Comments to MEITY on Proposed Draft Amendments to the IT Rules, 2021

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Abstract

On June 6, 2022, MEITY published draft amendments to the Information Technology (Intermediaries Guidelines and Digital Media Ethics Code) Rules, 2021, for public comments

In our response, we point to how the entire IT Rules framework under Section 79 of the Information Technology Act needs to be revised as the parent statute does not contemplate the introduction of the variety of obligations being introduced through delegated legislation. Further, implementing overly prescriptive rules, including by creating a government entity to oversee content removal requests, would chill fundamental rights. Instead, the focus should be to ensure that intermediaries provide their users with appropriate mechanisms for grievance redress.

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Comments on the Proposed Draft Amendments to the IT Rules, 2021

- *Rishab Bailey and Smriti Parsheera*[1]
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The Ministry of Electronics and IT (MEITY) has sought comments on proposed amendments to the IT Rules, 2021 vide a press release of June 6, 2022. We thank the MEITY for putting out this document for consultation, an essential process in the framing of any new regulations, and request that any further action on the proposed amendments should engage substantively with the comments received during the consultation. We note that this was not the case with the IT Rules, 2021 as the final rules that were introduced in February, 2021 were substantively different in scope from the (Draft) Information Technology [Intermediaries Guidelines (Amendment) Rules], 2018, that were released for public comment in December 2018.

Since the proposed amendments build upon the changes brought about through the IT Rules of February, 2021 we would like to begin by highlighting some issues with the existing rules. In line with our comments on the amendments to the IT Rules proposed in 2018, we believe that the entire Intermediary Guidelines framework under Section 79 of the IT Act must be revised through a statutory amendment.[2] The IT Rules cannot be a mechanism or route for the imposition of new and varied obligations on a range of different intermediaries that are not contemplated by the parent provision. The parent section is of limited scope and does not envisage the imposition of the wide variety of substantive obligations as required under the current IT Rules, 2021, as well as the proposed amendments thereto.

In addition, the 2021 Rules are bad in law insofar as they:

(a) Contain a list of proscribed information in Section 3(1)(b) that is arbitrary and vague, not least as this list includes various categories of information that are not illegal under any substantive law in force.[3]
(b) Establish a notice-takedown regime that was held unconstitutional by the Supreme Court in the *Shreya Singhal* judgement.[4]
(c) Introduce a requirement for messaging services to identify the originator of information, which is a disproportionate intrusion into rights of privacy, association and to carry out business.[5]
(d) Require use of automated tools for proactive identification and censorship of online content, which violates rights of speech and privacy.[6]
(e) Categorise intermediaries based on the types of content they carry, a manner of differentiation which has no basis in the parent IT Act, which establishes a functional test for categorization of intermediaries.[7]

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[2] Rishab Bailey, Smriti Parsheera, Faiza Rahman, *Comments on the (draft) Information Technology [Intermediaries Guidelines (Amendment) Rules], 2018,* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3328401
[3] *Id.*
[4] *Id.*
[5] Rishab Bailey, Vrinda Bhandari, Faiza Rahman, *Backdoors to Encryption: Analysing an intermediary's duty to provide "technical assistance"*, Data Governance Network WP 15, February 2021, https://datagovernance.org/report/backdoors-to-encryption-analysing-an-intermediarys-duty-to-provide-technical-assistance
[6] *Supra* Note 2.
[7] *Supra* Note 2.

(f) Introduce a new range of arbitrary and disproportionate obligations on publishers of online curated content and news and current affairs content in Part III thereof, the application/enforcement of which has already been stayed by various courts in India.[8]

While we appreciate the basic intent behind many of the provisions in the IT Rules of 2021 (and the proposed revisions thereto) *we nevertheless reiterate that the entire set of rules under Section 79 of the IT Act must be revised/reviewed starting with a revision of the parent provision itself.* We understand that MEITY is already in the process of considering a new legislative framework for governing the digital ecosystem in India.[9] It would, therefore, be fitting to consider introducing more nuanced and sub-group specific obligations as a part of that process rather than imposing blanket requirements for all intermediaries under the contested route of subordinate legislation that exceeds the mandate of the existing Section 79 of the IT Act.

