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Megha Middha, is working as an Assistant Professor of Law in Mody University of Science and Technology, Lakshmangarh, Sikar (Rajasthan). She has an experience in the teaching of almost 3 years. She has completed her graduation in BBA LL.B (H) from Amity University, Rajasthan (Gold Medalist) and did her post-graduation (LL.M in Business Laws) from NLSIU, Bengaluru. Currently, she is enrolled in a Ph.D. course in the Department of Law at Mohanlal Sukhadia University, Udaipur (Rajasthan). She wishes to excel in academics and research and contribute as much as she can to society. Through her interactions with the students, she tries to inculcate a sense of deep thinking power in her students and enlighten and guide them to the fact how they can bring a change to the society

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Assistant professor of Law

Mrs.S.Kalpana, presently Assistant professor of Law, VelTech Rangarajan Dr. Sagunthala R & D Institute of Science and Technology, Avadi. Formerly Assistant professor of Law, Vels University in the year 2019 to 2020, Worked as Guest Faculty, Chennai Dr.Ambedkar Law College, Pudupakkam. Published one book. Published 8 Articles in various reputed Law Journals. Conducted 1 Moot court competition and participated in nearly 80 National and International seminars and webinars conducted on various subjects of Law. Did ML in Criminal Law and Criminal Justice Administration. 10 paper presentations in various National and International seminars. Attended more than 10 FDP programs. Ph.D. in Law pursuing.



Avinash Kumar



Avinash Kumar has completed his Ph.D. in International Investment Law from the Dept. of Law & Governance, Central University of South Bihar. His research work is on "International Investment Agreement and State's right to regulate Foreign Investment." He qualified UGC-NET and has been selected for the prestigious ICSSR Doctoral Fellowship. He is an alumnus of the Faculty of Law, University of Delhi. Formerly he has been elected as Students Union President of Law Centre-1, University of Delhi. Moreover, he completed his LL.M. from the University of Delhi (2014-16), dissertation on "Cross-border Merger & Acquisition"; LL.B. from the University of Delhi (2011-14), and B.A. (Hons.) from Maharaja Agrasen College, University of Delhi. He has also obtained P.G. Diploma in IPR from the Indian Society of International Law, New Delhi. He has qualified UGC - NET examination and has been awarded ICSSR - Doctoral Fellowship. He has published six-plus articles and presented 9 plus papers in national and international seminars/conferences. He participated in several workshops on research methodology and teaching and learning.

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THE LEGALITY AND **CONSTITUTIONALITY OF THE** **INFORMATION TECHNOLOGY** **RULES, 2021**

AUTHORED BY - MS. SAKSHI PANDEY

BA-LLB STUDENT

SYMBIOSIS LAW SCHOOL-NAGPUR

SYMBIOSIS INTERNATIONAL (DEEMED UNIVERSITY)

NEAR GIDOBA MANDIR

MOUZA – WATHODA, NAGPUR DISTRICT – 440008

MAHARASHTRA STATE, INDIA.

EMAIL [SAKSHIPANDEY.STUDENT@SLSNAGPUR.EDU.IN]

ABSTRACT

In 2021, the Central Government of India enacted Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 while exercising the powers conferred upon it by the virtue of Section 87 of the Information Technology Act, 2000 with an objective to regulate the digital media content. The rules were formulated relying upon the guidelines issued by the Supreme Court in In Re: Prajwala Letter wherein it directed the Central Government to lay down the guidelines for the elimination of child pornography and content that are sexual in nature. The rules aim at incurring liability upon the intermediaries for not removing the prohibited digital content from digital media and thus depriving them of the safe harbor protection conferred upon them under Section 79 of the Information Technology Act, 2000. In the instant paper, the researchers attempt to establish that the rules of 2021 are intra vires the IT Act, 2000, and the Constitution of India.

KEYWORDS: IT Rules 2021, Constitution, Reasonable Classification, delegation.

INTRODUCTION

“The Ministry of Electronics and Information Technology (MeitY) has notified the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021” (hereinafter referred to as “IT Rules, 2021”) on 25.10.2021.

The Rationale behind the enactment of the IT Rules, 2021 is to provide basic uniform guidelines for the regulation of digital media with a rationale to curb the growing instances of misuse of digital media platforms which is nowadays seen at its peak within the territory of India.

