Comments to the draft amendments to the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021

6 July, 2022

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Preliminary

Comments from the previous iteration of the rules
- The rules are ultra vires the IT Act 3
- Provisions on content takedown
  - The need for harmonisation of content takedown procedures 5
  - Voluntary removal by intermediaries 6

Specific comments on the proposed amendments
- Preamble: Significant Social Media Intermediaries (SSMI) and ‘big tech’ 7
- Horizontality of rights 8
- Accessibility, privacy and transparency
  - Accessibility of service 10
  - Privacy and transparency 10
- Expedited timeline to deal with user grievances 11
- Establishment of a Grievance Appellate Committee 11
- Removal of content 13
Preliminary

The Centre for Internet and Society (CIS) is a non-profit organisation that undertakes interdisciplinary research on internet and digital technologies from policy and academic perspectives. The areas of focus include digital accessibility for persons with disabilities, access to knowledge, intellectual property rights, openness (including open data, free and open source software, open standards, open access, open educational resources, and open video), internet governance, telecommunication reform, digital privacy, and cyber-security. The academic research at CIS seeks to understand the reconfiguration of social processes and structures through the internet and digital media technologies, and vice versa.

This submission presents comments by the CIS on the draft amendments to the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 (‘the rules’), which were released on 6 June, 2022 for public comments. These comments examine whether the proposed amendments are in adherence to established principles of constitutional law, intermediary liability and other relevant legal doctrines. We thank the Ministry of Electronics and Information Technology (MEITY) for allowing us this opportunity.

Our comments are divided into two parts. In the first part, we reiterate some of our comments to the existing version of the rules, which we believe holds relevance for the proposed amendments as well. And in the second part, we provide issue-wise comments that we believe need to be addressed prior to finalising the amendments to the rules.

Comments from the previous iteration of the rules

The rules are ultra vires the IT Act

(i) Section 79(1) of the IT Act states that the intermediary will not be held liable for any third-party information if the intermediary complies with the conditions laid out in Section 79(2). One of these conditions is that the intermediary observe “due diligence while discharging his duties under this Act and also observe such other guidelines as the Central Government may prescribe in this behalf.” Further, Section 87(2)(zg) empowers the central government to prescribe “guidelines to be observed by the intermediaries under sub-section (2) of section 79.”

It has been held by the Supreme Court in State of Karnataka and Another v. Ganesh Kamath & Ors 

1 State of Karnataka and Another v. Ganesh Kamath & Ors, 1983 SCR (2) 665.
thereto.” A combined reading of Section 79(2) read with Section 89(2)(zg) makes it clear that the power of the Central Government is limited to prescribing guidelines related to the due diligence to be observed by the intermediaries while discharging its duties under the IT Act. However, the 2021 guidelines have imposed additional requirements and widened the ambit of requirements to be fulfilled by the intermediary.

For instance, the rules include an obligation on a significant social media intermediary, primarily messaging services, to enable the identification of the first originator of the information on their service when required either by a government (under Section 69 of the IT Act) or court order. This obligation can only be fulfilled if messaging services technically modify their platform to remove end-to-end encryption or add additional metadata to each message in a way that undermines the security and privacy guarantees that end-to-end encryption offers. As discussed above, the executive through subordinate legislation can only make rules that are consistent with the parent act and with the legislative policy enunciated by the central government. There is nothing in Section 79 of the IT Act to suggest that the legislature intended to empower the Government to mandate changes to the technical architecture of services, or undermine user privacy.

(ii) Similarly, the IT Act does not prescribe any classification of intermediaries. Section 2(1) (w) of the Act defines intermediaries as “with respect to any particular electronic records, means any person who on behalf of another person receives, stores or transmits that record or provides any service with respect to that record and includes telecom service providers, network service providers, internet service providers, web-hosting service providers, search engines, online payment sites, online-auction sites, online-market places and cyber cafes”. Intermediaries are treated and regarded as a single monolithic entity with the same responsibilities and obligations.

