



Jus Corpus Law Journal

Open Access Law Journal – Copyright © 2023 – ISSN 2582-7820

Editor-in-Chief – Prof. (Dr.) Rishikesh Dave; Publisher – Ayush Pandey

This is an Open Access article distributed under the terms of the Creative Commons Attribution-Non-Commercial-Share Alike 4.0 International (CC-BY-NC-SA 4.0) License, which permits unrestricted non-commercial use, distribution, and reproduction in any medium provided the original work is properly cited.

Passing of IT Rules 2021 - An Arbitrary Action of the Government

Sejal Birani^a

^aNirma University, Ahmedabad, India

Received 23=1 January 2023; *Accepted* 10 February 2023; *Published* 13 February 2023

*Today, social media is a significant facilitator for trade and business activities rather than merely a kind of pleasure. Additionally, it preserves the fundamental standards of information dissemination and provides a forum for the unrestricted expression of thoughts and opinions. Given the Fundamental Rights to Equality, Rights of Free Speech and Expression, and Right to Privacy, every citizen of India has a right to be treated equally before the law, freely express his opinions, and exercise his privacy while restraining any other from arbitrary interference in his life, respectively. It is correct that these rights are not absolute in nature, but is the government entitled to pass any legislation or rules arbitrarily capable of violating these fundamental rights in the name of these being not of absolute nature? This is a question to ponder upon. **The Information Technology (Intermediaries Guidelines and Digital Media Ethics Code) Rules, 2021** is one such example.*

Keywords: *equality, privacy, free speech, information, arbitrary.*

INTRODUCTION

This article critically analyses the Information Technology (Intermediaries Guidelines and Digital Media Ethics Code) Rules, 2021, which came into force on February 25, 2021. The web series **Tandav** created controversy and it insisted on legislation regulating the OTT platforms.¹

¹ Susan Zacharia, 'Critical Analysis Of Information Technology (Intermediary Guidelines And Digital Media Ethics Code) Rules 2021' (*Legal Service India*) <<https://www.legalserviceindia.com/legal/article-7198-critical->

Thus, the draught Intermediaries Rule 2018 was amended and the government introduced IT Rules 2021. The government has cited the **Prajawala case from 2018**, in which the Supreme Court stated that the government may create the required regulations to ban child pornography, rape and gang rape photos, videos, and websites on content hosting platforms and other applications. The stakeholders were not actively consulted when these rules were being developed. The issue of whether the government enacted it unanimously or unilaterally raises itself given the inadequate consultation and lack of a legislative process.

Furthermore, these rules, from their very initiation, have faced a lot of criticism from various cyber experts, OTT platforms, social media handles, opposition parties, and citizens. They have been claimed as violative of the fundamental rights of citizens. The controversy surrounding these new regulations mandates that we understand them in the most accurate way possible. This will not only help us to understand its provisions in detail but will also show how the government has tried to bypass its authority to regulate digital media at the cost of the fundamental rights of the citizens. The said rules have come into force following the provisions of **Section 87(1)², Section 87(2)(z)³, and Section 87(2)(zg)⁴ of the IT Act 2000** as mentioned below⁵-

“**Section 87.** Power of the Central Government to Make Rules. - (1) The Central Government may make rules to carry out the provisions of this Act, which must be published in the Official Gazette and the Electronic Gazette”.⁶

“**Section 87(2)(z).** The procedures and safeguards for blocking access by the public under subsection (3) of section 69A”⁷.

[analysis-of-information-technology-intermediary-guidelines-and-digital-media-ethics-code-rules-2021.html](https://www.mca.gov.in/intermediary-guidelines-and-digital-media-ethics-code-rules-2021.html)>

accessed 25 August 2022

² Information Technology Act 2000, s 87(1)

³ Information Technology Act 2000, s 87(2)(z)

⁴ Information Technology Act 2000, s 87(2)(zg)

⁵ 'Home' (Ministry of Information and Broadcasting, Government of India)

<[https://mib.gov.in/sites/default/files/IT\(Intermediary%20Guidelines%20and%20Digital%20Media%20Ethics%20Code\)%20Rules,%202021%20English.pdf](https://mib.gov.in/sites/default/files/IT(Intermediary%20Guidelines%20and%20Digital%20Media%20Ethics%20Code)%20Rules,%202021%20English.pdf)> accessed 25 August 2022

⁶ Information Technology Act 2000, s 87

⁷ Information Technology Act 2000, s 87(2)(z)

“**Section 87(2)(zg)**. The guidelines to be observed by the intermediaries under sub-section (2) of section 79”.