That said, our comments on the proposed revisions to the 2021 Rules are below.

1. **Rule 3(1)(a)**

While it may seem fair to expect that the intermediary should ensure compliance with the contractual terms entered into between it and its users, linking such requirements with the issue of intermediary liability can be problematic. The contractual terms between intermediaries and users may contain a variety of stipulations, compliance with which is not necessarily relevant to the exercise of due diligence by the intermediary or the stated goals of creating an open, safe and trusted environment. By linking compliance with all terms and conditions to the safe harbour available to intermediaries under Section 79 of the IT Act, the rules would incentivize the over-enforcement of terms which are very often designed to favour the interests of intermediaries over that of their users. At the same time, it would also negatively affect the speech rights of users.

We suggest that rather than having a generic requirement of ensuring compliance, which would in any event be hard for the authorities to monitor effectively, It would be preferable to say that the intermediary should put in place, and demonstrate the existence of appropriate systems and processes, to ensure compliance with the same. In the alternative, the provision could be re-drafted to require intermediaries to "endeavour" to ensure user compliance. Such a standard would require intermediaries to show that they have established reasonable systems to check compliance (rather than withdrawing immunity from prosecution for every single instance where a user breaches the relevant rule).[10]

2. **Rule 3(1)(b)**

The proposed insertion makes a substantive change in the scope of the existing provision by converting it from an information-related obligation to an enforcement-related one. The revised provision therefore places a vast amount of discretion in the hands of intermediaries

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[8] Internet Freedom Foundation, *Factcheck! IT Rules 2021 FAQ,* November 2, 2021, https://internetfreedom.in/factcheck-of-the-it-rules-faq/; Internet Freedom Foundation, *Deep Dive: How the intermediaries rules are anti-democratic and unconstitutional*, February 27, 2021, https://internetfreedom.in/intermediaries-rules-2021/

[9] Dia Rekhi, *Govt. to roll out new Digital India Act shortly, says Rajeev Chandrashekhar,* Economic Times, April 10, 2022, https://economictimes.indiatimes.com/tech/technology/govt-to-roll-out-new-digital-india-act-shortly-says-rajeev-chandrasekhar/articleshow/90747851.cms

[10] While reiterating our previous comments on the problems with a mandate for proactive censorship using automated tools, we note that such a standard already exists in the IT Rules under Rule 4(4) which requires significant social media intermediaries to "*endeavour* to deploy" technological measures to proactively detect certain types of illegal content. See *Supra* Note 2 for our comments on proactive censorship using algorithmic tools.

to assess and restrict certain types of proscribed conduct. Further, the requirement that the intermediary "shall cause the user" not to engage in the listed activities can be construed to mean that ex-ante action should be taken to prevent the user from doing those things. This is problematic both in terms of the broad/vague nature of the restrictions listed under Rule 3(1)(b) and the discretion available to intermediaries to decide how they choose to meet those ends, for instance through the rampant adoption of technological and automated measures (which may hamper expression rights). We, therefore, reiterate our recommendations on the need for a rationalisation of the items listed under Rule 3(1)(b)[11] and caution against giving intermediaries the mandate or broad discretion to adopt any means for ensuring compliance with the said requirements.

The draft provision as it stands can be interpreted to mean that even one act of non-compliance with the rules by an intermediary's users could lead to a challenge to its intermediary liability exemption status. In addition to adversely affecting the speech and expression rights of users through over-enforcement, this can also become the cause for unfair political pressure being exerted on intermediaries.

Accordingly, we suggest that the provision should be limited to an obligation to demonstrate that the intermediary has the systems and processes to ensure compliance with the given requirements rather than an obligation to ensure that no user of its computer resource acts in a manner that is inconsistent with the listed requirements.