The 2021 Intermediary Guidelines have now established and defined new categories of intermediaries; namely (i) Social Media Intermediary;² and (ii) Significant Social Media Intermediary.³ This classification comes with an additional set of obligations for significant social media intermediaries as well as an expansion of the obligations for social media intermediaries. The additional set of obligations placed on social media intermediaries finds no basis in the IT Act, which does not specify or demarcate between different categories of intermediaries.

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² IL Rules 2021, Rule 2(w) states, “Social Media Intermediary’ means an intermediary which primarily or solely enables online interaction between two or more users and allows them to create, upload, share, disseminate, modify or access information using its services.”
³ IL Rules 2021, Rule 2(v) states, “Significant Social Media Intermediary’ means a social media intermediary having number of registered users in India above such threshold as notified by the Central Government.” The threshold for social media intermediary to be considered and regulated as a “significant social media intermediary” was notified on February 26, 2021, as fifty lakh (5 million) registered users.
The 2021 Rules have been prescribed under Section 87(1) and Section 87(2)(z) and (zg) of the IT Act. These provisions do not empower the Central Government to make any amendment to Section 2(w) or create any classification of intermediaries. As discussed previously, the rules cannot go beyond the parent act or prescribe policies in the absence of any law/regulation authorising them to do so.

Therefore, while we believe and agree that the classification of intermediaries (instead of treating the disparate group of intermediaries as one category) is a more nuanced approach for their regulation, we recommend that such a classification should happen through an amendment to the parent act and the amendment should also prescribe the additional responsibilities and obligations of significant social media intermediaries. Documents obtained under the Right to Information Act reveal that advisors in the Ministry of Law and Justice were also of the opinion that the changes brought through the rule went beyond the scope of the current IT Act.⁴

**Provisions on content takedown**

Rule 3(1)(d) contains procedures that intermediaries (including SMI and SSMI) ought to follow while dealing with government takedown notices. An intermediary would be required to remove access to content upon receiving ‘actual knowledge’ about such content within a turnaround period of 36 hours. An intermediary would be said to possess actual knowledge only on the receipt of a government notification or a court order.⁵

Additionally, the rules mention that any legal takedown order, issued either by the government or the court, ought to be restricted to content that is prohibited in the interests of “sovereignty and integrity of India; security of the State; friendly relations with foreign States; public order; decency or morality; in relation to contempt of court; defamation; incitement to an offence relating to the above, or any information which is prohibited under any law for the time being in force”.

**The need for harmonisation of content takedown procedures**

This provision moves the guidelines towards formal compliance with the Supreme Court’s directions in *Shreya Singhal v. Union of India*⁶, in ensuring that intermediaries are only legally required to act on content takedown orders from authorised government agencies or courts.

While such adherence with established judicial doctrine is the correct stance in law, we highlight that the content takedown procedure under Rule 3(1)(d) is currently not in harmony

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⁵ CIS 2011 Analysis.

⁶ Shreya Singhal Case.
with the procedure laid down by section 69A of the IT Act, and the rules made thereunder [“the blocking rules”]. The framework created by section 69A and the blocking rules envisage a completely different procedure for the removal of online content, which includes allowing the intermediary or the originator an opportunity to represent themselves, periodic review of the blocking orders issued by the government, and the provision of at least 48 hours for the concerned individual/entity to respond to a request for blocking.\(^7\) Also, the scope of the grounds on which the government is empowered to send blocking orders under section 69A, with those delineated in Rule 3(1)(d), save ‘decency and morality’.

In light of this, we believe that it is important for the two legal frameworks to be harmonised, to ensure that the procedure for removal of online content is uniform and that the same safeguards are available to the intermediary/originator of the information.

