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Important Documents

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Outline

1. Executive Summary

- a. Key Concerns
 - i. Definitional vagueness
 - ii. GAC = govt censorship body
 - iii. Lack of transparency around the GAC's functioning + unfeasible
 - iv. Legal uncertainty
- b. Broad Concern with IT Rules
 - i. Unreasonable restriction on online free speech
 - ii. Beyond ambit of law
- c. Recommendations
 - i. Withdraw IT Rules, 2021 in its entirety
- d. Background

2. Analysis (IT Rules'21 vs Proposed Amendments (June 06) vs Notified Amendment'22)

- a. Consultation process
 - b. Overview (Rule 2)
 - c. Rule 3
 - i. *"in English or any language specified in the Eighth Schedule to the Constitution in the language of his choice"* added under several sub-clauses of 3(1).
 - d. Rule 3(1)(a)
 - i. "Shall cause" changed to *"shall make reasonable efforts"*
 1. Shields MeitY from Shreya Singhal; earlier was a SS violation + separation of power. Welcomed this change.
 - e. Rule 3(1)(b)
 - i. Rule 3(1)(b) (ii): removed "defamatory" + added "promoting enmity between different groups on the grounds of religion or caste with the intent to incite violence"
 - ii. Rule 3(1)(b) (v)
 1. "Misinformation" added. "and untrue" was earlier in (x) which has now been added under (v). Also removed "or misleading in nature but may reasonably be perceived as a fact;"
- (v) "deceives or misleads the addressee about the origin of the message or knowingly and intentionally communicates any **misinformation** or information which is patently false and **untrue** or misleading in nature;"*

- iii. Rule 3(1)(b) (ix)
 - 1. Deleted: “(x) is patently false and untrue, and is written or published in any form, with the intent to mislead or harass a person, entity or agency for financial gain or to cause any injury to any person;”
- f. Rule 3(1)(n)
 - i. the intermediary shall respect all the rights accorded to the citizens under the Constitution, including in the articles 14, 19 and 21. (highlighted part added)
- g. 3(2)(b)
 - i. (i) earlier IT Rules’21 said “dispose of such complaint”; now it says “resolve such complaint”
 - ii. Earlier in proposed amendments: “including suspension, removal or blocking of any user or user account or any complaint from its users in the nature of request for removal of information or communication link relating to sub-clauses (i) to (x) of the clause (b) under sub-clause (1) of rule 3,” - now deleted
 - iii. New addition and changes (yellow and pink highlighted part resp): “Provided that the complaint relating to clause (b) of sub- rule (1) of rule 3, except sub-clauses (i), (iv) and (ix), shall be acted upon as expeditiously as possible and shall be resolved within seventy-two hours of such reporting.”

Exemptions to the following sub-clauses didn’t exist in the proposed amendments:

- (i) belongs to another person and to which the user does not have any right*
- (iv) infringes any patent, trademark, copyright or other proprietary rights*
- (ix) violates any law for the time being in force*

- h. 3(A)
 - i. Rule 3(A)(1): added
 - 1. “The Central Government shall, by notification, establish one or more Grievance Appellate Committees within three months from the date of commencement of the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Amendment Rules, 2022.”
 - ii. Rule 3(A)(2):GAC(s) composition
 - 1. “Each Grievance Appellate Committee shall consist of a chairperson and two whole time members appointed by the Central Government, of which one shall be a member ex-officio and two shall be independent members.”
 - iii. The proposed amendment (June 06) Rule 3(a) included a footnote which said “*the user has the right to seek judicial remedy at any time.*” The press note also included this statement: “*Even after this amendment, the users will have the right to directly approach a court of law against the intermediary’s decision.*” This has nowhere been retained in the notified amendments.
 - iv. Rule 3(A)(3):
 - 1. “Any person aggrieved by a decision of (earlier: “by an order made by”) the Grievance Officer (now deleted: under clause (a) and clause (b) of

sub-clause (2) of rule 3) may prefer an appeal to the Grievance Appellate Committee...”

