

Media Hotline

August 19, 2021

BOMBAY HIGH COURT IMPOSES INTERIM STAY ON PROVISIONS OF NEW IT RULES

- In February, 2021, the Central Government introduced the *Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021* ("Rules") under the Information Technology Act, 2000 ("IT Act"). The Rules required online news and entertainment platforms to adhere to the prescribed Code of Ethics (Rule 9 (1)) and institute a three-tier grievance redressal mechanism (Rule 9 (3)).
- On August 14, 2021, the High Court of Bombay ("Bombay HC") has issued an interim stay¹ on Rule 9(1) and 9(3) ("Order").
- The Bombay HC held that said provisions were *ultra vires* the IT Act, and had the potential to bring about a chilling effect on the free speech of writers, editors and publishers.

BACKGROUND TO RULES

- The Rules were introduced on February 25, 2021 in supersession of the *Information Technology (Intermediaries Guidelines) Rules, 2011* ("2011 Rules").
- While the 2011 Rules sought to regulate intermediaries, the Rules seek to regulate publishers of news and current affairs content ("NCAC") and online curated content ("OCC") (including individual creators) under Part III as well.
- The Rules were framed in exercise² of the Central Government's power to make rules under Section 87 of the IT Act on (1) the guidelines to be followed by intermediaries to avail safe harbor under Section 79 of the IT Act, and (2) procedures and safeguards for blocking access to certain content under Section 69 A of the IT Act (which empowers the Central Government to direct *intermediaries* to block access to content on certain grounds).
- The Rules require publishers of NCAC and OCCs with a physical presence in India, as well as foreign publishers conducting the '*systematic business activity of making their content available in India*' to adhere to the Code of Ethics appended to the Rules. The Code of Ethics requires publishers of NCAC to adhere to:
 - (i) Norms of Journalistic Conduct of the Press Council of India under the Press Council Act, 1978 ("Norms")
 - (ii) Programme Code under section 5 of the Cable Television Networks Regulation) Act, 1995 ("Programme Code")
- The Code of Ethics requires publishers of OCC to (i) classify content into categories (i.e., discrimination, language, imitable behaviour, etc.), (ii) provide the relevant rating for such categories based on the relevant content descriptors³, (iii) introduce access control mechanisms (i.e., parental locks, etc.), (iv) take reasonable efforts to improve accessibility of OCC to persons with disabilities, as well as (v) ensure that the OCC published is not prohibited under law.
- The Rules also mandate publishers having a physical presence in India to institute a three-tier grievance redressal mechanism⁴, i.e. self-regulation by the publishers, self-regulation by self-regulating bodies that may be set up by publishers or their associations, and an Oversight Mechanism by the government.
- As part of the Oversight Mechanism, the Ministry of Information and Broadcasting ("MIB") is empowered to establish an Inter-Departmental Committee ("Committee") for hearing grievances, comprising of representatives from the MIB, and various other ministries.⁵ The Committee cannot issue direct orders to publishers, and its role is recommendatory in nature. It may make recommendations to the MIB to issue certain directions after carrying out a hearing with the publisher⁶.

BACKGROUND TO PETITIONS CHALLENGING RULES

- Petitions challenging several provisions of the Rules as unconstitutional and *ultra vires* the IT Act were filed by the Leaflet, a digital web portal, and Nikhil Mangesh Wagle, a journalist, before the Bombay HC.
- There are also several petitions challenging the Rules pending before the High Courts of Delhi, Kerala, Madras, Calcutta, Karnataka and Orissa.
- The Central Government filed a transfer petition⁷ seeking a transfer of the pending petitions to the Supreme Court ("SC"). However, the transfer petition has not yet been allowed by the SC and is still pending as of date.
- During the course of the proceedings before the Bombay HC, the Central Government urged the court to wait till the decision of the SC on the transfer petition⁸, however in the absence of a stay on the proceedings before the High Courts by the SC, the Bombay HC proceeded to hear the matter and issue order in the matter.

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The Central Government, through the Ministry of Information and Broadcasting ("MIB") (which administers Part III of the Rules), submitted an affidavit to the Bombay HC stating that, *inter alia*,

- The Code of Ethics for NCAC imported the Norms and Programme Code, thereby creating a level playing field between online and offline publishers;
- The grievance redressal mechanism was introduced to ensure accountability of publishers of NCAC in order to combat the issue of fake news;
- Significant number of publishers, including publishers of NCAC had already complied with the Rules, and implemented grievance redressal mechanisms;
- The MIB had not received any representation from digital news publishers regarding difficulty in addressing grievances, and accordingly no complaint could be made with respect to excessive compliance burdens;
- The self-regulatory framework was working well, as evident from the fact that the Oversight Mechanism had not had to intervene in any matter thus far.
- The scope of the IT Act included recognition and regulation of electronic records, which were in the nature of media content, and therefore Part III was not *ultra vires* the IT Act.
- No other High Court had issued an interim stay on the Rules (however, the High Court of Kerala had ruled that the Central Government should refrain from taking any coercive action for non-compliance of Part III of the Rules)⁹.