**Voluntary removal by intermediaries**

The provisions further clarify that any content removed by the intermediary on the basis of government or court orders, voluntarily under Rule 3(1)(b), or based on user grievances will not disqualify them from immunity from liability for third-party content. Such a clarification was critical to include given that the text of section 79 does not contain this clarity.\(^8\)

However, there is a need for the rules to consider the fact that voluntary removal and flagging of content by a large number of intermediaries goes beyond the categories mentioned in Rule 3(1)(b). Many online communities also have their own content rules and may prohibit content beyond what is described under 3(1)(b). Spam is such an example, which may not meet any criteria under 3(1)(b), but is regularly monitored for and removed by social media intermediaries. Another example is online collaborative communities like Wikipedia would have other users edit and delete content based on the quality. We recommend that this editorial independence be protected to a large extent for all intermediaries dealing with third-party content.\(^9\)

There is a need to expand the scope of the provision to ensure that voluntary content removal and flagging by intermediaries is permissible in all cases.

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\(^7\) See Gurshabad Grover and Torsha Sarkar, ‘Content takedown and Users’ Rights’, The Leaflet, 12 February 2020, [https://www.th叶let.in/content-takedown-and-users-rights/](https://www.thleaflet.in/content-takedown-and-users-rights/), which shows that Section 69A has flaws of its own.


\(^9\) This comment is not aimed to critique network neutrality regulations that oblige internet service providers to not block or throttle content without a legal basis.
Specific comments on the proposed amendments

Preamble: Significant Social Media Intermediaries (SSMI) and ‘big tech’

Stringent regulations have significant economic as well as social costs that merit careful consideration by policymakers.\textsuperscript{10} It has been observed that usually, the big platforms possessing deep pockets are able to afford compliance with onerous regulations. Consequently, these changes often enacted with the intention of keeping a check on big monopolies may have an opposite effect and may further entrench their dominance.\textsuperscript{11}

Even though, the draft amendments re-released with clarification on June 6, 2022, categorically state in the press note accompanying the proposed amendments that the rules will not “impact early-stage or growth stage Indian companies or Startups”,\textsuperscript{12} the press note by itself does not have any legal effect; there remains a lack of clarity around categorisation of these ‘early stage’ companies. Furthermore, while the notification explicitly states that these amendments have been proposed to address “some of the infirmities and gaps that exist in the current rule vis-a-vis Big Tech platform”, there is a lack of clarity on what constitutes ‘Big-tech’ platforms in India.

As such, according to the IT Rules, 2021 a significant social media intermediary (SSMI) is a “social media intermediary having number of registered users in India above such threshold as notified by the Central Government”\textsuperscript{13} The current notified threshold is 50 lakh users, by virtue of which SSMIs in India include Google, Facebook, Twitter, among others.\textsuperscript{14}


\textsuperscript{11} Pete Swabey, GDPR cost businesses 8% of their profits, according to a new estimate, March 11, 2022, available at https://techmonitor.ai/policy/privacy-and-data-protection/gdpr-cost-businesses-8-of-their-profits-according-to-a-new-estimate (Last available on June 6, 2022). (GDPR has not affected all companies equally. Frey and Presidente’s study found that the drop in both profits and sales was greater for small businesses. This discrepancy was especially pronounced in the IT sector; large IT firms suffered a 4.6% drop in profits since GDPR’s introduction, compared to a 12.3% drop for small IT firms.)


\textsuperscript{13} Rule 2(1)(v), Intermediary Guidelines and Digital Media Ethics Code Rules, 2021.

Overall, there is a lack of clarity around the ‘intermediaries’ that shall fall within the ambit of the proposed amendments. Even though, the Press Note states that the amendments shall not apply to early-stage Indian companies, and while elaborating the broad principles specifically mentions ‘significant social media intermediaries’, the proposed amendments to clauses Rule 3 (1) (a) and (b) mandating due diligence by an intermediary apply to social media intermediary in addition to SSMI. This leaves room for an expansive interpretation of the term ‘intermediary’; and may impact entities beyond the ‘Big-tech’ including early-stage Indian startups. Furthermore, these relaxations have not been codified into the amendments, as such, leaving room for ambiguities and lack of predictability.

