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NLU DELHI

NATIONAL LAW UNIVERSITY DELHI

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Professor Srikrishna Deva Rao

Vice Chancellor

July 4th, 2022

Shri Alkesh Kumar Sharma
Secretary, Ministry of Electronics and Information Technology
Government of India
Electronics Niketan
6, CGO Complex, Lodhi Road, New Delhi - 1 10003

Subject: Submission of Comments on the proposed draft for amendment in Part-I and Part-II of the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021

Dear Shri Alkesh Kumar Sharma,

The *National Law University Delhi* (NLU Delhi), established by 'The National Law University, Delhi Act, 2007' (Act No. 1 of 2008 of National Capital Territory of Delhi), is a public funded university established by the Government of NCT of Delhi on the initiative of the High Court of Delhi. The Chief Justice of India is the visitor of the University and the Chief Justice of the High Court of Delhi is the Chancellor of the University. The *Centre for Communication Governance* (CCG) was established by the University in 2013 to contribute to improved governance and policy making and to ensure that Indian legal education establishments engage more meaningfully with information technology law and policy. CCG is the only academic research centre dedicated to working on information technology law and policy in India.

CCG regularly engages with various institutions, such as the Ministry of External Affairs, Ministry of Law & Justice, Ministry of Electronics and Information Technology, and the Competition Commission of India, and works actively to provide the executive and judiciary with research in the course of their decision-making on issues relating to information policy.

As part of our work, and given how critical it is to provide policymakers with well researched and useful material, we are submitting our response to the proposed draft for amendment in Part-I and Part-II of the '*Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021*'. We are thankful to MeitY for giving us the opportunity to comment on these draft rules and commend MeitY for adopting a public and consultative approach to this amendment process.

Sincerely yours,

Professor Srikrishna Deva Rao

Encl: **Comments on the proposed draft for amendment in Part-I and Part-II of the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021**

CC:

(i) Dr. Dhawal Gupta, Scientist E, Cyber- Laws and E-Security Group, MeitY

(ii) Shri Notan Roy, Scientist D, Common Services Centre Program Division, MeitY

(University of Law Established in 2008 by Act No. 1 of 2008 of Delhi)
Sector-14, Dwarka, New Delhi - 110 078 (India) ☎ :+91 11 2803 4253 🖷 :+91 11 2803 4256
: vc@nludelhi.ac.in, psrikrishnadevarao@gmail.com Website : www.nludelhi.ac.in

CENTRE FOR COMMUNICATION GOVERNANCE AT NATIONAL LAW UNIVERSITY DELHI

COMMENTS TO THE MEITY ON THE PROPOSED DRAFT FOR AMENDMENT IN PART-I AND PART-II OF THE INFORMATION TECHNOLOGY (INTERMEDIARY GUIDELINES AND DIGITAL MEDIA ETHICS CODE) RULES, 2021[1]

nludelhi.ac.in | ccgdelhi.org | ccg@nludelhi.ac.in

[1] Authored by Vasudev Devadasan and Bilal Mohamed. Reviewed and edited by Jhalak M. Kakkar and Shashank Mohan.

Introduction

The Centre for Communication Governance at National Law University Delhi would like to thank the Ministry for Electronics and Information Technology ("MeitY") for the opportunity to provide comments on the proposed amendments to the The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 (hereinafter referred to as the "2021 IT Rules") and appreciate the Ministry's efforts to embed consultative processes in lawmaking. We also commend the government's efforts towards ensuring that the Internet is "*Open, Safe & Trusted and Accountable*" for all Indians. The 2021 IT Rules introduced some welcome improvements on the law surrounding online intermediaries but also raised new challenges for all concerned stakeholders, and we welcome the MeitY's intention to make changes and amend these Rules.

However, the proposed amendments in their current form raise certain concerns that we believe merit additional scrutiny. A summary of the potential issues and analysis are as follows:

1. **Dilution of safe harbour in contravention of Section 79(1)**: The core intention behind providing intermediaries with safe harbour under Section 79(1) of the Information Technology Act, 2000 ("IT Act") is to ensure that intermediaries do not restrict the free flow of information online due to the risk of being held liable for the third-party content uploaded by users. The proposed amendments to Rules 3(1)(a) and 3(1)(b) may dilute the general principles of safe harbour by requiring intermediaries to actively prevent users from uploading unlawful content. These amendments may require intermediaries to make complex determinations on the legality of speech and cause online intermediaries to remove content that may carry even the slightest risk of liability. This may result in the restriction of online speech and the corporate surveillance of Indian internet users by intermediaries. In the event that the proposed amendments are to be interpreted as not requiring intermediaries to actively prevent users from uploading unlawful content, in such a situation, we note that the proposed amendments may be functionally redundant and we suggest they be dropped to avoid legal uncertainty.