For instance, “communal riots happened in different parts of North-East Delhi between the 24th and 29th which caused loss of life and property and disrupted the working of civic services in Delhi. A committee was set up to determine the factors that could disturb communal harmony in the NCT of Delhi and suggest measures for eliminating such factors. The committee suggested that Facebook had been used as a breeding ground for abetting hate and jeopardizing communal harmony.”¹

According to the 2021 Global Threat Assessment Report,² there is a rise in child self-generated sexual material during the COVID-19 pandemic. According to Internet Watch Foundation, 3,61,062 reports were investigated in 2021, and action was taken against 2,52,000 reports, that contain videos and images of children being sexually abused. It added that in 2021 the sharing of images of girls being sexually abused was much more than in any previous year. There was a three-fold increase in the content that shows the children between the age group of 7-10 being abused. To stop such activities, the rules 2021 were enacted. Its key features include the due diligence that shall be observed by the Social Media Intermediary (hereinafter referred to as SMI) and Significant Social Media Intermediary (hereinafter referred to as SSMI) by ensuring prohibition from the publication of content that is “(i) prohibited under the law for time being in force in relation to the interest of the sovereignty and integrity of India; security of the state, friendly relations, public order; decency or morality; (ii) defamatory, obscene, pornographic, paedophilic, invasive of

¹ Ajit Mohan & Ors. v Legislative Assembly, NCT of Delhi AIR 2021 SC 3346.

² 2021 Annual Report, Internet Web Foundation (April. 04, 2023, 6:06 PM) <https://www.iwf.org.uk/about-us/who-we-are/annual-report-2021/>.

another's privacy including bodily privacy, insulting or harassing on the basis of gender, libellous, racially or ethnically objectionable, harmful to a child; (iii) a false information; (iv) violative of IPR, etc.”³ It also provides a robust complaint mechanism for the users of social media and over-the-top (OTT) platforms to address their grievances.

One of the new features that Rules 2021 provides is a prohibition on the publication of harmful content to children. Children are the most vulnerable because of their age and are at risk of exploitation. As has already been mentioned above that there is a surge in child sexual abuse apart from that there are also instances of situations where children even committed suicide because of the use of digital media. For example, the Blue Whale game also called a suicide game, wherein the creators seek out their players/victims who are in depression and send them an invitation to join. 50 tasks are allotted to selected “players” which must be accomplished within a 50-day period. Once the Players started playing the game they cannot stop it, they are coerced into completing the game, where they are brain-washed and dragged to commit suicide. The consequences of this game were so destructive that the SC passed an order for taking immediate measures to ban/block all sites linked with the Blue Whale online game or any other form of violent and immoral games similar in nature.⁴

PRE-2021 RULES TO GOVERN DIGITAL MEDIA

1. DIGITAL MEDIA ENTITIES ARE GOVERNED UNDER DIGITAL NEWS PUBLISHERS ASSOCIATION GUIDELINES

Digital Media entities are governed under Digital News Publishers Association guidelines (hereinafter referred to as DNPA Guidelines). The guidelines seek to make sure that its members shall follow the standards of digital publishing by (i) following the Constitution of the country and subjecting themselves to the domestic laws relating to the media; (ii) maintaining Accuracy, Transparency & Fairness; (iii) Taking down, deleting, or editing any new report or article; (iv) Respecting Intellectual Property Rights; (v) taking special care to be taken while reporting on sexual harassment in the workplace, child abuse, rape, etc; (vi)

³ Rule 3(1) (b) of the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021.

⁴ Sneha Kalita vs. Union Of India and Anr. MANU/SCOR/46460/2017

complying with Sections 67, 67A and 67B of the Information Technology Act, 2000 where applicable; (vii) providing Grievance Redressal Mechanism – The members shall appoint a grievance officer whose contact details are displayed on the website and who shall act within 36 hours of receipt of a complaint by an aggrieved.

2. THE INTERNET AND MOBILE ASSOCIATION OF INDIA

In 2019, the Internet and Mobile Association of India (hereinafter referred to as IAMAI) released the 'Code of Best Practices for Online Curated Content Providers, 2019 (hereinafter referred to as code 2019). This code prohibits the publication of any content which is prohibited under the law in the interest of the sovereignty and integrity of India, content that shows child pornography or encourages terrorism or other forms of violence against the state, or any content that has been banned for exhibition or distribution by online video service under applicable laws or by any court of competent jurisdiction. It was later substituted by the Self-Regulation of Online Curated Content Providers issued in 2020.