In addition to our remarks on the amendments proposed on June 6, 2022, we would also like to reiterate some of our earlier remarks submitted on June 21, 2021 as a response to the amendments to IT Rules, 2021, that also applies to these recently proposed amendments. Creating an additional layer of compliance for SSMIs may be a step in the right direction. However, the extant government notification regarding the threshold does not elaborate on how this threshold of 50 lakh users is calculated. This issue was also encountered by the Network Enforcement Act (NetzDG) in Germany, which required social media networks with more than 2 million users to remove ‘clearly illegal’ content within 24 hours. The Act was criticised for inadequate disclosure around computing user-base, i.e. would they consider the active user base or an average value aggregated over a period of time? Similarly, there is a lack of clarity on how user thresholds for SSMIs would be calculated in India. Additionally, the currently specified threshold of 50 lakh users (5 million) which is only 0.007% of the total population, is a very low threshold which may create impediments for SMEs and early-stage companies in India.

**Horizontality of rights**

Rule 3(1)(n) introduces further delineation of an intermediary’s obligations, by stating that:

“*the intermediary shall respect the rights accorded to the citizens under the Constitution of India.*”

Under this rule, the amendment creates an obligation for intermediaries to uphold Constitutional rights, including, presumably, fundamental rights enumerated in Chapter III of

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the Constitution. However, under constitutional law jurisprudence, fundamental rights are enforceable only against the State (vertical enforcement); private parties like intermediaries, generally, are not liable to uphold them (horizontal enforcement).

The Indian Supreme Court (‘SC’) has had some opportunities to explore whether fundamental rights can be enforced horizontally, that is, whether citizens can bring a claim against acts of private parties on the touchstone of constitutional law.18

One way of approaching this is by debating whether an intermediary qualifies to be ‘State’ under Article 12 of the Indian Constitution, which defines the term to be: “the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India”.

The Supreme Court, in the case of Pradeep Kumar Biswas v Indian Institute of Chemical Engineering19, lays down the current position in law about the interpretation of the term ‘other authorities’, which only includes entities that are “functionally, financially and administratively dominated by or under the control of the Government”. In light of this precedent, a privately-controlled intermediary does not qualify to be ‘State’ within the meaning of Article 12, and the obligation under Rule 3(1)(n) does not adhere to this strand of constitutional jurisprudence on the enforcement of rights.

Another way of approaching this is locating whether there are specific fundamental rights that permit citizens to challenge private-party actions (direct horizontalit).20 In Chapter III of the Constitution, there are three provisions that allow this: Article 15(2) lays down that no citizen shall be restricted from access to shops, public restaurants, hotels and places of public entertainment, and places of resort for the use of general public, on grounds only of religion, race, caste, sex, place of birth, or any of them.21 Article 17 prohibits the practice of untouchability,22 while Article 23 prohibits human trafficking and bonded labour.23

Barring Article 23, the jurisprudence on Article 15(2) and Article 17 is underdeveloped.24 It is not clear, for instance, what the term ‘access’ in Article 15(2) means.25 Even presuming that an intermediary is made liable to enforce the mandate of Article 15(2) by not excluding any

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19 Ibid.
20 Ibid
21 Article 15(2), Constitution of India
22 Article 17, Constitution of India
23 Article 23, Constitution of India
25 Ibid.
citizens on the basis of religion, race, caste, sex, or place of birth, Rule 3(1)(n) must, at the very least, expand on the exact nature of the intermediary's obligation. The mere allusion to 'rights accorded to the citizens under the Constitution of India' does not make this obligation adhere to the limited jurisprudence on the horizontal application of fundamental rights in India.