3. **Rule 3(1)(m):**

It is unclear what the requirement to "ensure accessibility of services" implies. For instance, does it mean accessibility for specific groups, such as persons with disabilities who often face barriers in digital access, or accessibility in terms of product features, for instance through the availability of content in local languages? Yet another interpretation of accessibility could be in the broader sense of ensuring openness and non-discrimination, similar to the requirements of network neutrality that are already applicable to a particular class of intermediaries, namely telecommunication and internet service providers. If the intent of the provision is to treat *all* intermediaries akin to public utilities, with what amounts to a "must provide access" or non-discrimination requirement, this decision requires much more careful deliberations and assessment.

These differing interpretations demonstrate that the provision is vague, arbitrary and incapable of consistent enforcement. The draft rules therefore require a clearer articulation of the problem that is sought to be solved through the requirement of accessibility and the intended meaning of the term in the present context. Unless such clarity is introduced into the public consultation process and adequately debated, this provision should be deleted from the rules on account of its vagueness.

The next part of the proposed Rule 3(1)(m) is also unclear on what is meant by "a reasonable expectation of due diligence, privacy and transparency". If this implies the reasonable expectations of users, such a requirement can lead to regulatory uncertainty and lack of consistency in enforcement. On the contrary, if it means the expectations of the government, the same have presumably already been articulated under these rules.

The inclusion of the due diligence requirement here is problematic as intermediaries are required to follow the entire set of IT Rules, the purpose of which is to lay down due diligence related guidelines. Therefore, an exhortation to provide a reasonable expectation of due diligence appears unwarranted. Any obligations on intermediaries towards their due diligence obligations must be clearly specified in the rules rather than transferring the

[11] Supra note 2.

determination of the standards of due diligence on to the intermediaries themselves. Further, as discussed subsequently, substantive obligations to protect privacy cannot be introduced through rules under Section 79.

Accordingly, we suggest deleting the proposed Rule 3(1)(m).

4. **Rule 3(1)(n):**

We recognise that it is the duty of the State to protect and promote fundamental rights, including in the digital ecosystem (viz. there is a positive obligation on the State to protect fundamental rights).[12] However, the route/method being contemplated, that is, the introduction of a generic requirement in rules issued under Section 79 of the IT Act, is inappropriate. This will likely only lead to greater interference with the rights of expression and association. A generic requirement ("to respect the rights of citizens under the Constitution") as proposed under Rule 3(1)(n), without laying down any clear requirements or mechanisms for the same, will lead to arbitrary application and promote confusion amongst intermediaries.

Intermediaries are almost entirely private sector entities. Thus, they are not, generally speaking, required to adhere to the fundamental rights under the Constitution.[13] The State is, as mentioned, free to implement legislation to protect and promote respect of fundamental rights and thereby mandate certain obligations on intermediaries. However, till such time, a general exhortation as proposed in Rule 3(1)(n) is bad in law, being vague, arbitrary, and incapable of proper enforcement.[14]

There is instead a need to implement clear and specific obligations on actors in the digital ecosystem to protect specific rights. In the context of privacy, this could be done through, for instance a data protection law (a draft of which is currently before Parliament), or through amendment of relevant provisions of the IT Act (for instance, Sections 43A, 66C, 66D, 66E all deal with various aspects of privacy and data protection). In this context it is also worth reiterating our opening comments that rules under Section 79 cannot be a route for imposition of new substantive obligations that are not contemplated by the parent provision, irrespective of whether such obligations may be independently justifiable.

Accordingly, we suggest deleting the proposed Rule 3(1)(m).

5. **Rule 3(2)(a):**

The proposed insertion of the words "*including suspension, removal or blocking of any user or user account…*" in Rule 3(2)(a) is confusing. It might be better to separately set out the meaning and scope of a complaint and limit this provision to setting out the timelines for acknowledgment and redress of such complaints. Further, even while defining a complaint a distinction needs to be drawn between the subject matter of the complaint and suggested

[12] See for instance, KS Puttaswamy v Union of India (AIR 2017 SC 4161) where the court outlined the positive and negative aspects of the right to privacy viz. the obligation of the state to both refrain from disproportionate interferences with the right, as well as to establish mechanisms for protection of the right (such as by passing a law to *inter alia* cover the private sector).

