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- - Note - -

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India's Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021

-Tanishq Dev Kadam, student, Vivekananda Institute of Professional Studies.

Introduction:

The IT (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 notified by the Ministry of Electronics and Information Technology through a notification in February 2021¹ has brought some significant changes in terms of doubling down on due diligence and the consequences of non-compliance by the intermediaries, social media intermediaries and significant social media intermediaries.

The term 'Intermediary' refers to a third party that provides a platform for communication between two or more two parties. According to the Information Technology Act, 2000 — “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”²

Protection by Law: Safe Harbour:

Social Media Intermediaries by virtue of Section 79 of the Information Technology Act, are protected from incurring liability for any third-party data available or hosted on their platform i.e., in the event that any data of the third party that is utilizing the stage is infringing upon any law, the intermediary will not bring about any risk for same. This form of protection of the social media intermediaries is important as intermediaries like Facebook, Twitter, etc do not monitor the content uploaded by the users. In order to maintain the free flow of information and in order avail the protection envisaged under Section 79 of the Information Technology Act, an intermediary need to observe due diligence while discharging its duties and adhere to the guidelines made by the central government respectively.

¹ Notification dated, the 25th February, 2021 G.S.R. 139(E)

² Information Technology Act, 2000

Before the enactment of IT Rules 2021, IT (Intermediary Guidelines) Rules, 2011 were enacted. 2011 rules are now overridden by the 2021 rules.

New IT Rules 2021:

The IT Rules 2021 covers wide range of companies that come under the purview of the definition of the term 'Intermediary' given under Section 2 of the Information Technology Act and under the new 2021 rules, they are classified on the basis of their number of users in the following types:

- a. Social Media Intermediary: less than 50 lakh registered Indian users
- b. Significant Social Media Intermediary: more than 50 lakh registered Indian Users
- c. Publisher of news and current affair contents
- d. OTT platforms

This notification introduces certain rules regarding Due Diligence by the Intermediaries and Grievance Redressal Mechanism which are to be adhered to by the intermediaries, social media intermediaries & other significant intermediaries, and code of ethics which are to be adhered to by publishers of news and current affair content.

Government's Rationale Behind this Enactment:

The rules have been enacted with a view to empower the "ordinary user" of the social media platform against social media abuse, where the victim or the aggrieved user can seek redressal in a forum. IT Rules 2021 aims to establish a Grievance redressal system for the users of the social media intermediaries and OTT platforms which can offer timely redressal for grievances with the help of a Grievance Redressal Officer.

Any person having a grievance regarding the content published by publisher concerning code of ethics can register his/her grievance with the help of the grievance redressal mechanism established under rule 11 of the IT Rules 2021. The importance of the newly included provisions regarding establishment of a Grievance redressal mechanism originates from the acknowledgement that the "ordinary user" needs to be listened to and his/her grievances needs to be taken care of.

According to the rules a Resident Grievance Officer, a Chief Compliance Officer shall be appointed by the digital media and social media platforms. All the information regarding the same needs to be published by the all the social media platforms on their apps and web-based portals. The concerned platforms shall also explain the redressal mechanism in place and shall also assist the users in registering complaint regarding any digital content. The IT Rules 2021 also directs that the concerned complaint needs to be actioned upon within 15 days from the date of the receipt of acknowledgment of the complaint.

The government has addressed that the concern regarding the implication and consequences of the application of the IT Rules 2021 on the freedom of speech and expression is highly misdirected. That freedom of speech is still protected by the Indian Constitution.

In their letter to UN the Ministry of Electronics and Information Technology and Ministry of Information and Broadcasting explained that regarding the traceability of the first originator, it is important to note that the IT rules seek only for limited information. The letter further explained that only when the concerned information is already out in public circulation and is giving rise to violence or is encouraging any kind of sexual abuse or is in violation of any law, then only the intermediary is asked to trace the first originator of such information.³

Special care has been given on the idea to curb sexual offences against women and children. Since the rules now, are also applicable on online news portals, the government though these rules also attempt to eliminate fake news and misuse of social media.

Due Diligence Obligations:

According to the new rules, the Intermediary shall publish rules and regulations, user agreements, privacy policy, etc for the access or usage of its resources by any user on their web-based platforms, mobile application platforms, or both. The Intermediary shall also inform their users not to host, upload, modify any kind of data which is defamatory, infringes any copyright, is in violation of any law for the time being in force, etc.⁴

There is also a provision in the IT Rules 2021 that directs the Intermediary, on order, to provide information under its possession to the government agency that is empowered to investigate

³ <https://www.livemint.com/news/india/new-it-rules-designed-to-empower-ordinary-users-of-social-media-india-tells-un-11624182887737.html>

⁴ IT (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, R 3(1)(a)

for the purposes of prevention, detection, or prosecution of offenses for the time being in force, though it is provided that any such order shall be in writing stating clearly the purpose of seeking such information.⁵

It is also obligatory that upon receiving actual knowledge in the form of an order, from the government or an authorized agency that a piece of information hosted by them is unlawful or prohibited, the intermediary shall remove such information within 36 hours from the time of the receiving of the order.⁶ This, nevertheless, deprives the intermediary of a fair alternative in case they do not agree with the government's order, due to the lack of time that is given to the intermediary to go ahead with the government order.