**Accessibility, privacy and transparency**

**Accessibility of service**

"Accessibility of service" is not defined in the IT Rules 2021 or Act. "Access" is defined in the Act "with its grammatical variations and cognate expressions means gaining entry into, instructing or communicating with the logical, arithmetical, or memory function resources of a computer, computer system or computer network" and has predominantly been used in the context of availability of a computer resource or the information housed by it.

It is unclear what the directive of 3(1)(m) with regards to "ensure accessibility of service" refers to or how it will be measured. Intermediaries are private companies and they cannot ensure access of all services to all users regardless of internal use cases, business interests or company priorities. Directing the services offered by private companies to be made available to all users is an unreasonable expectation.

Further, user access to an intermediary is not solely dependent on its actions. The unavailability of an intermediary may also be due to technical issues such as lack of infrastructure, or network disturbances, among others. There is also no guideline on what counts as "reasonable measures" or which ones take precedence when multiple intermediaries are involved in a user's ability to access one of them, eg. domain registrars, internet service providers, or social media intermediaries.

**Privacy and transparency**

The gambit of "privacy" and "transparency" are similarly unclear and vague.

"Privacy" has not been defined under IT Rules, 2021, and in the IT Act is defined explicitly in Section 66E in terms of bodily privacy. Section 72 makes reference to "privacy" as it relates to confidentiality and consent of "concerned persons", but is irrelevant to the discussion with Intermediaries as it relates to the proposed amendments. It is unclear whether "privacy" in the proposed amendment refers to privacy between users, data protection by the intermediary, from third party actors or something else entirely.

The term "Transparency" has never been used in the Act or the IT rules before this set of proposed amendments.
This lack of a clear definition leaves room for broad interpretations of these terms, thereby leading to a lack of consistency and predictability in the implementation of the policy. Furthermore, this also runs the risk of ‘overbroad’ enforcement which would have an adverse effect on online speech. Such a chilling effect on freedom of online speech may also cause the end-user to self-censor, thereby creating an atmosphere of fear within the society at large.

** Expedited timeline to deal with user grievances **

The draft also places new responsibilities upon grievance officers appointed by social media companies. It states that if a user reports that content falls between Rule 3(1)(b)(i)-(x), a grievance officer is required to address the complaint within 72 hours. However, the draft also mentions that social media companies can develop safeguards to prevent misuse of these provisions.

A short timeline to dispose of complaints may affect free speech. A risk associated with faster disposal of complaints by non-judicial bodies is that owing to ‘expedited timelines’ authorities may dispose of complaints carelessly without the requisite application of mind, thereby vitiating the process of regulating content in a fair manner. Recently, it has also been observed that despite claims of objectivity, decisions of intermediaries tend to be shaped by the dominant political discourse, business interests, and personal biases.

Moreover, the compliance burden could create further impediments for smaller companies with significantly less financial resources at their disposal. This can have detrimental effects on competition as well as innovation in the market. Therefore, it might be prudent to limit the application of these amendments specifically to SSMLs. Even though the preamble clarifies that the amendments will not impact early-stage or growth-stage Indian companies or Startups, however, the rules make no such distinction (See: Preamble: Significant Social Media Intermediaries (SSML) and ‘big tech’), and therefore in its present form the proposed amendment may be applied to all ‘intermediaries’, their size or scale notwithstanding.

** Establishment of a Grievance Appellate Committee **

The proposed amendments facilitate governmental scrutiny of social media content by allowing users to appeal decisions of the Grievance Officer, to a Grievance Appellate

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26 Intermediary Guidelines and Digital Media Ethics Code Rules, 2021, Rule 3(2), Proviso 1 (Draft Amendment).
Committee (‘GAC’) constituted by the government. Users can file an appeal with the proposed GAC against any decisions made by the company’s grievance officer. This will override the decisions of existing grievance redressal mechanisms of social media companies. Additionally, there is no clarity about whether there will be any further forums to file appeals against decisions taken by the GAC or whether users can be heard before the GAC.