VIOLATION OF ARTICLE 14 OF THE CONSTITUTION OF INDIA

The said rules are violations of the right to a free hearing or "**audi alteram partem**," an institutional facet of Article 14.⁸ The Secretary of the Ministry of Information and Broadcasting has the authority to order the suspension of online content to individuals, publishers, or intermediaries hosting such information without providing them with a chance to be heard. The authority to pass this order is given by the Oversight Mechanism (level III) under Section 13, Chapter IV of the IT Rules, 2021. An unspecified reason for the blocking of the content(on OTT) and terming it an "emergency" indicates ambiguity in the procedure and how rules have been specified. As a result, this provision violates the concerned person's right to equal protection under the law. In *Anwar v the State of Jammu and Kashmir (1970)*, the Supreme Court ruled that the person who would be impacted must have a fair opportunity to be heard and that the hearing must be sincere.

The aforementioned regulations also go against the **Rule of Law and the idea of Natural Justice**. Anything arbitrary by definition violates Article 14 of the Indian Constitution, according to the Rule of Law. The aforementioned rules also go against the idea of natural justice. Natural justice is "the minimum protection of the individual's rights against the arbitrary procedure that may be adopted by a judicial, quasi-judicial, or administrative authority while making an order affecting those rights," according to the definition given by the courts in the case of **Canara Bank v VK Awasthy (2005)**⁹. According to the ruling in **Rajasthan State Road Transport Corporation v Bal Mukund Bairwa (2009)**¹⁰, if the standards of natural justice are not followed, it constitutes a violation of Article 14 unless it has been expressly permitted (established by the Supreme Court in the case of **H.L. Trehan v UOI**¹¹). Any arbitrary behaviour can be viewed as negating equality. The fundamental demands of Article 14 are reasonability and fairness. They fall short

⁸ Constitution of India 1950, art 14

⁹ *Canara Bank v V K Awasthy* 2005 (6) SCC 321

¹⁰ *Rajasthan State Road Transport Corporation v Bal Mukund Bairwa* (2009) 4 SCC 299

¹¹ *HL Trehan v Union of India* (1989) 1 SCC 764

of the reasonability test due to the government's arbitrary nature of power and the rules' ambiguity. How much power these rules give the intermediaries to control digital media is unclear. The said rules only have a provision to regulate the digital medium and not the print media. Influential and wealthy media outlets can publish information that cannot be published in digital or print media. Also, **Section 2(1)(t) of the IT Rules** does not extend to replicating e-papers of newspapers. These are some of the factors that add to discrimination.

VIOLATION OF ARTICLE 19 OF THE CONSTITUTION OF INDIA

Article 19(1)(a)¹² implicitly includes freedom of the press, which is integral to preventing the government from turning into a totalitarian approach. The various content depicted by the intermediaries of these OTT platforms is directed towards the prevailing social evils in our society, be it evil practices, traditions, actions of political parties, etc. Their avoidance is very much possible if they are widely disseminated, illustrating their negative impact on society.

Freedom of the press is a basis for a democratic institution like India, as held in the cases of **Romesh Thappar v the State of Madras (1950)**¹³ and **Shreya Singhal v UOI (2015)**¹⁴. According to the rules, the intermediaries are prohibited from hosting "illegal information. This again illustrates ambiguity. The subjective nature of the phrase "unlawful information" may allow the government to label any form of opposition or criticism of its policies or anti-national actions as illegal. This can lead to autocracy.

VIOLATION OF THE RIGHT TO INFORMATION-

The Supreme Court formally recognised the Right to Information and the Right to be Informed as fundamental rights in the case of **UOI v Association for Democratic Reforms (2002)**¹⁵ and **Anuradha Bhasin v Union of India (2020)**¹⁶. If this information is used as the foundation for

¹² Constitution of India 1950, art 19(1)(a)

¹³ *Romesh Thappar v the State of Madras* (1950) AIR 124

¹⁴ *Shreya Singhal v UOI* AIR (2015) SC 1523

¹⁵ *UOI v Association for Democratic Reforms* (2002) AIR 2112

¹⁶ *Anuradha Bhasin v Union of India* (2020) 3 SCC 637

criticism of the government's policies and activities, the consumers of this information are very likely to receive altered information.