2. **Concerns with the Grievance Redressal Committee:** We appreciate the MeitY's intention to provide users with recourse against online speech determinations by intermediaries. However, the current framing of the proposed Grievance Appellate Committee ("GAC") may exceed MeitY's rulemaking powers under the IT Act. Further, the GAC lacks the necessary safeguards in its composition and operation to ensure the independence required by law of such an adjudicatory body. Such independence may be essential to ensure that users repose trust in the appeals process. Additionally, since the Central Government or its functionaries or instrumentalities may be a party before the GAC, it is important that the GAC be structured as an independent and impartial adjudicatory body. Further, we note with concern that the originator, the legality of whose content is at dispute before the GAC, has not expressly been granted a right to hearing before the GAC. Finally, we note that the GAC may lack the capacity to deal with the high volume of appeals against content and account restrictions. This may lead to situations where, in practice, only a small number of internet users are afforded redress by the GAC, leading to inequitable outcomes and discrimination amongst users. We suggest that the proposed formulation of the GAC not be implemented.

3. **Concerns with the grievance redressal timeline**: We welcome MeitY's goal of ensuring that content which results in severe online and real-world harms be expeditiously removed from the internet. However, the 72-hour timeline to address complaints proposed by the amendment to Rule 3(2) may cause online intermediaries to over-comply with content removal requests, leading to the possible take-down of legally protected speech at the behest of frivolous user complaints. Empirical studies conducted on Indian intermediaries have demonstrated that smaller intermediaries lack the capacity and resources to make complex legal determinations of whether the content complained against violates the standards set out in Rule 3(1)(b)(i)-(x), while larger intermediaries are unable to address the high volume of complaints within short timelines - leading to the mechanical takedown of content. We suggest that any requirement that online

intermediaries address user complaints within short timelines could differentiate between types of content that are *ex-facie* (on the face of it) illegal and causes severe harm (e.g., child-sex abuse material or gratitious violence), and other types of content where determinations of legality may require legal or judicial expertise like copyright or defamation.

4. **Need for specificity in defining due diligence obligations:** The proposed amendments to Rules 3(1)(m) and 3(1)(n) do not impose clearly ascertainable legal obligations, which may lead to increased compliance burdens, hamper enforcement, and results in inconsistent outcomes. In the absence of specific data protection legislation, the obligation to ensure a "*reasonable expectation of due diligence, privacy and transparency*" is unclear. The contents of fundamental rights obligations were drafted and developed in the context of citizen-State relations and may not be suitable or aptly transposed to the relations between intermediaries and users. Further, the content of 'respecting Fundamental Rights' under the Constitution is itself contested and open to reasonable disagreement between various State and constitutional functionaries. Requiring intermediaries to uphold such obligations will likely lead to inconsistent outcomes based on varied interpretations. We suggest that these proposed amendments be dropped to avoid legal uncertainty.

Our comments below fully expand on these issues and analysis and cumulatively form our response to the proposed amendments that were released for public consultation by MeitY on 6th June, 2022.

We once again thank the MeitY for releasing these proposed amendments for public consultation and for giving stakeholders an opportunity to submit comments.

1) Concerns regarding Rule 3(1)(a) and (b)

Section 79(1) of the IT Act provides intermediaries with legal immunity for unlawful third party content hosted by them, subject to certain conditions. In the absence of this

protection, the modern internet would look very different in nature, as intermediaries would hesitate to host user content due to the risk of secondary liability arising from the content uploaded by their users. Sections 79(2) and 79(3) of the IT Act, along with the 2021 IT Rules outline the conditions that intermediaries must satisfy to continue to avail of this legal immunity. Thus, the core principle behind Section 79 recognises that most content hosted by intermediaries is legal, but intermediaries need to be provided with legal immunity for any unlawful third party content uploaded by their users, to guarantee the free flow of information online - because otherwise intermediaries would hesitate to host *any* user content.

a) The proposed amendments to Rules 3(1)(a) and 3(1)(b) may dilute the principle of safe harbour guaranteed by Section 79(1)

The proposed amendment to Rule 3(1)(b) states that intermediaries "*shall cause*" users "*not to host, display, upload, modify, publish, transmit, store, update or share any information*" that falls under any of the ten categories of speech set out in Rule 3(1)(b)(i)-(x). The Press Note affixed to the proposed amendments states that the proposed amendments will "*specifically require them to enforce the rule 3(1)(b)*". The proposed amendment to Rule 3(1)(a) further requires intermediaries to "*ensure compliance*" with their user agreements, that by law, must prohibit the ten categories of speech set out in Rule 3(1)(b)(i)-(x). These ten categories of prohibited speech include any content which "*violates any law for the time being in force*"[2] and is "*inconsistent with or contrary to the laws in force*".[3]