However, no such order is required in cases where the complaint is made by an individual about sexual imagery or unlawful adult content exposing an individual or sexually graphic content. Here, the intermediary shall take all the reasonable practical measures to remove or disable access to such content which is hosted, published, or transmitted by it.⁷

First Originator Identification:

Essentially, for Significant Social Media Intermediary, one more obligation has been imposed which enables the government to identify the first originator of certain information if required by the virtue of an order under Section 69 of the Information Technology Act. Provided that the order shall be passed for the purposes of prevention, detection, investigation, prosecution of serious offenses, punishable with imprisonment for a term of not less than five years.⁸ However, the application of the above-mentioned rule might result in the expiration of the practice of providing end-to-end encryption of data that may be provided by the intermediary.

This complete process of identification of the first originator might put user's right to privacy into jeopardy for the reason that the end-to-end encryption is important as it provides the users and their recipients the confidentiality and safety regarding their data for example: text messages, images etc, from the moment the data was created by the user to the moment the data reaches the recipient.

⁵ IT (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, R 3(1)(j)

⁶ IT (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, R 3(1)(d)

⁷ IT (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, R 3(2)(b)

⁸ IT (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, R 4(2)

Non-Compliance: Consequences:

On the failure to follow the IT Rules 2021 and comply with the due diligence obligations, the intermediaries are disentitled from claiming safe harbour protection under Section 79 of the Information Technology Act. Consequentially, this would result in the intermediaries being charged for penal allegations and intermediaries also being liable for the data or information belonging to a third party.

Recent Developments/Judgements:

The **Press Trust of India** has challenged the IT Rules 2021, by approaching the Delhi High Court. The plea by the Press Trust of India argued that the government is attempting to govern the digital news through the new rules.

A bench led by Hon'ble Chief Justice D.N. Patel and Justice J.R. Midha issued a notice to the Ministry of Electronics and Information Technology and the Ministry of Information & Broadcasting on the petition.

The plea argued that the IT Rules 2021 are a step towards an era of “surveillance” and fear and that the IT Rules would compel the publishers to self-censor their content in order to escape the liabilities unlawfully set upon them by the new Information Technology Act, which all-together is a violation of the fundamental right.

PTI argued that the rules allowed the government to regulate digital news portals and infringe their freedom of speech and expression.⁹

On 25 May 2021, WhatsApp moved to the Delhi High Court challenging the constitutional validity of the IT Rules 2021. WhatsApp, contesting mainly Rule 4(2), argued in the light of the judgement in *Justice K S Puttaswamy vs Union of India*¹⁰, that requiring a social media intermediary to trace messages to its first originator would amount in breakage of the practice of end-to-end encryption and would undermine people's fundamental right to privacy.

⁹ <https://www.thehindu.com/news/national/pti-challenges-new-it-rules-in-delhi-hc/article35187469.ece>

¹⁰ (2019) 1 SCC 1

In a reply to this, the Ministry of Electronics and Information Technology of India clarified that such requirement is only in the case when the information of the first originator is required for prevention, detection, investigation, or prosecution of a serious offence related to sovereignty, the integrity of India, security of the state, offence relating to sexual abuse, rape, etc. The ministry argued that such requirement of the information of the first originator is the last resort attempt when other alternative measures become ineffective. Furthermore, such information can only be sought through.¹¹

Conclusion:

IT rules 2021 have brought some significant change to the social media world as we see it. The social media spaces are becoming more and more engraved in the life of an ordinary user, it has a socio-economic impact on everyday life. Considering the vast base of intermediaries and Significant Social Media Intermediaries, their significance cannot be overstated. Thus, arises a need to have rules and regulations that can regulate the tasks or processes that emerge on the bad side of the social media spectrum. However, the IT rules 2021 have raised concerns over their lack of consultation while formulating the rules. Also, concerns have been raised regarding the constitutionality of the rules due to which these have been challenged several times and currently are under Judicial Scrutiny. Freedom of speech and expression are the basic principles of democracy. However, no freedom is absolute, and is it bound to be restricted as prescribed lawfully. A complete balance has to be struck between the freedom of speech and the power to curb that freedom of speech so that harmony can prevail.

How the grievance redressal mechanism is utilized by the government and the intermediaries is still left to be seen. Also, it remains to be seen what kind of impact this tussle of government and social media giants would have on the users, on the whole, social media discourse, and on the psychological perspective of people regarding their privacy.

¹¹ <https://www.hindustantimes.com/india-news/we-respect-right-of-privacy-govt-on-whatsapp-s-challenge-to-it-rules-101622031271979.html>