[13] As a general rule, fundamental rights are only applicable to the "State" as defined in Article 12 of the Constitution, though certain limited exceptions exist. For instance, the text of A 15(2) makes itself applicable to certain private entities. Similarly, some rights flowing from A 21 (concerning the right to health and against sexual harassment) have been applied to the private sector. Ashish Chugh, Fundamental Rights – Vertical or Horizontal, (2005) 7 SCC (J) 9, https://www.ebc-india.com/lawyer/articles/2005_7_9.htm; Siddharth S Aatreya, *Private Governments and the Indian Constitution – Rethinking 'State' under Article 12,* National Law School of India Review, July 25, 2019, https://nlsir.com/private-governments-and-the-indian-constitution-rethinking-state-under-article-12/..

[14] It is also worth noting that many fundamental rights in the Constitution are also extended to non-citizens.

course of action (suspension, removal, blocking, etc). While the intermediary should exercise due diligence while determining the type of redress to be provided, thi need not necessarily be the one requested by the complainant.

Next, the proposed timeline of 72 hours for removal of an information or communication link based on a complaint could incentivise rapid blocking actions without appropriate consideration. Given the vague and broadly worded nature of the requirements under Rule 3(1)(b) this would lead to a disproportionate restriction on the speech and expression rights of users'. Moreover, Rule 3(2)(a) already provides for expedited redress for certain types of complaints. Extending a similar time frame for all removal requests would effectively nullify the fifteen day consideration period applicable to all other types of complaints. Lastly, the need for "appropriate safeguards" to be developed by intermediaries to avoid misuse of the complaints mechanism is also a very broad and vague requirement which is likely to lead to regulatory uncertainty.

Accordingly, we suggest adding a separate definition of the term 'complaint' and doing away with the limit of 72 hours for all removal requests.

6. **Rule 3(3):**

The proposed change seeks to institute a government-appointed body called the Grievance Appellate Committee (GAC) as an appellate authority for hearing appeals against the internal grievance redress processes established by intermediaries. The draft text notes that the Chairperson and Members of the GAC will be appointed by the Central Government but without any clarity on the intended affiliations, qualifications, skills, and basis for selection of such persons. Notably, the proposal does not even clarify if the members of the GAC will exclusively consist of government officials or also include other actors like representatives of intermediaries, consumer representatives or other independent experts. Absent this clarity, our comments below are based on the assumption that this is intended to be a government body that will have the power to issue binding instructions to intermediaries. We consider this to be an unnecessary and disproportionate interference with the digital ecosystem for the following reasons:

(a) The government already has powers to block content, which can also be accessed by individuals, under Section 69A of the IT Act and the rules under it. The said provisions contemplate the possibility of individuals making complaints to a nodal officer along with various checks and balances to be followed while issuing any blocking instructions.[15] The same would, however, not be applicable to decisions taken under the proposed rule. The proposed revision, therefore, shortcuts the process for blocking of content by the government under Section 69A of the IT Act.

(b) The proposed rule casts the GAC in a (quasi) judicial role, without any mechanisms to ensure that such an entity will have the expertise and capacity to inquire into content-based decisions made by intermediaries. It is worth noting that scrutinising censorship and similar complaints (such as pertaining to de-platformisation) will be a highly discretionary exercise requiring application of mind in every individual case. Further, the exercise will be transaction intensive, requiring significant resources and time to fulfil, particularly as the volume of such cases may be large.[16] The institutional arrangement contemplated by the amendments is therefore likely to prove insufficient and inadequate to adequately balance competing interests.

[15] Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules. 2009

[16] See Lant Pritchett and Michael Woolcock, "Solutions when the Solution is the Problem: Arraying the Disarray in Development", Center for Global Development Working Paper No. 10, September, 2002, available at https://www.cgdev.org/sites/default/files/ 2780_file_cgd_wp010.pdf., on the challenges of delivering public services that are highly discretionary and transaction intensive.