Thus, a literal reading of the proposed amendments suggests they may impose an obligation on intermediaries to ensure their users do not upload unlawful content. This would directly contradict the principle of safe harbour in Section 79(1), which envisages that intermediaries are not responsible for unlawful content of their users where intermediaries' comply with Sections 79(2) and 79(3). Under the proposed amendments, if a user uploads unlawful content, the intermediary may be in breach of its Rule 3(1)(b)

[2] Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules ("**2021 IT Rules 2021**") Rule 3(1)(b)(v)
[3] 2021 IT Rules, Rule 3(1)(b)(ii)

obligation to prevent the user from uploading unlawful content. As Rule 3(1)(b) forms part of the 2021 IT Rules, and a precondition for safe harbour, this effectively means as soon as a user uploads unlawful content, an intermediary has lost safe harbour - rendering the concept of safe harbour as immunity for uploaded content redundant. In other words, an intermediary will lose safe harbour and could be liable because it has failed to prevent a user from uploading unlawful content, however, as analysed above, the reason for safe harbour is to ensure that intermediaries are not penalised for their users' unlawful content.

This undermining of safe harbour is also problematic because the proposed amendments to the 2021 IT Rules constitutes delegated legislation, and cannot contradict or override the text of Section 79(1) which is primary legislation.[4] As noted by the Supreme Court in *Indian Express Newspapers v Union of India*, "*subordinate legislation must yield to plenary legislation*."[5] Further, in *Shreya Singhal v Union of India,* the Supreme Court interpreted the term "*actual knowledge*" in Section 79(3) to mean a court or government order.[6] Thus, an intermediary cannot be legally required to remove content absent a court or government order. Requiring intermediaries to prevent users from uploading unlawful content would contravene this interpretation. Finally, to ensure their users do not upload unlawful content, intermediaries may desist from hosting content that carries even a remote risk of illegality. This may have a limiting effect on the flow of legal information online.

b) The proposed amendments to Rules 3(1)(a) and 3(1)(b) may subject Indian internet users to horizontal restriction of speech and corporate surveillance

As noted previously, stating that intermediaries "*shall cause*" users not to upload unlawful content may cause them to desist from hosting content that carries even a remote risk of illegality. This problem is aggravated by the broad categories of content that intermediaries are expected to prevent users from uploading. If the proposed

[4] *Mahachandra Prasad Singh v Bihar Legislative Council* 2004 (8) SCC 747 [13]
[5] (1985) 1 SCC 641 [75]
[6] 2015 (5) SCC 1 [122]

amendments were adopted, intermediaries will be expected to prevent users from uploading content that is neither defined nor expressly restricted by an Indian statute, such as: (i) racially or ethnically objectionable content; (ii) content that is harmful to a child; (iii) and content that is patently false and untrue. These broad categories of impermissible content specified under Rule 3(1)(b) are also arguably beyond the reasonable restrictions to speech envisaged in Article 19(2) of the Constitution and thus may constitute an impermissible restriction on free speech.[7] Further, the requirement that intermediaries cause their users not to upload content that violates any Indian law may impose unreasonable compliance burdens on intermediaries - especially as this obligation is imposed on all intermediaries, and not merely 'significant social media intermediaries'.

To ensure that their users do not upload content that violates Rule 3(1)(b)(i)-(x), intermediaries may take down large swathes of content uploaded by Indian users. They may rely on untested or inaccurate technologies such as upload filters which have been known to remove legal content.[8] These amendments, when read with the broad categorisation of impermissible content under 3(1)(b)(i)-(x), could result in intermediaries restricting the legally permissible speech of Indian users (i.e., horizontal censorship of Indian users by internet platforms). This may also lead to the privacy of Indian users being compromised, as intermediaries will have to closely monitor the content being uploaded by Indian users. As noted by the High Court of Delhi in *Myspace v Super Cassettes Industries*:

> *The greater evil is where a private organisation without authorisation would by requirement be allowed to view and police content and remove that content which in its opinion would invite liability, resulting in a gross violation of the fundamental right to privacy.*[9]

[7] *Shreya Singhal v Union of India 2015 (5) SCC 1 [23]-[25], [122]; Sakal Papers v Union of India 1962 (3) SCR 842 [34]*
[8] Zoe Kleinman, 'Fury over Facebook "Napalm Girl" Censorship' BBC News (9 September 2016) <https://www.bbc.com/news/technology-37318031>
[9] *Myspace Inc. v Super Cassettes Industries Ltd* 2016 SCC OnLine Del 6382

