

Policing the internet

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Recently released guidelines giving the government power over social media and news portals are being challenged in court. Freny Patel asks experts whether the new rules are a case of overreach

The release of “draconian” rules in the guise of guidelines under the Information Technology Act, 2000, came as a shock to many. These enhance the government’s power to control how the internet is accessed. The fallout of this has led to a slew of lawsuits challenging the government for violating constitutional rights.

When Information Technology Minister Ravi Shankar Prasad announced the Information Technology (Guidelines for Intermediaries and Digital Media Ethics Code) Rules, 2021, on 25 February, he said they aimed to empower users of social media against abuses and to put a check on fake news.

But the legal community and the digital world have a more critical view of the rules. Contrary to the government’s claim of wanting a “soft-touch oversight mechanism”, lawyers *India Business Law Journal* spoke to say the rules give unprecedented powers to the executive to regulate and control social media, streaming platforms, and other digital content providers, including news portals. The oversight mechanism enables ministries to decide what content can be banned should it be deemed to impact the sovereignty and integrity of the country or threaten national security.

The rules are “in violation of the right to privacy and manifestly arbitrary”, says Rahul Narayan, an advocate on record at the Supreme Court. Narayan, who has worked on issues relating to

digital rights, privacy and technology law, and intermediary liability, says that these are probably the most stringent regulations in the world.

“If the problem the guidelines was supposed to address was that the intermediaries were too powerful, I don’t think making the government even more powerful is an answer from the consumer point of view,” says Narayan.

Within weeks since the rules were notified, online news organisations such as The Wire, Live Law and Kannada news portal Pratidhvani filed petitions in various high courts, challenging the legal basis of the rules and their applicability to news entities. They claimed that they do not fall under the purview of the rules because they are not intermediaries and the parent legislation, the IT Act, does not govern the news media, which comes under the purview of the Press Council Act.

Senior advocate Nitya Ramakrishnan, representing The Wire, told the [Delhi High Court](#): “We do not say news media is beyond regulations. It has to be done by way of a statute dedicated only for the news media.”

“The basis of notifying the rules are provisions within the IT Act, which do not have any direct bearing and have no correlation whatsoever to the nature and type of control that is sought to be exercised on news and current affairs content,” says Bagmisikha Puhan, an associate partner at TMT Law Practice.

Digital media and news fall within the purview of the Ministry of Information and Broadcasting and not the Ministry of Electronics and Information Technology under the Allocation of Business Rules, 1961. “Clubbing news entities under the new rules may therefore be an overreach by the IT ministry and exceed the scope of the parent legislation,” Jyotsna Jayaram, Bengaluru-based partner and part of the TMT practice group at Trilegal, points out.

Puhan agrees and adds that the Allocation of Business Rules, 1961, was last amended in November 2020 when the powers and jurisdiction to regulate digital/online media was transferred to the Ministry of Information and Broadcasting.

Why news?

The new rules have initially attracted more attention from digital news companies probably because “when it comes to news, there is a stronger emphasis on freedom of expression”, says Jayaram. “There cannot be an executive body overseeing content and determining whether it should be put out for consumption by the public,” she says.

Concerns that the government could misuse these rules and put a gag on the media are not unfounded. The state government of Manipur jumped the gun and directed a local online publication, The Frontier Manipur, to produce documents to prove it complied with the new rules after they were notified. It was only after the Ministry of Information and Broadcasting warned the state government that only the ministry was empowered to demand such documentation that the notice was withdrawn.

“All the challenges [to the rules] raise significant issues of constitutional law, particularly on free speech based on the overly broad categories of content that can be required by the state to be taken down and the reduced timelines for compliance,” says Narayan.

The petitions have raised significant issues of administrative law, saying that the 2021 rules go beyond the powers of the IT Act, which is the parent legislation. “The petitions argue that the blocking provisions violate the letter and spirit of the Supreme Court’s Shreya Singhal judgment and are, further, manifestly arbitrary,” says Narayan.

The constitutionality of the intermediary guidelines shall be decided in the courts, adds Narayan.

Live Law’s challenge before the Kerala High Court is very substantive while the challenge of The Wire is limited to the provisions dealing with online news agencies.

The government could be asked to issue these regulations under the right ministry because only the Ministry of Information and Broadcasting has the right to regulate news, TMT Law’s Jayaram says.

“In addition to the challenges on the jurisdiction, it remains to be seen whether the broad powers of the government concerning decision-making over the content and the takedown of content under the IT Rules will stand a constitutional challenge on the grounds of fundamental rights violations,” Jayaram surmises. Digital delivery of news has drawn the attention of the government of late. Recent **foreign direct investment** restrictions are another demonstration of the government’s intent to regulate news over digital media, Jayaram says. Therefore, it seems unlikely that these requirements will be done away with, she explains.

