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INTRODUCTION

It gives us great pleasure to bring out the first edition of a technology newsletter, the first of what we hope will be a series of newsletters that discuss recent developments in technological advances or milestones or events. As lawyers, we enjoy delving into the legal nuances and implications of technological changes and analysing their impact on our clients and their activities. It is said that law always lags behind technological advances and there could be some truth behind such statement, but there is no reason for lawyers to lag behind technological advances.

The Argus Technology Newsletter is not meant to be a substitute for your regular technology periodical. Instead, we hope and promise to offer a lawyer's insights into technological change and innovation.

Argus Partners has developed a strong and a robust technology and data privacy practice, which spans transactional advisory, corporate and regulatory advisory as well as contentious matters and disputes. Whilst physically the attorneys are based out of our Mumbai, Delhi & Bangalore offices, the team is servicing clients across the globe on Indian legal issues in technology and data privacy.

Petitions Challenging Part III of the Information Technology (Intermediary Guidelines) Rules, 2021

The Ministry of Electronics and Information Technology of India, Government of India, notified the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 ("IT Rules"), on February 25, 2021.

The IT Rules are applicable to all "intermediaries" sans relation to their user base, or the content posted on their platform. The IT Rules are split into two sections based on their applicability. Part II is applicable to intermediaries, while Part III is applicable to publishers of news and current affairs and publishers of online content. Such publishers are required to adhere to a Code of Ethics provided in the IT Rules.

Following this, the provisions of IT Rules regulating digital news media and OTT platforms and the Code of Ethics have been challenged by certain providers of news and current affairs content such as *The Wire*, *LiveLaw* and *The Quint* in various High Courts in India. Subsequently the Central Government sought a transfer of all these petitions to the Supreme Court ("SC") to be heard together for the sake of uniformity in interpretation of the challenged provisions. However, in the interim, the following cases continued to be heard in the High Courts:

1. Kerala High Court: Live Law Case

On the March 10, 2021, the Kerala High Court issued a notice restraining the Centre from taking coercive action against Live Law Media Private Limited, which owns a legal news portal, for any non-compliance with Part III of the IT Rules as they were the publishers of law reports and legal literature.

2. Bombay High Court: The Leaflet Case

The Bombay High Court on August 14, 2021 stayed Rule 9(1) of the IT Rules which required digital news media and online publishers to follow the "Code of Ethics" prescribed within the IT Rules and Rule 9(3) of the IT Rules which established a three-tier grievances redressal structure. The Court observed that the pertinent provisions which were challenged infringe the fundamental right to freedom of speech under Article 19(1)(a) and also go beyond the aims and provisions of the Information Technology Act, 2002.

3. Delhi High Court: Foundation for Independent Journalism

The Delhi High Court on June 28, 2021 refused to pass any order in favour of the digital news portals seeking a stay on the applicability of the IT Rules on digital news media. The Bench opined that the notice published by the Central Government on May 28, 2021 requiring digital portals to comply with the IT Rules was merely for the implementation of the IT Rules.

4. Madras High Court: Digital News Publishers Association

The Madras High Court issued notices to the Ministry of Electronics and Information Technology and Ministry of Information & Broadcasting on June 23, 2021 pursuant to a petition filed by the Digital News Publishers Association, a 13 (thirteen) member collective of the nation's biggest news media companies. The petition challenged the IT Rules on the basis that they violate Articles 14, 19(1)(a) and 19(1)(g) of the

Constitution of India. On September 16, 2021, the Madras High Court observed that the Additional Solicitor General had acknowledged that the order passed by the Bombay High Court (see above) would have a pan-India effect. The Court also observed that, “*prima facie, there is substance in the petitioners' grievance that an oversight mechanism to control the media by the government may rob the media of its independence and the fourth pillar, so to say, of democracy may not at all be there*”. In its interim order, the Madras High Court also noted that any action taken citing Rules 3 and 7 of the IT Rules during the interregnum would have to abide by the result of the petitions and further orders therein.

Internet Suspension Without Following Due Process

In the wake of [recent unrest and violence](#), the Meghalaya Government [suspended mobile internet services](#) for a period of 48 hours in four districts, with the objective of maintaining public order. Suspension of internet services was announced by the Home (Police) Department, Meghalaya Government through a [notification](#), dated August 15, 2021, under [Section 5\(2\)](#) of the Indian Telegraph Act, 1885 (“[Telegraph Act](#)”) read the Temporary Suspensions of Telecom Services (Public Emergency or Public Safety) Rules, 2017 ([Suspension Rules](#)”).

More recently, the Haryana Government suspended telecom services in five districts for a period of 24 hours, through an [order](#) dated September 6, 2021, under Rule 2, Suspension Rules. This order was issued in mere **anticipation** of public disorder during planned farmers' protests.

Resorting to internet bans for addressing breaches of public peace and public disorder has become [commonplace](#) in India, with the Meghalaya Government alone banning mobile internet services for over [600 hours](#) since 2018. However, despite clear directions from the Supreme Court (discussed below), internet bans are often implemented without adhering to prescribed principles and safeguards.