If the proposed amendments are construed literally to create an obligation on intermediaries to "*cause*" users not to upload unlawful content, this may also amount to the imposition of a general monitoring obligation on intermediaries. A general monitoring obligation can be said to exist where intermediaries are required to install a system of filtering content: (i) stored by users on its platform; (ii) which is indiscriminately applicable to all users; (iii) as a preventive measure; (iv) exclusively at the intermediary's expense; (v) for an unlimited period; (vi) to identify suspect classes of content.[10] General monitoring obligations, as inherently disproportionate, are impermissible under the European E-Commerce Directive,[11] as they require the screening of all content irrespective of the subject matter or user – effectively examining the content of all users to identify illegal activity amongst some users. Indian courts have also made observations critical of the imposition of such obligations.[12] For example, the High Court of Delhi noted that the IT Act does not *"oblige the intermediary to, of its own, screen all information being hosted on its portal for infringement of the rights of all those persons who have at any point of time complained to the intermediary*."[13]

c) If the proposed amendments to Rules 3(1)(a) and 3(1)(b) do not override safe harbour or the requirement for a court order, they may be functionally redundant and could be dropped to avoid legal uncertainty

It is possible to interpret the proposed amendments to Rule 3(1)(a) and Rule 3(1)(b) as not imposing an obligation on intermediaries to prevent users from uploading unlawful content. Accordingly, section 79(3) (as interpreted in *Shreya Singhal*) read with Rules 3(1)(d) and 3(1)(g) of the 2021 IT Rules, would indicate that an intermediary is only legally required to remove content in three situations: (i) pursuant to an order by a competent

[10] Frosio G and Mendis S, 'Monitoring and Filtering: European Reform or Global Trend?' in Giancarlo Frosio (ed), Giancarlo Frosio and Sunimal Mendis, *Oxford Handbook of Online Intermediary Liability* (Oxford University Press 2020)
[11] Directive 2000/31/EC of 8 June 2000 on electronic commerce, Art. 15
[12] *UTV Software Communications Ltd v 1337x CS* (Comm) 724 of 2017 (High Court of Delhi, 10 April 2019); *Kent RO Systems Ltd v Amit Kotak* 2017 SCC OnLine Del 7201; *Myspace Inc v Super Cassettes Industries Ltd* 2016 SCC OnLine Del 6382; *Dept of Electronics and Information Technology v Star India Pvt Ltd FAO* (OS) 57 of 2015 (High Court of Delhi, 29 July 2016)
[13] *Kent RO Systems Ltd v Amit Kotak* 2017 SCC OnLine Del 7201 [31]

court; (ii) pursuant to an order by an authorised government agency; or (iii) pursuant to a user complaint with respect to non-consensual intimate images under Rule 3(2). Upon this reading, the proposed amendments to Rule 3(1)(a) and Rule 3(1)(b) do not require intermediaries to "*ensure*" that users do not upload unlawful content.

While we believe that such an interpretation remains consistent with the principles underlying Section 79, upon such an interpretation the proposed amendments to Rule 3(1)(a) and Rule 3(1)(b) do not alter the position that currently exists under the 2021 IT Rules. If intermediaries are not required to cause users not to upload content, their obligations will be limited to ensuring that their terms of service prohibit the ten categories of content set out in Rule 3(1)(b)(i)-(x). This is what is currently required of them under the 2021 IT Rules. In such a situation, given that the proposed amendments would not provide any incremental improvement to the current operation of the 2021 IT Rules, we suggest that they be dropped to avoid legal uncertainty. Alternatively, language clearly specifying that intermediaries continue to only be required to remove content pursuant to a court or government order - or a user complaint against non-consensual intimate images under Rule 3(2) - could be included. For example, Rule 3(1)(b) could read - "*shall cause the user,* ***in accordance with Rule 3(1)(d)****, not to host…*" unlawful content.

2) The 72 hour timeline proposed by Rule 3(2) to address all removal complaints may lead to corporate censorship of online content by intermediaries.

Under the proposed amendment to Rule 3(2), intermediaries must acknowledge the complaint by an internet user for the removal of content within 24 hours, and 'act and redress' this complaint within 72 hours. We acknowledge that intermediaries are not necessarily required to *remove* the content complained against, and the intermediary must merely dispose of the complaint within 72 hours. We also welcome MeitY's intention to ensure that content capable of causing severe and real-world harm is removed from the internet expeditiously. However, the current framing of the proposed rule may impose significant compliance burdens on intermediaries, ultimately incentivising

intermediaries to over-comply with even frivolous user complaints. To comply with the proposed amendments and retain safe harbour, intermediaries may restrict the online speech of Indian users merely because someone has complained against it.

a) The complaints received by intermediaries may require careful legal analysis

The ten categories of content that users may complain against - set out in Rule 3(1)(b)(i)-(x) - are broad and may be open to interpretation. As noted previously, categories of content such as: (i) racially or ethnically objectionable content; (ii) content that is harmful to a child; (iii) and content that is patently false and untrue are not covered by existing Indian statutes. This may make determinations of exactly when content violates these categories difficult and burdensome for the intermediary. Further, under Rule 3(1)(b)(v), a complaint may be lodged against content that allegedly violates any Indian law. To determine whether content violates standards such as "*defamatory*" requires judicial determinations on speech as competing rights and interests need to be balanced - e.g., the right to reputation of the aggrieved person, the public interest of the information, and the potential veracity of the statement. The result of these broad categories is that intermediaries may receive a high volume of complaints which they may lack the capacity to address.