Smaller intermediaries might also face additional compliance costs in order to comply with new amendments, especially the ones which require intermediaries to make users not post infringing content. Also, as experts have pointed out, the GAC could also harm the interests of smaller intermediaries by erring on the side of caution and banning smaller intermediaries based on frivolous complaints by a larger competitor.29

The Supreme Court has previously held that “It is a well-settled principle of interpretation of statutes that conferment of rule-making power by an Act does not enable the rule-making authority to make a rule which travels beyond the scope of the enabling Act or which is inconsistent therewith or repugnant thereto.”30 A combined reading of Section 79(2) read with Section 89(2)(zg) of the Information Technology Act, 2000 (‘IT Act’) makes it clear that the power of the Central Government is limited to prescribing guidelines related to the due diligence to be observed by the intermediaries while discharging its duties under the IT Act.31 However, the creation of the GAC is a substantive change in the law which travels beyond the scope of the parent act. Hence, the creation of such a body should be a legislative exercise.

The number of social media users in the country is beyond millions.32 Therefore, even if a small percentage of users take up the process with the GAC, there will be a large volume of appeals that the GAC would have to deal with. For this, the GAC ought to be equipped with the infrastructure to do so. Without sufficient number and training of staff at the GAC, there may be arbitrariness and an improper appeals process.

Additionally, the members of the GAC shall be appointed by the Central Government by notification in the Official Gazette. The composition of the GAC has not been identified and it is unclear whether these members shall be representatives from the executive, industry or civil society. The total number of members in this body is also not defined. An executive majority composition of the GAC gives the executive disproportionate powers of agenda-setting to further police online content and empowers the government to directly comment and influence the internal rules and policies of the intermediaries.

31 The Information Technology Act, 2000, Section 79(2) and 89(2)(zg).
Furthermore, it must be noted that the grounds enumerated within Rule 3(1)(b)(i)-(x), i.e., the grounds on which the GAC would be having the jurisdiction to hear appeals, go beyond the reasonable restrictions under Article 19(2) of the Indian Constitution. For instance, content that is infringing copyright, or content that impersonates another person, are not legitimate grounds under Article 19(2) for the government to suppress speech. In that light, giving the GAC — which in its proposed form appears to be almost entirely government-driven — powers to hear adjudications made on these grounds under Rule 3(1)(b)(i)-(x), goes directly against the judgement of the Supreme Court in *Shreya Singhal v Union of India*, where it was held that “*Unlawful acts beyond what is laid down in Article 19(2) obviously cannot form any part of Section 79.*” In light of this, the GAC’s powers, as envisaged in the rules, which derive their legitimacy from the rule-making power in section 79, are violative of the precedent of the Supreme Court and must be struck down in entirety.

**Removal of content**

Rule 3(1)(b) of the IT Rules states that social media platforms must ‘cause the users’ to not post content which may be ‘ethically objectionable’, ‘defamatory’, ‘harmful to child’ etc. However, the Rules do not mandate the removal of content without a complaint filed. The draft amendment proposes to remove content regardless of a complaint being filed. R By reading Rule 3(1)(a) and 3(1)(b) intermediaries are obliged to ‘cause the user’ to not upload certain kinds of content, it is implied that the intermediary would be legally obligated to take down content.

Post the decision in *Shreya Singhal v Union of India* case, the Supreme Court laid down that intermediaries would be legally mandated to take down content when they knew about the same either through court or government orders.\(^{33}\)

However, the proposed amendment to Rule 3(1)(b) does away with the ‘actual knowledge’ requirement and makes intermediaries fully responsible to remove content. Resultantly, there may be more content takedowns which will inevitably affect the users, as well as contravene the precedents set in *Shreya Singhal v Union of India*.

\(^{33}\) *Shreya Singhal v Union of India*, AIR 2015 SC 1523.