1. Law Governing Internet Suspension

Under Indian law, the Telegraph Act read with the Suspension Rules legitimise issuance of blanket orders for suspension of telecom services (including the internet), by both the Central and State Governments. Such orders must conform to Section 5(2), Telegraph Act, which permits their issuance only upon occurrence of a “*public emergency*” or “*in the interest of public safety*”. Further, these orders must also adhere to the principles postulated by the Supreme Court in *Anuradha Bhasin v. Union of India*, [(2020) 3 SCC 637], (“[Bhasin](#)”), regarding restrictions on internet services.

In *Bhasin*, the Supreme Court formally endorsed the ‘doctrine of proportionality’ as a standard for assessing the validity of restrictions on internet services, prescribed procedural safeguards for the issuance of such restrictions, and recognised the right to access the internet as a derivative fundamental right. Salient aspects of the *Bhasin* ruling, relevant for this discussion, are as under:

- (a) **Endorsement of the ‘proportionality’ standard:** Orders suspending internet services curtail free speech, and therefore, must be proportionate. To ensure proportionality, such orders should be: (i) issued for a legitimate goal; (ii) necessary for achievement of the goal; and (iii) the “*least restrictive alternative*” available for achieving the goal. Further, the “*territorial and temporal*” scope of such orders/ restrictions are important factors to assess their proportionality.

- (b) Source of power to suspend internet services: Prior to 2017, directions for internet suspension were generally issued under [Section 144](#) of the Code of Criminal Procedure, 1973 (“**CrPC**”), which empowers Magistrates to pass orders for preventing public nuisance. However, the Court noted the position of law has changed since 2017, with the passage of the Suspension Rules, thereby tacitly finding that internet suspension orders should no longer be issued under Section 144, CrPC.
- (c) Procedural safeguards: The Court recognised that the Suspension Rules already provide certain safeguards to prevent misuse or arbitrary exercise of the power to suspend telecom services, including: (i) issuance of reasoned suspension orders; and (ii) post-facto ratification of such orders by a review committee, constituted under the Suspension Rules. In addition to these, to ensure greater transparency, the Court read-in additional safeguards: (i) orders suspending telecom services including the internet, should be made publicly available to enable affected persons to challenge them; (ii) internet suspension orders, issued under the Suspension Rules, must be temporary and cannot operate indefinitely; and (iii) the review committee must conduct a periodic review of suspension orders **every seven working days**, to determine their necessity.

2. Need for Better Implementation of the Law

It is a [settled law](#) that the freedom of speech includes, not just the right to express oneself, but also the ‘right to be informed’. Complete shutdowns of internet services curtail both facets of this fundamental right, *first*, by restricting citizens’ ability to circulate ideas online; and, *second*, by limiting the sources from which they can access essential information. With the increasing digitisation of healthcare, education and employment, on account of the global COVID-19 pandemic, the ability to exercise the freedom of speech, to the fullest extent permissible under law, has become vital. It is, therefore, imperative for concerned governmental authorities to thoroughly assess the necessity of complete telecom/ internet bans and actively explore less restrictive alternatives for addressing situations affecting public order. These alternative measures could, *inter-alia*, include:

- (a) Blocking public access to specific pieces of controversial online content/ URLs under Section 69A of the Information Technology Act, 2000 read with the Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules, 2009; or
- (b) Blocking access to specific websites, such as social media platforms, that are actively being used to instigate violence and breaches of public peace. Incidentally, such selective social media ban has been [previously employed](#) by the Jammu & Kashmir government.

Further, since complete internet bans imposes a ‘prior restraint’ on free speech, it is crucial that they be imposed only in exceptional circumstances, where apprehended danger to public interest is “[real and imminent](#)”, and only ‘[incitement and not advocacy](#)’ is sought to be curbed. Tested against these principles, the suspension orders discussed above (especially the one passed by the Haryana Government), appear invalid. Specifically, the Haryana order apprehends “*disruption of public utilities and safety, damage to public assets & amenities*” due to “*spread of inflammatory material and false rumours*” online. Such vague speculation, unsupported by facts justifying the territorial and temporal scope of the order, does not establish the ‘necessity’ behind its issuance, rendering the order constitutionally infirm.

Additionally, pre-existing procedural safeguards stipulated in the Suspension Rules and additional safeguards read-into the rules by the *Bhasin* verdict, must be strictly complied with before issuance of internet suspension orders. Particularly, authorities must ensure that such orders are made publicly available to enable affected individuals to challenge them, if they are perceived as invalid. Pertinently, the Haryana order (discussed above) has still not been uploaded on the state government's website, and is only accessible on third party platforms and social media.