b) Requiring all intermediaries to address complaints within 72 hours may cause them to comply with even frivolous complaints

We note that the requirement to address complaints within 72 hours is applicable to all intermediaries, and not only 'significant social media intermediaries' as defined under the 2021 IT Rules. This is a cause for concern as smaller intermediaries may lack the resources and capacity to make the legal determinations of, or engage legal guidance on, whether the content complained against violates the standards set out in Rule 3(1)(b)(i)-(x). Even in the case of large social media platforms, the large volume of complaints received may lower the quality of decision-making on whether or not the content complained against violates the standards set out in Rule 3(1)(b)(i)-(x).

In the face of limited capacity (in the case of smaller intermediaries) or a high volume of complaints (in the case of larger intermediaries), intermediaries are likely to over-comply with user requests and simply remove content. A study done by the Centre for Internet and Society in India sent several prominent intermediaries complaints against content. The study empirically demonstrated that when intermediaries are required to respond to user complaints within a short time-frame, they mechanically remove content. As noted by the Study:

> *From the responses to the takedown notices, it can be reasonably presumed that not all intermediaries have sufficient legal competence or resources to deliberate on the legality of an expression. Even if such intermediary has sufficient legal competence, it has a tendency to prioritize the allocation of its legal resources according to the commercial importance of impugned expressions. Further, if such subjective determination is required to be done in a limited timeframe and in the absence of adequate facts and circumstances, the intermediary mechanically (without application of mind or proper judgement) complies with the takedown notice.*[14]

This may lead to intermediaries accepting even frivolous complaints against content, resulting in the legal speech of Indian users being removed from the internet by intermediaries - violating the free speech rights of Indian users and constitutional values that the proposed amendments expressly seek to protect.

We note that the proposed amendment to Rule 3(2) merely requires that the intermediary address the complaint and not take down the content complained against. However, even if intermediaries were to respond to the majority of user complaints by rejecting complaints and retaining content (to preserve the free speech rights of Indian users or because the lack the capacity to evaluate whether complaints are legitimate), this may also not be beneficial to India's online ecosystem as potentially illegal and dangerous content

[14] Rishabh Dara, 'Intermediary Liability in India: Chilling Effects on Free Expression on the Internet' (2012) <https://cis-india.org/internet-governance/chilling-effects-on-free-expression-on-internet>

that has been complained against may not be taken down. Therefore, we suggest that the 72-hour timeline to address complaints from users be dropped from the proposed amendments and the MeitY adopts a more nuanced approach that differentiates between various types of online content and provides for staggered take down timelines depending on the nature of the content.

c) We suggest that requirements to address complaints within short timelines should differentiate between different types of content

As noted previously, the types of content that users can complain against in Rule 3(1)(b)(i)-(x) are broad and expansive. We suggest that any proposal to require intermediaries to address complaints against content within a short timeline should be limited to content that is immediately *ex-facie* (on the face of it) illegal and causes severe online harm.

For example, we note that Austria's proposed Communication Platforms Act requires service providers to remove content within twenty-four hours only if "*its illegality is already evident to a legal layperson without further investigation*".[15] However, if the content's "*illegality becomes apparent only after a detailed examination*" the service provider has *seven days* to make a determination with respect to the content.[16] While we do not endorse this precise text, we believe this example highlights that other jurisdictions have recognised the importance of differentiating between different categories of content when imposing obligations on intermediaries to respond to user complaints. For example, child-sex abuse material or gratitious violence may easily be identified as illegal or violative of an intermediary's terms of service, while content alleged to be fraudulent or defamatory may require investigation into the surrounding facts and circumstnaces, which may require additional time. We suggest that any obligations imposed on intermediaries to respond to user complaints within short time frames differentiate between different categories of content, categories and timelines that should be determined pursuant to a multi-stakeholder consultative process.

[15] Draft Federal Act on measures to protect users on communication platforms (Communication Platforms Act) (2020) <https://ec.europa.eu/growth/tools-databases/tris/en/search/?trisaction=search.detail&year=2020&num=544>
[16] ibid.

3) Concerns regarding Rule 3(3) - the Grievance Appellate Committee.

One of the key proposals under the proposed amendment is the constitution of a Grievance Appellate Committee ("GAC") for users to appeal against the decision of the intermediary. The inclusion of the Central Government appointed GAC in Rule 3(3) of the proposed amendments creates an avenue for user recourse against decisions by intermediaries. Under Rule 3(3)(b), aggrieved persons can approach the GAC to appeal orders made by intermediaries with respect to "*suspension, removal or blocking of any user or user account*" or any complaint from its users requesting the removal of content. Any orders passed by the GAC must be complied by the intermediary.