(c) The GAC is envisioned as a purely governmental entity, with no independence whatsoever. Should there be a need for an online content regulator (as an appellate mechanism or otherwise), such an entity must be created through statute and must be independent of executive interference, including in the form of laying down appropriate processes for appointment and termination, salaries, etc. To be noted that the Supreme Court has repeatedly noted that a body exercising judicial functions must enjoy independence from the government.[17]

(d) There is a lack of procedural safeguards on arbitrary and disproportionate interference by the GAC. For example, there is no clarity on the process to be followed by the GAC. Will hearings be provided to all affected parties? Will evidence be led by intermediaries or the concerned individuals (including the original publisher of the content)? Will reasoned decisions be passed, and made public?

(e) Allowing a government agency to scrutinise public complaints made to intermediaries from a substantive perspective is inherently problematic. While some comparisons could be drawn with the (yet to be enacted) Online Safety Bill in the United Kingdom or in the German NetzDG law (both of which, it should be noted, have also faced significant criticism), there are notable differences. The crucial point of difference is that these laws focus on ensuring that intermediaries establish appropriate grievance redress processes. Further, regulators are empowered to fine intermediaries only if they should fail to implement appropriate mechanisms of grievance redress.[18] The State is not given specific powers to re-evaluate content curation decisions made by an intermediary in the form of an appellate mechanism.[19]

(f) There is no data or evidence produced to justify the conclusion that grievance redress processes as currently instituted by intermediaries do not or cannot work, and that the best method of addressing this is for a government agency to sit in judgement over content curation decisions. Notably, the justification given for this action states that it was "*made necessary because currently there is no appellate mechanism provided by intermediaries nor is there any credible self-regulatory mechanism in place*". The proposal is, however, not backed by any evidence to demonstrate the extent of the problem or why the GAC model was preferred over the idea of creating a layer of appeal within the organisation or any other self-regulatory yet accountable model for appeals against the decisions taken by intermediaries.

Ultimately, the appointment of a government entity to oversee and adjudicate on the validity or otherwise of complaints redressed by intermediaries will open a pandora's box, leading to the possibility of political and arbitrary decisions being made about what content can or cannot be published in the digital ecosystem. The chilling nature of such a rule, the lack of adequate safeguards, and the lack of independence of the GAC from the government imply that the provision is disproportionate, arbitrary and with inadequate procedural fetters to prevent misuse.

Accordingly, we suggest deleting the proposed Rule 3(3).

If required, the government may consider developing an institutional mechanism, through appropriate statutory changes, that:

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[17] See for example, Brahm Dutt v. Union of India, WP (C) 490/2003, https://indiankanoon.org/doc/1029167/; Madras Bar Association v. Union of India, WP (C) 502/2021, https://indiankanoon.org/doc/105716048/

[18] For example, the UK Government notes with respect to the Online Safety Bill, that "these laws are not about imposing excessive regulation or state removal of content, *but ensuring that companies have the systems and processes in place to ensure users' safety.*" Government of UK, Online Safety Bill: Factsheet, April 19, 2022, https://www.gov.uk/government/publications/online-safety-bill-supporting-documents/online-safety-bill-factsheet

[19] Note that both these laws however do provide some additional or alternative remedies. For instance, the German law requires intermediaries to establish appeals processes (failure to do so can lead to fines being imposed). The UKs proposed law allows designated entities to file "super complaints" to OFCOM in the event a regulated intermediary engages in significantly harmful acts on a systemic level.

(a) Collects information on whether there are problems in implementation of grievance redress processes;
(b) Inquires into whether or not intermediaries of a certain function/type/size, have appointed grievance redress committees that provide a viable path to addressing user grievances;
(c) Incentivizes intermediaries to create working grievance mechanisms or creates scope for sanctions to be imposed upon intermediaries for failing to do so.

As mentioned previously, conversations already seem to have been initiated on revising the statutory framework applicable to the digital ecosystem. Accordingly, significant changes like the ones contemplated by the current amendments to the IT Rules should be brought in only pursuant to relevant statutory amendments.