Drone Rules 2021 – An Analysis

The Indian government has promulgated the Drone Rules 2021 ("**Drone Rules**") to be effective from August 25, 2021, after a three-week period of consultation. The Drone Rules 2021 supersede the Unmanned Aircraft System Rules, 2021 ("**UAS Rules**"), which had been made effective in March 2021. Compared to the UAS Rules, the Drone Rules are a lot more liberal and require fewer licenses from drone operators. Further, the Drone Rules make it easier and cheaper to own and operate drones in India, as compared to the UAS Rules.

1. Applicability

The Drone Rules apply to all persons owning or possessing, or engaged in leasing, operating, transferring or maintaining an unmanned aircraft system in India as well as to all unmanned aircraft systems that are registered in India or operated in or over India. The Aircraft Rules, 1937 have been disappplied to unmanned aircraft systems unless they exceed 500 kilograms. The UAS Rules disappplied the Aircraft Rules, 1937 only if the unmanned aircraft systems did not exceed 300 kilograms.

2. Categories of Unmanned Aircraft Systems

The Drone Rules categorise unmanned aircraft systems into three categories, namely aeroplanes, rotorcrafts and hybrid unmanned aircraft systems. The aeroplane, rotorcraft and hybrid unmanned aircraft system are further sub-categorised remotely piloted aircraft systems, model remotely piloted aircraft systems and autonomous unmanned aircraft systems.

On the basis of weight, unmanned aircraft systems are classified into nano unmanned aircraft system that weigh not more than 250 grams, micro unmanned aircraft system that between 250 grams to 2 kilograms, small unmanned aircraft system that weigh between 2 kilograms to 25 kilograms, medium unmanned aircraft system that weigh between 25 kilograms to 150 kilograms and large unmanned aircraft system that weigh more than 150 kilograms. Payload is to be taken into account for determining the applicable category.

3. Digital Sky Platform

An online platform called the "digital sky platform" will be hosted by the Directorate General of Civil Aviation, for various activities related to the management of unmanned aircraft system activities in India. The digital sky platform will be a secure and scalable platform that supports drone technology frameworks such as NPNT (no permission, no take-off) and will be designed to enable flight permissions digitally and manage unmanned aircraft operations and traffic efficiently.

4. Licence to Fly

No person shall operate an unmanned aircraft system without first registering it on the digital sky platform and obtaining a unique identification number. An individual shall be eligible to obtain a remote pilot licence, if he is not less than eighteen years of age and not more than sixty-five years of age, has passed class tenth examination or its equivalent from a recognised Board and has successfully completed such training as may be specified by the Director General, from any authorised remote pilot training organisation. Any individual, who desires to obtain a remote pilot licence for any category, sub-category or class of an unmanned aircraft system, or a combination thereof, has to complete the training specified by the Director General for such category, sub-category or class, and pass the tests conducted by the authorised remote pilot training organisation. A remote pilot licence shall remain valid for a period of ten years. No remote pilot licence is required for operating a nano unmanned aircraft system or a micro unmanned aircraft system for non-commercial purposes. The UAS Rules did not provide these two exemptions.

5. Exceptions for Research, Development and Testing

Research and development organisations and educational institution under the control of, or recognised by the central or any state government, start-ups recognised by the Department for Promotion of Industry and Internal Trade, authorised testing entities and unmanned aircraft system manufacturers with GST registration do not require a type certificate, unique identification number, prior permission or remote pilot licence for operating unmanned aircraft systems for research, development and testing purposes. The UAS Rules did not provide these exemptions.

6. Airspace Map

The Central Government is required, within 30 days of the date of notification of the Drone Rules, to publish on the digital sky platform, an airspace map for unmanned aircraft system operations segregating the entire airspace of India into red zone, yellow zone and green zone, with a horizontal resolution equal or finer than 10 meters. The airspace map for unmanned aircraft system operations shall be so designed as to be programmatically accessible through a machine-readable Application Programming Interface (API) and interactive so that unmanned aircraft system pilots shall be able to plot their proposed flight plan and easily identify the zone within which it falls so as to assess whether or not they need to make an application for prior approval. Before commencing an unmanned aircraft system operation, a remote pilot shall mandatorily verify the digital sky platform for any notification or restriction applicable to unmanned aircraft system operations in the intended area of operation. No person shall operate an unmanned aircraft system in a red zone or yellow zone without prior permission.

7. Putting Safety and Security First

Carrying or transporting arms or ammunitions or explosives or military stores on any unmanned aircraft is prohibited, except with the written permission of the Central Government. Unmanned aircraft systems are required to remain clear of all manned aircrafts and to never violate the right of way of any manned aircraft.

8. Prior Security Clearance Not Required

The UAS Rules had required applicants to obtain security clearance before registering a drone or applying for a licence. The Drone Rules have done away with this

requirement.

9. Mandatory Safety Features

The Drone Rules state that the Central Government may, in future, by notification in the Official Gazette, specify safety features to be installed on an unmanned aircraft system by persons owning it. These could be safety features such as 'No Permission – No Takeoff' hardware and firmware, real-time tracking beacon that communicates the unmanned aircraft system's location, altitude, speed and unique identification number and geo-fencing capability.

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