We recognise that intermediaries may take decisions impacting the online speech of Indian users, and we welcome the MeitY's intention to ensure that Indian users have a measure of recourse against decisions impacting the content they post online. However, as currently framed: (i) the creation of the GAC and its designated functions exceeds the rule-making power under the IT Act; (ii) the GAC lacks the independence and procedural safeguards required by law; and (iii) the GAC may lack the capacity to dispose of the high volume of appeals it is likely to face.

a) The creation of the GAC and its designated functions exceeds the rule-making powers under the IT Act

As noted previously the 2021 IT Rules constitute delegated legislation. It follows that the provisions in the Rules cannot exceed, contradict, or override the text of the parent legislation i.e., the IT Act. The 2021 IT Rules, and if adopted, the proposed amendments, will be enacted under Sections 87(2)(z) and 87(2)(zg) of the IT Act which grants the MeitY the powers to prescribe the *"procedure and safeguards for blocking for access by the public under sub-section (2) of section 69A"* and "*the guidelines to be observed by the intermediaries under sub-section (2) of section 79*" respectively. The contents of the 2021 IT rules and the proposed amendments (which pertain to the due diligence obligations of intermediaries) must therefore fall within these rule-making powers.

As noted by the Supreme Court in *Mahachandra Prasad Singh v Chairman, Bihar Legislative Council*, the scope of delegated legislation may be inferred from the outline of the parent act.[17] The Court noted,

> *The intention of the legislation, as indicated in the outline (that is the enabling Act), must be the prime guide to the meaning of delegated legislation and the extent of the power to make it.* [...] *Power delegated by an enactment* [...] *will authorise the provision of subsidiary means of carrying into effect what is enacted in the statute itself and will cover what is incidental to the execution of its specific provision. But such a power will not support attempts to widen the purpose of the Act, to add new and different means of carrying them out or to depart from or vary its ends.*

A bare reading of Section 87(2)(zg), along with the IT Act as a whole, indicates that the creation of a distinct adjudicatory body was not envisioned as part of the guidelines for intermediaries. Where Parliament has chosen to recognise or create designated bodies in relation to the IT Act, it has expressly done so in the primary legislation itself. The IT Act recognises authorities such as the Cyber Appellate Tribunal,[18] Indian Computer Emergency Response Team,[19] and the Certifying Authority.[20]

Where Parliament empowered the Central Government to appoint an adjudicatory officer to determine violations of the IT Act, it has expressly done so and set out the officer's jurisdiction, powers, and procedures to be followed in the parent statute itself.[21] This indicates that if Parliament had envisioned an adjudicatory body for content hosted by intermediaries, it would have delineated the contours of such a body in the IT Act itself. However, Section 87(2)(zg) does not contain an enumeration of any legislative intent by Parliament for the constitution of a redressal mechanism to hear appeals to decisions made by intermediaries. A perusal of the IT Act indicates that Parliament did not

[17] 2004 (8) SCC 747 [13]
[18] Information Technology Act 2000 ("IT Act 2000") Chapter X
[19] IT Act 2000, Section 70B
[20] IT Act 2000, Chapter VI
[21] IT Act 2000, Section 46

empower the Central Government to create a distinct adjudicatory body under Section 87(2)(zg) that any Indian user could appeal to. Therefore, the creation of the GAC may exceed the MeitY's rulemaking powers under Section 87(2)(zg). Consequently, this may leave the proposed amendments concerning the GAC open to a challenge before a court and raises the possibility that the amendments may be struck down.

b) The GAC lacks the independence and procedural safeguards required by law.

The proposed amendments do not set out how the independence of the GAC will be ensured, both in its composition and its operation. In *K.A. Abbas v Union of India*,[22] where the power of the Central Government to exercise revision powers over film certification was challenged, the Central Government agreed to set up an independent tribunal and the Supreme Court observed its satisfaction that:

> *The Central Government will cease to perform curial functions through one of its Secretaries in this sensitive field involving the fundamental right of speech and expression. Experts sitting as a tribunal and deciding matters quasi-judicially inspire more confidence than a Secretary and therefore it is better that the appeal should lie to a court or tribunal.*

The independence and impartiality of the GAC is essential for users to repose trust in the appeals process. Further, the GAC may hear appeals where the Central Government or one of its functionaries or instrumentalities is a party before it. Therefore, the GAC must possess safeguards, having statutory force, ensuring the independence of the composition and operation of the GAC to impartially decide appeals.