TECH-BASED MEASURES TO IDENTIFY "UNLAWFUL INFORMATION"

Section 4(4) of the Rules empowers the social media intermediary to employ "technology-based measures," thus giving the intermediary the power to employ artificial intelligence tools. The idea of artificial intelligence is still being developed. Its efficiency is challenged in filtering content that uses regional languages.¹⁷ The execution of it imposes a significant technical and financial strain on the businesses. Moreover, the AI tools themselves are coded by human beings and are full of biases like they are. Is it justified to rely on these tools to determine which speech or opinions are unlawful in nature and thus violate integrity, public order, national security, and so on?

VIOLATION OF THE RIGHT TO ACCESS THE INTERNET-

The Supreme Court in the **Anuradha Bhasin case** stated the right to access the Internet as a fundamental right under Article 19. The restrictions imposed on viewing various content on the internet violate this right. Also, blocking or deleting the accounts or the content of intermediaries denies them their fundamental right to access the Internet.

VIOLATION OF ARTICLE 21, ESPECIALLY THE RIGHT TO PRIVACY-

According to **Section 3(j) of the IT rules**, intermediaries are required to hand over the personal information of users and their data within 72 hours of receiving written orders from the government, thereby violating their right to privacy. The intermediaries have no free will to decide on the matter of sharing the personal data of users. By **Section 3(1)(h) of the IT rules**, intermediaries have the authority to keep users' information for 180 days if they receive a request for it from a recognised agency for investigative purposes. The hitch is that even if the aforementioned individual has deactivated his or her account, this data may still be accessible i.e. the data can be preserved. The ambiguity in the surveillance procedures combined with the

¹⁷ Susan Zacharia (n 1)

absence of any law relating to data privacy in India makes this approach detrimental to users' privacy.

Furthermore, although the rules specify that the government would direct intermediaries to identify the first originator of the information and would not view the entire content within it, the government can still use these rules in synergy with the IT decryption rules to decrypt the information. **IT (Procedure and Safeguards for Information Interception, Monitoring, and Decryption) Rules, 2009**. Mass surveillance cannot be used to mask the problems relating to national security. Thus, the government's claiming national security and decrypting each of the messages is not justifiable.¹⁸

Additionally, **Rule 5(2)(17)** places an extra duty on significant social media intermediaries engaged in messaging services to help law enforcement organisations locate and track the originating source of any controversial or problematic information. According to **Section 69 of the rules**, this can only be carried out through an order from a competent court or the relevant body. This authority may only be used to prevent crimes that pose a threat to the state's integrity or security or that encourage the commission of rape, child sexual abuse, or other serious crimes. Such a government approach to regulating OTT platforms and the entire digital media is a serious threat to the data principles' data, infringing on citizens' right to privacy. Also under **Section 7**, if for any reason the intermediary does not follow the rules, Section 79 (1) of the IT Act 2000¹⁹ guaranteeing the immunity of the intermediary (also known as the "safe harbour provisions") stands cancelled and they can face action under the Indian Penal Code, 1860. The privacy of the user's data is at complete risk.

ANALYSIS AND CONCLUSION

It can thus be concluded that the government, through these rules, is trying to bypass its authority to regulate and control digital media, including OTT platforms. Implementation of

¹⁸ Manshi Sinha, 'An Extensive Critical Analysis of draft, IT Rules 2021' (*Lexlife India*) <<https://lexlife68840978.wordpress.com/2021/05/06/an-extensive-critical-analysis-of-draft-it-rules-2021/>> accessed 25 August 2022

¹⁹ Information Technology Act 2000, s 79 (1)

these rules violates the abovementioned fundamental rights of the users and intermediaries. In a country where citizens still do not have a data privacy law, rules framed in the absence of open and public debate, parliamentary study, and over-regulation are very likely to be counterproductive.²⁰

Tracking the originator of the information and decrypting the messages in the name of mass surveillance are major and direct attacks on the right to privacy of the users. The government, in a way, has compelled the intermediaries to provide the personal sensitive data of the users within the said time frame on the demand of the governmental authorities. This mandatory provision makes the intermediaries themselves breach their terms and conditions about the privacy of the data of their users. Furthermore, how can we trust that the mechanisms used for data collection by the government cannot be hacked and manipulated by a third party through illegal means? The intermediaries as per the regulations may share the data, but the user may become the victim of various offences if his data gets into the wrong hands. The government may have some valid reasons to defend the passing of these rules, but by critically analysing the provisions of these rules, one can infer that the cons related to these rules supersede their pros, thus indicating that we should at least postpone their implementation for a period until we are not in an efficient position to implement them.

²⁰ Ram Manohar, 'Critical Analysis of New IT Rules 2021' (*ForumIAS Blog*, 3 March 2021) <<https://blog.forumias.com/critical-analysis-of-new-it-rules-2021/>> accessed 25 August 2022