NEED FOR THE IT RULES, 2021

The fact that there were guidelines for the regulations of these entities even before 2021 makes it apparent that there were instances of inappropriate information on the internet. Moreover, in *Prajwala v UOI*, the Court ordered the UOI to frame guidelines to eliminate child pornography, rape, and gang rape imageries, videos, and sites in content hosting platforms and other applications. Therefore, to make a uniform guideline to regulate the content published on various digital media, IT Rules, 2021 was formulated. The pre-2021 guidelines viz. DNPA guidelines and the Code 2019 were discretionary in nature and are applicable to members who voluntarily want to subject themselves to these guidelines.

LEGALITY AND CONSTITUTIONALITY OF **THE IT RULES, 2021**

RULES 2021 ARE INTRA VIRES THE IT ACT 2000

The preamble of an Act states the intention of the lawmakers behind the legislation. The preamble of the Information Technology Act of 2000 in its preamble states:

“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 Bankers' Books Evidence Act, 1891 and the Reserve Bank of India Act, 1934 and for matters connected therewith or incidental thereto.”⁵

The preamble to the Act, 2000 states that the Act had been brought into force in order to provide legal recognition to transactions carried out by means of electronic communication which involve an alternative to paper-based communication and storage of information.

Apart from the two above-mentioned points which hint at the intention of the Act, 2000, is that the makers were careful enough to provide that the Act, 2000 shall also deal with matters connected/incidental to electronic communication.

Therefore, it is clear by virtue of the wording of the preamble that the Act, 2000 shall regulate the aspects which are beyond what the preamble mentions but are incidental to electronic communication.

Therefore, it would be fit to say that the essence of the Act, 2000 and the preamble to the Act, 2000 is very well incorporated in the IT Rules 2021; whereby the Rules 2021 intends to ensure proper redressal of disputes that arise out of the arena of the intermediaries.

THE IMPUGNED RULES 2021 ARE VIRES THE CONSTITUTION OF INDIA

Where any legislation or rule so enacted is in derogation to the fundamental rights (Part III) of the Constitution, it shall be void to the extent of such inconsistency. The same has been explicitly mentioned in Article 13 of the Constitution. Furthermore, if any legislation or rule so enacted is violative of Article 14 of the Constitution, the same shall result in making such legislation or rule unconstitutional.

⁵ Preamble of The Information Technology Act, 2000.

The IT Rules 2021 are consistent with Article 13 and 14 of the Constitution of India. Article 14 of the Constitution provides that the State shall not deny to any person equality before the law or equal protection of the laws within the territory of India.

The IT Rules 2021 under Rule 2(v) & 2(w) have classified intermediaries into significant social media intermediaries (SSMI) and social media intermediaries (SMI) respectively. In this relation, it is submitted that although a classification has been made into the intermediaries ie. SSMI and SMI, the genus for SMI & SSMI are only one, ie. Intermediaries (so mentioned in the Act, 2000). In this relation only a classification of intermediaries is made and that the same has already been provided in the Act, 2000. Thus, the IT Rules, 2021 have not in any way brought into effect any concept/entity poles apart from what the Act, 2000 in Section 2(1)(w) provides for. The Rules have merely made it specifically about the two subsets of intermediaries- SMI & SSMI, both of which have a direct & absolute nexus with the aspect of intermediary which the Act, 2000 already has provided.

In order to substantiate better that the IT Rules 2021 only provide for the classification of intermediaries and provide equal protection to both SMI & SSMI, it becomes crucial to take into consideration Rule 7 of the Rules 2021. The said rule talks about non-observance of the IT Rules, 2021 mentioned as follows:

“Where an intermediary fails to observe these rules, the provisions of sub-section (1) of section 79 of the Act shall not be applicable to such intermediary and the intermediary shall be liable for punishment under any law for the time being in force including the provisions of the Act and the Indian Penal Code.”⁶

Rule 7 mentioned above provides for liability in case of non-compliance or non-observance of the Rules, 2021 is in question. Rule 7 mentions the liability of an ‘intermediary’ and does not make the provision specific to an SMI or an SSMI. Had the Rule mentioned specifically the liability of an SMI or an SSMI, it could have been construed that the Rule differentiates between SMI or an SSMI. However, the same is not the case herein. Rule 7 provides the same liability for an SMI &

⁶ Rules 7 of the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021.

an SSMI. Therefore, it cannot be said that there is even an iota of providing unequal treatment to SMI or SSMI under the Rule 7 w.r.t. the aspect of equality before the law as provided under Article 14 of the Constitution of India.