Second, the proposed amendments do not define the procedure to be adopted by the GAC in hearing appeals. For instance, a significant concern is that where the GAC hears appeals concerning an intermediary's failure to remove content pursuant to a user complaint, the user or originator who uploaded the disputed content has not expressly been granted an

[22] 1970 SCC (2) 780

opportunity to be heard by the GAC. Given that, if the GAC were to rule in favour of the complainant, it is the originator's content which would be removed, the principles of natural justice require that the originator be heard by the GAC. We note that under the Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules, 2009 (Blocking Rules), the originator is granted a hearing prior to their content being restricted.[23] Recently, the High Court of Delhi has also judicially affirmed the importance of the originator being granted a hearing by the Committee formed under the Blocking Rules prior to their content being restricted,[24] highlighting the significance of this requirement

Finally, we note that the proposed amendments specify that users continue to have recourse to courts. Where an intermediary removes content or restricts an account, they do so pursuant to the terms of service that govern the relationship between the intermediary and the user. These terms of service themselves typically grant intermediaries final discretion on what content it may host and the right to restrict accounts. If a user was to approach a court seeking the reinstatement of content or the overturning of an account restriction, they would effectively be seeking a remedy that *compels* an intermediary to host content contrary to their terms of service. Such a remedy may interfere with the intermediary's right to freely conduct its business.[25] Currently, even courts have not overridden these contractual terms of service between users and intermediaries or ever directed an intermediary to reinstate posts or accounts.[26] Thus, while users may continue to have recourse to courts to require intermediaries to *remove* content from the internet - with respect to the reinstatement of content or suspension of a user account, courts may not provide such a remedy. Thus, the GAC may be the only body which is capable of directing the reinstatement of content or the removal of account restrictions with respect to intermediaries. Given that the proposed amendments grant this crucial power to the GAC to direct intermediaries to host content, ensuring the

[23] Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules, 2009 (Blocking Rules), Rule 8
[24] *Tanul Thakur v Union of India* W.P.(C) 13037/2019, CM APPL. 53165/2019 (High Court of Delhi, 11 May, 2022)
[25] *See Union of India v Motion Picture Association* 1999 (6) SCC 150
[26] At the time of writing, there is a matter pending before the Delhi High Court, wherein Sanjay Hegde (petitioner), in *Sanjay R Hegde v Ministry of Electronics and Information Technology* W.P.(C) 13275/2019 has challenged the suspension of their Twitter account

independence and procedural safeguards for such a quasi-judicial body becomes even more pertinent.

c) The GAC may lack the capacity to dispose of the high volume of appeals.

As an appellate body tasked with disposing user grievances, there are concerns around the GAC's capacity to effectively deal with the high volume of user complaints. For instance, Meta's Oversight Board, which is an independent body established to address appeals from users that disagree with decisions made about content on Facebook or Instagram, in their first Annual Report, recorded one million user appeals over a 15-month period.[27] The Oversight Board only heard 278 of these one million appeals, highlighting the difficulty in ensuring all users get meaningful recourse. The GAC will also likely have to hear a high number of appeals, especially considering that appeals will originate from all intermediaries operating in India.

Within the Indian context, the Srikrishna Committee Report on Data Protection noted the challenges faced by the Review Committee set up under the Indian Telegraph Rules, 1951 to review interception orders. It was observed that the Review Committee was tasked with reviewing roughly 15,000 - 18,000 interception orders every two months - described by the Srikrishna Committee as an "*unrealistic task*".[28] This experience showcases the difficulty of staffing executive review committees. Government officials typically have various pressing responsibilities and limited time available to engage with the vital tasks of the committee. This may be contrasted to a court, tribunal, or designated regulator whose sole task is adjudicating cases.

Ultimately, it is likely that the GAC will only be able to hear a small fraction of the appeals made to it. This will result in some internet users being able to appeal to the GAC and others not, resulting in inequitable access to redressal against intermediary decisions.

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[27] Oversight Board, 'Oversight Board publishes first Annual Report' (June 2022) <https://www.oversightboard.com/news/322324590080612-oversight-board-publishes-first-annual-report/>

[28] Committee of Experts under the Chairmanship of Justice B.N. Srikrishna, A Free and Fair Digital Economy, Protecting Privacy, Empowering Indians" ("Justice Srikrishna Committee Report") ch 8 <https://www.meity.gov.in/writereaddata/files/Data_Protection_Committee_Report.pdf>

4) Rule 3(1)(m) does not impose clearly ascertainable legal obligations, which may increase compliance burdens for all intermediaries and render enforcement difficult.

The inclusion of Rule 3(1)(m) is a welcome move as it recognises the need to ensure accessibility of internet services for all Indians, in a manner which is transparent and respectful of individual privacy. However, as highlighted by us in our stakeholder comments on the Personal Data Protection Bill 2018[29] and 2019, National Open Digital Ecosystem,[30] Non Personal Data Governance Framework,[31] and National Data Governance Framework Policy,[32] ensuring meaningful recognition of the right to privacy is difficult in the absence of a data protection law that defines the privacy rights of individuals and the obligations of data processors (in this case intermediaries).

