021 are allowed to operate in their current form and substance, it would result in a writer/ editor/ publisher standing the risk of being punished and sanctioned should the Inter-Departmental Committee not be in favour of criticism of any public figure. Thus, even without transgressing the boundaries prescribed by Art. 19(2) of the Constitution, a publisher/ writer/ editor may become liable to the sanctions under the IT Rules 2021.

The Bom HC held that Rule 9 on the face of it appears to be infringing the constitutional guarantee of freedom of speech and expression as conferred by Article 19(1)(a) of the Constitution. The court also held that the Relevant Rules are manifestly unreasonable and go beyond the IT Act and its aims and provisions. However, the Bom HC did not stay Rule 14 and 16 on the ground that while the former has not been fully operationalized yet<sup>14</sup>, the provisions of the latter are traceable to Section 69A(1) of the IT Act, which itself is in line with the restrictions imposed by Article 19(2) of the Constitution and that Rule 16 is also equivalent to the provisions of earlier rules<sup>15</sup> formulated under the IT Act (which are in still in force).

#### 5. ISSUE 2

##### 5.1 Section 87 of the IT Act does not confer a power on the central government to frame such provisions as are found in the IT Rules 2021: Bom HC

After perusing the content and objectives of Sections 69A, 79 & 87(2)(z) and 87(2)(zg) of the IT Act, the Bom HC held that Rule 9 of the IT Rules 2021 suffers from two legal infirmities. *Firstly*, it imposes an obligation on NCA & CC publishers to adhere to a Code which is completely alien to the IT Act and is under an entirely different statutory regime. Also, the provision<sup>16</sup> under which MeitY claims competence for the IT Rules 2021, does not confer a power on the central government to frame such provisions as are found in the IT Rules 2021. *Secondly*, the IT Act censors content on the internet only to the extent mentioned in Section 69A, and the grounds therein too are equivalent to those existing under Article 19(2) of the Constitution. As a result, the Bom HC held Rules 9(1) and 9(3) to be beyond the ambit of the provisions of the IT Act, being beyond the delegated power.

After perusing the Preface of the Norms of Journalistic Conduct of the Press Council of India under the Press Council Act, 1978, the Bom HC noted that these are merely meant to act as guidelines indicating

<sup>14</sup> The Inter-Departmental Committee under Rule 14 is yet to be constituted. The court granted the petitioners the liberty to seek relief as regards this Rule as and when the said Committee is constituted by the I&B Ministry.

<sup>15</sup> Rule 9 of the Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules, 2009.

<sup>16</sup> Section 87(2)(z) and Section 87(2)(zg) of the IT Act.

standards of conduct for journalists in the discharge of their duties as members of the press. The sanction behind them is moral in nature and not statutory. The IT Rules cannot elevate the status of such moral standards to that requiring mandatory compliance nor make them a ground for attracting action of the nature specified in Rule 14(5)<sup>17</sup> of the IT Rules 2021.

Similarly, the court observed, the Programme Code under Rule 6 of the Cable Television Networks Rules, 1994 framed in terms of Section 5 of the Cable Television Networks (Regulation) Act, 1995 is mainly intended for programmes carried in the cable service and cannot bind writers/ editors/ publishers of content on the internet to express views which may be against good taste or even may not be decent.

- 5.2 The Bom HC held that the challenge to Rule 9 of the IT Rules 2021 ought to be regarded as an exception to the general rule of presumption in favour of the constitutionality of a provision in as much as Rule 9 does not conform to the IT Act and is also an intrusion into the fundamental right of the publishers guaranteed under Article 19(1)(a) of the Constitution.

On the above grounds, the Bom HC directed an interim stay of operation of Rules 9(1) and 9(3) of the IT Rules 2021, and also refused the central government's prayer to stay the operation of this order.

## 6. **INDUSLAW VIEW**

Though this is an interim stay, and the final hearing has been scheduled for September 27, 2021, this is a key development and will have an impact on the multiple legal challenges that the IT Rules 2021 are currently facing. The interim stay will be applicable throughout India as the SC has in multiple judgements held that when a High Court passes an order on the constitutionality of a central law, the same would have effect throughout the territory of India.<sup>18</sup>

Meanwhile, news reports suggest that the central government is mulling an all-encompassing law for digital media and the central government may take that route.<sup>19</sup> It is also possible that the SC may pass an order in the transfer petition preferred by the central government and transfer to itself all the legal challenges to the IT Rules 2021 pending before different High Courts and hear them together.

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<sup>17</sup> The sub-rule, *inter alia*, allows the Inter-Departmental Committee to recommend certain actions to the I&B Ministry which include warning, censuring, admonishing or reprimanding an entity or requiring an apology from an entity or requiring such entity to include a warning card or a disclaimer.

<sup>18</sup> See *Kusum Ingots and Alloys Ltd. v. Union of India* (Civil Appeal No. 9159 of 2003) & *All India Jamiat-ul-Quresh Action Committee v. Union of India* (WP Civil No. 422 of 2017).

<sup>19</sup> "Centre mulls single law to supervise all media", hindustantimes.com, 17<sup>th</sup> August 2021, available at <https://www.hindustantimes.com/india-news/centre-mulls-single-law-to-supervise-all-media-101629149955442.html> (last visited on August 24, 2021).

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