Possible trigger

The farmers’ protests could have prompted the government to release the new rules under the IT Act after it clashed with Twitter when the microblogging site refused to remove posts by a number of activists and politicians. The US social media platform protested saying the

move was against freedom of speech and expression. But was forced to give in when its employees were threatened with jail time.

The focus of the new rules is less on due diligence and more on the redistribution of power favouring the government, a non-profit organisation, Access Now, said in a statement.

Its Asia-Pacific policy director, Raman Jit Singh Chima, feared that the mandates under the new rules would encourage internet platforms to over-censor content, require dangerous and unproven AI-based content regulation tools, retain vast amounts of user data for handing over to the government, and undermine end-to-end encryption crucial for cybersecurity and individual privacy.



Jyotsna Jayaram

Partner
Trilegal

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What next?

Social media platforms might also end up challenging the government should discussions fail, largely stemming from the traceability requirement under the new rules. Social media companies would need to capture and store sizeable amounts of information, which in turn would increase the risk of data breaches.

WhatsApp has said in the past that its end-to-end encryption technology “is absolute” and would be broken if it had to disclose the name of the originator of a message.

Narayan is sceptical whether “the originator requirement or the automated filtering requirement can be complied with without damaging end-to-end encryption, which damages security”.

The reduced timeframe to take down content and the stringency of the procedures may mean that platforms will sooner take down first rather than contest any order, Narayan says. “The mandatory requirement to retain data and metadata for a long stretch is violative of

privacy, particularly considering that India still does not have a serious **data protection** law in place and no clear law on surveillance at all,” he adds.

There is an urgency for the rules to be amended because they would “significantly alter the experience of users and intermediaries in a way that diminishes security, freedom and privacy”, says Narayan.

While the government is unlikely to withdraw the rules, it could remove their application to news from streaming platforms, which is exactly what the petitions have demanded, says Jayaram.

Access Now, along with nine other non-profit organisations, has called for the Indian government to stop “digital authoritarianism” and exerting pressure on social intermediaries.

The rules explained

The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, which was notified on 25 February and framed under the Information Technology Act, 2000, replaced the 2011 Rules.

Though the IT Act is under the purview of the Ministry of Electronics and Information Technology, the new rules aimed at regulating social media, streaming platforms and digital media, will be jointly administered by it and the Ministry of Information and Broadcasting. The latter will administer the code of ethics, procedure and safeguards pertaining to digital media. Here are some of its key features:

Traceability:

Intermediaries need to disclose the originator of a message should it jeopardise India’s sovereignty or security if ordered by the court or the government.

Removing/taking down content:

The process to remove/take down offending content by an intermediary could be voluntary, or based on a complaint or grievance, or following a court order or government notification.

Three-tier grievance mechanism:

Intermediaries and digital media need to set up a three-tier mechanism to address

complaints regarding content, which includes an internal grievance officer, a regulatory body headed by a retired judge and an inter-ministerial committee.

Significant social intermediaries:

Appointment of a chief compliance officer to adhere to the rules, a grievance officer to deal with the redressal mechanism and a nodal contact person to coordinate with law enforcement agencies. And the monthly publication of a compliance report detailing complaints received and action taken.

Content rating system:

Publisher of online curated content needs to display classification rating based on context, theme, impact and target audience. The intent behind the rating system is to allow a user to make an informed decision before watching the programme.

It is alarming that censoring the internet user base in the world's largest democracy and curtailing the rights of individuals to free speech and liberty online is increasingly a policy priority for the Indian government, Access Now's Chima said.

The new rules need to align with international practices as they govern international streaming platforms and other digital media. "Otherwise, international players will have to reclassify global content to comply with the 2021 IT Rules," says Krrishan Singhania, managing partner and founder at [K Singhania & Co.](#)

This would increase the compliance burden and investment costs for international platforms and could deter them from coming to India, Srishti Singhania, senior associate at [K Singhania & Co](#) points out. The rules need to be compliance-friendly if the nascent digital media industry is to be given a further boost, she says.



Rahul Narayan
Advocate on record
Supreme Court

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Should the courts rule that the rules do not conform with the IT Act, parliament may need to amend the act to empower the government to issue rules that can regulate all forms of digital media, including social media, streaming platforms and news portals, says Singhania.

Afreen Fazal, an associate at **K Singhania & Co**, says that the government “needs to hold more fruitful dialogue with stakeholders”. While regulations are needed to guard against fake news or content that could hurt religious sentiments, “there cannot be over-regulation”, she says. A balance can only be struck when the government has heard the concerns raised by stakeholders, she adds.

This is just the start. The much-awaited Personal **Data Protection** Bill, with some radical proposals including data localisation, not to mention a cybersecurity law, is in the offing, and would further decide how internet players are allowed to operate.