IT RULES 2021 FOLLOWS THE PRINCIPLE OF REASONABLE CLASSIFICATION

The rules make a classification of intermediaries in SMI & SSMI, the genus of both is the same ie, intermediary as defined in Section 2(1)(w) of the Act, 2000. The IT Rules, 2021 do not coin anything in the ambit of SMI or SSMI which is distinct from what the Act, 2000 provides under the concept of the intermediary. Rules 2(v) & 2(w) do not transgress what has been already mentioned in Section 2(1)(w). Therefore, it cannot be said that the IT Rules 2021 fail to follow the principle of reasonable classification.

The Hon'ble Apex Court in *Transport & Dock Workers Union v. Mumbai Port Trust*⁷ has held that “*If a classification is conducive to the functioning of modern society, then it is certainly reasonable and rational.*” The Court has also held in *Khandig Sham Bhat v Agrl. ITO*⁸ that “*It is not the phraseology of the statute that governs the situation; but the effect of the law that is decisive.*”

The preamble of the Act, 2000 provided that the Act, 2000 was enacted to deal with matters connected or incidental to electronic communication which involves paperless communication & storage of information. Without this classification of intermediaries into SMI & SSMI, the impugned Rules, 2021 shall be inefficient & shall have effect merely on paper & not in reality. Without the classification, dealing with the matters of electronic communication (as aimed by the preamble of the Act, 2000) shall be nearly impossible. This is the very logic behind classification of intermediaries, that the purpose of the preamble to the Act, 2000 is served. Therefore, it cannot be said that there is no logic behind such a classification.

The very purpose of Rules 3 to 7 is to ensure due diligence by intermediaries & grievance redressal mechanism of the grievances of the intermediary users. This is one of the biggest reasons behind the classification of the intermediaries into SMI & SSMI. In case no such classification would

⁷ Transport & Dock Workers Union v. Mumbai Port Trust, (2011) 2 SCC 575.

⁸ Khandig Sham Bhat v. Agrl. ITO, AIR 1963 SC 591.

have been made, efficient & better grievance redressal of grievances arising out of digital space would be impossible.

In relation to the same, Rule 3 provides basic due diligence which is an obligation on all the intermediaries (including SSMI as well). Rule 4 provides for additional due diligence which by its nature is intended to provide for more enhances grievance redressal. The same obligates the SSMI to appoint a nodal contact person (apart from other obligations & appointment of Chief Compliance Officer & Resident Grievance Officer) for 24x7 coordination with law enforcement agencies.

It is a known fact that since SSMI has a huge user base, they tend to have greater & deeper effects on the lives of the users & the people. Thus, when grievance redressal of dispute arising out of an SSMI is in question, there is bound to be a more stringent, more efficient & deeper redressal mechanism. The same calls for greater & more elaborate obligations to be complied by the SSMI. Thus, it cannot be said that the impugned Rules 2021 do not follow reasonable classification for there needs to be heavier & more detailed grievance redressal considering the effect an SSMI has on the people, the gravity of the probable complaints, and the expected remedy.

CONCLUSION

There has been a considerable passage of time between the enactment of the IT Act, 2000, and the enactment of the impugned Rules, 2021. In these 21 years, there has been significant development in the digital space. The canvas of digital space has seen a significant change. The impact of the internet has increased and a plethora of social media platforms have mushroomed over time.

Although digital space & technology has developed rapidly, amendments to the Act, of 2000 have not happened at a similar pace as technology. Therefore, by way of delegated legislation, the legislature tried to address these on-ground situations & ensure that the delegated legislation provides an effective remedy when the Parent Act becomes inefficient.

The rapid developments in the digital space, the Legislature attempted by virtue of the IT Rules, 2021 to codify the grievance redressal mechanism & the working of intermediaries in the digital space. It is noteworthy to consider that had the legislature not taken such a course, there could have been chances of an absence of law; thereby resulting in lawlessness.