Accordingly, there was no urgency warranting the interim intervention of the Bombay HC. Further, any interim stay on Part III of the Rules, would result in an environment of impunity, rampant spread of fake news, and unlawful content, thereby harming citizens' right to receive accurate information.

[The MIB also made several legal arguments against issuing an interim stay order, which we have not elaborate upon for brevity.]

THE BOMBAY HC ORDER

The Bombay HC held that Rule 9 of the Rules was *ultra vires* the provisions of the IT Act, and issued the interim stay on the rule *inter alia* for the following reasons:

- i. The obligation on the publishers of NCAC and OCC to observe the Code of Ethics was imported from a statutory regime alien to the Information Technology Act, 2000 (i.e., *the Norms under the Press Council of India Act, 1978 ("PCI Act") and the Programme Code under the Cable Television Network Act ("Cable TV Act")*).
- ii. The rule-making provisions under which the Rules were framed did not confer power on the Central Government to frame rules contemplating such restrictions. Accordingly, Rule 9 was *ultra vires* the IT Act.
- iii. The Norms under the PCI Act and the Programme Code under the Cable TV Act were framed under different statutory regimes and independent legislations dealing with such fields could not be introduced under the Rules, nor could substantive action for their contravention be taken under the Rules.
- iv. The IT Act did not seek to censor content on the internet, except to the extent of the grounds under Section 69A (in the interest of sovereignty and integrity of India, defence of India, security of the State, or public order, etc.). Rule 9 travelled beyond the provisions of Section 69 A.
- v. Compliance with the Norms and the Programme Code had been elevated to a mandatory statutory compliance under the Rules, however, the sanctions under the Norms and Programme Code were moral sanctions and not statutory sanctions, i.e., there are no penalties for non-compliance, and they simply set out a moral code for the publisher (apart from warning, censoring, or admonishing the newspaper, editor, or journalist under the PCI Act).
- vi. Rule 9 appeared to *prima facie* infringe upon the constitutional guarantee of freedom of speech and expression under Article 19(1)(a) of the Constitution of India in seeking to subject publishers to action under the PCI Act/Cable TV Rules which provided for an independent mechanism for violation of their provisions.
- vii. The indeterminate and wide terms of the Code of Ethics could bring about a chilling effect on the fundamental right to freedom of speech and expression of writers, editors and publishers.

Accordingly, the Bombay HC imposed an interim stay on Rule 9 (1) and (3) as it was *prima facie* of the opinion that it went beyond the statute, i.e., the IT Act, and also infringed upon the fundamental right of freedom of speech and expression under Article 19(1)(a) of the Constitution of India.

NEXT STEPS

At this stage, only an interim stay has been issued by the Bombay HC on Rules 9(1) and 9(3). The final hearing has been scheduled for September 27, 2021.

As stated above, the Central Government has filed a transfer petition seeking transfer of the various matters before the SC. However, the transfer petition has not been allowed as yet and is still pending. Accordingly, the Central Government has the following options (1) seek transfer of all the pending High Court matters to the SC and (2) press for a stay of all the matters pending before various high courts as well as (3) seek a stay on the Bombay HC's order, during pendency of these proceedings.

Soon after the Order, it was reported that¹⁰ the Central Government was contemplating introducing a single law to govern all types of media, i.e., print and electronic media, digital media, cinema, as well as OCC/NCAC platforms, drawing from special legislations independently governing specific type of content.

We will need to wait and watch whether the government pursues the Rules under the IT Act or decides to introduce a completely new law as a statutory backing to the Code and Ethics and three-tiered grievance redressal mechanism.

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¹ Ajit Promotion of Nineteenonea Media Ltd. & Ors. v Union of India & Anr WP (L) No. 14172 of 2021, Nikhil Mangesh Wagle v Union of India PIL (L) No. 14204 of 2021

² Section 82 (2) IT Act, (z) the procedures and safeguards for blocking for access by the public under sub-section (3) of section 69 A; (zg) the guidelines to be observed by the intermediaries under subsection (4) of section 79;

³ Rule 11(4)

⁴ Rule 9(3) read with Explanation (a) to Rule 8(2)

⁵ Rule 14(1)

⁶ Rule 14(5)

⁷ TP (C) No. 1248-1252 of 2021 Union of India & Ors. V Sayanti Sengupta & Ors.

⁸ As indicated vide order dated August 9, 2021

⁹ WP (C) No. 6272/2021, WP (C) No. 13675/2021

¹⁰ <https://www.hindustantimes.com/india-news/centre-mulls-single-law-to-supervise-all-media-101629149955442.html>

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