Without a data protection law, the content of the obligation imposed on intermediaries to ensure a "*reasonable expectation of due diligence, privacy and transparency*" is unclear. This may cause increased compliance burdens and costs for intermediaries which are unable to ascertain when they may be in breach of these obligations. This problem will disproportionately impact smaller intermediaries.

We suggest that this proposed amendment not be adopted and intermediaries that engage in data processing be subject to a data protection law that clearly defines their obligations towards users. To this end, it is important to reiterate the need to bring a data protection law that protects the facets of privacy recognised *in KS Puttaswamy v Union of India*.[33]

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[29] Smitha Krishna Prasad, Yesha Paul and Aditya Singh Chawla, 'CCG's Comments on the Personal Data Protection Bill, 2018' (2018) <https://ccgdelhi.org/wp-content/uploads/2018/10/CCG-NLU-Comments-on-the-PDP-Bill-2018-along-with-Comments-to-the-Srikrishna-Whitepaper.pdf>

[30] Shashank Mohan, Gunjan Chawla, and Nidhi Singh, 'CCG's Comments to MeitY on the Consultation White Paper on Strategy for National Open Digital Ecosystems' (2020) <https://ccgdelhi.org/wp-content/uploads/2020/06/CCG-NLU-Comments-to-MeitY-on-the-NODE-White-Paper.pdf>

[31] Jhalak Kakkar and others, 'CCG's Comments to MeitY on the Report by the Committee of Experts onthe Non-Personal Data Governance Framework' (2020) <https://ccgdelhi.org/wpcontent/uploads/2020/09/CCG-NLU-Comments-to-MeitY-on-the-Report-by-the-Committee-of-Expertson-Non-Personal-Data-Governance-Framework.pdf>

[32] Joanne D'Cunha and Bilal Mohamed, 'CCG's Comments to MeitY on the Draft National Data Governance Framework' (2022) <https://ccgdelhi.s3.ap-south-1.amazonaws.com/uploads/ccg-nlu-comments-to-meity-on-the-draft-national-framework-policy-300.pdf>

[33] *Justice K.S. Puttaswamy (Retd.) v Union of India* (2017) 10 S.C.C. 1

5) Rule 3(1)(n) imposes broad and general obligations that may lead to inconsistent interpretations and outcomes.

We appreciate the MeitY's intent to reflect constitutional values in the 2021 IT Rules and require intermediaries to implement the spirit of these constitutional rights. However, there are concerns that arise from the framing of Rule 3(1)(n). We note that while platforms may perform certain functions that may be increasingly becoming crucial to the digital economy, they do not fall within the definition of "*State*" under Part III of the Indian Constitution,[34] and are not directly subject to fundamental rights obligations. Rather, we understand the proposed Rule 3(1)(n) as requiring intermediaries to uphold the *contents* of fundamental rights obligation *vis-a-vis* Indian users. However, the content of an obligation that requires intermediaries "*to respect the rights accorded to citizens under the Constitution*" may not be immediately discernible to private actors, and may make compliance and enforcement particularly difficult.

The text of the Fundamental Rights articulated in the Indian Constitution are intended to operate at a high level of generality and their application to individual situations are typically carried out by State or constitutional functionaries with a high degree of specialised legal knowledge. These Rights were drafted and have been applied in the context of the State's obligations to its citizens, and it may not be suitable to transpose these into the relationship between private corporations (i.e., intermediaries) and their users. The interpretation of different provisions (including Articles 14, 19, and 21) of the Constitution has constantly been evolving since the framing of the Constitution and the courts tasked with interpreting these provisions themselves may disagree on how a fundamental right should be applied in a given situation. Thus, it may be challenging for the contents of these State-citizen rights to be transposed on intermediaries *vis-a-vis* their users. What it means to 'respect the constitutional rights of citizens' is constantly evolving in a State-citizen context, is open to contestation, and is subject to reasonable disagreement amongst a multitude of actors. Thus, imposing them on intermediaries would lead to a high degree of legal uncertainty.

[34] Article 12 of the Constitution

A requirement that intermediaries 'respect constitutional rights' to retain safe harbour may have several adverse consequences on India's online ecosystem. First, because the content of the obligation is indeterminate, it may increase the costs of compliance for all intermediaries, and disproportionately impact smaller intermediaries. This may lead to a situation where intermediaries are unable to determine when they are in compliance with this obligation and when they are not. Second, because the interpretation of Fundamental Rights themselves are contested, the proposed amendment may entail different intermediaries making varied and even contradictory decisions with respect to online speech and privacy.

Any obligation, without precise specification, on private actors to abide by provisions of the Constitution may result in a high degree of legal uncertainty and consequently should be dropped from the proposed amendments.