- v. Rule 3(A)(4): “disposed off” changed to “resolve”
- vi. Rule 3(A)(5): [added]
 - 1. While dealing with the appeal if the Grievance Appellate Committee feels necessary, it may seek assistance from any person having requisite qualification, experience and expertise in the subject matter.
- vii. Rule 3(A)(6): [added]
 - 1. The Grievance Appellate Committee shall adopt an online dispute resolution mechanism wherein the entire appeal process, from filing of appeal to the decision thereof, shall be conducted through digital mode.
- viii. Rule 3(A)(7):
 - 1. Every order passed by the Grievance Appellate Committee shall be complied with by the Intermediary concerned and a report to that effect shall be uploaded on its website.”.

3. Table summarising our concerns

1. Executive summary

The Ministry of Electronics and Information Technology (“MeitY”) amended the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 ([“IT Rules, 2021”](#)), which were notified on February 25, 2021. The amended rules, now called the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Amendment Rules, 2022 ([“IT Amendment Rules, 2022”](#)) were published on October 28, 2022. This follows a public consultation held by MeitY on the “Proposed draft amendment to the IT Rules, 2021” ([“Proposed Amendment, 2022”](#)). The IT Rules, 2021 have been contested and criticised by various communities since its inception, primarily for introducing unreasonable restrictions on online free speech and user rights. However, the Proposed Amendment, 2022 and ultimately the IT Amendment Rules, 2022 further deepen injuries to the digital rights of every Indian social media user.

Key concerns with IT Amendment Rules, 2022

This brief aims to provide an in-depth analysis of the various changes brought by the IT Amendment Rules, 2022. Before expanding on a detailed analysis, we list below four main concerns with it:

- 1. A government appointed censorship body:** The creation of Grievance Appellate Committee(s), i.e., an executive-constituted committee, will make the Union Government (instead of, ideally, an independent judicial or a regulatory body) the arbiter of permissible speech on the internet. It may also incentivise social media platforms and intermediaries to suppress any speech unpalatable to the government.
- 2. Legislative uncertainty:** The IT Amendment Rules, 2022 empower the government to censor speech on grounds not stated under Section 69A of the Information Technology (“IT”) Act, 2000 or Article 19(2) of the Constitution. Further, the GAC itself does not have any legal basis, as it has neither been constituted by the legislature nor has the legislature permitted the executive to constitute the GAC through a subordinate legislation.
- 3. Lack of operational transparency:** The absence of details on the functioning of the GAC(s) and its methods of choosing appeals for review raises doubts regarding its independence as well as the government’s ability to influence content moderation decisions in a non-transparent manner.
- 4. Definitional vagueness:** Several grounds mentioned in Rule 3(1)(b), such as “misinformation”, remain undefined and thus are vague, impossible to implement consistently and prone to misuse. This may cause social media platforms to become pro-active arbiters of permissible speech which is already resulting in issues given existing lack of natural justice, transparency and accountability as noted by MeitY. It may also potentially lead to arbitrary censorship.

Recommendations

In addition to highlighting the concerns with the amendments, we have also provided recommendations to MeitY as we recognise the need to regulate social media in a rights respecting legislative framework. Given that the IT Rules have been widely criticised as well as legally challenged for undermining freedom of speech and expression, our broad recommendation remains its withdrawal in their entirety. Further, we urge MeitY to publish a white-paper detailing the government's intent with respect to intermediary liability and online content regulation.

For a quick summary of our main concerns and analysis of the IT Amendment Rules, 2022, refer to the table at the end of this document.

2. Background

- 2.1. The IT Rules, 2021 are subordinate legislation made under Section 87 read with Section 79 of the Information Technology Act, 2000 (hereinafter, "IT Act, 2000") which provides for safe-harbour immunities for intermediaries.¹ The IT Rules, 2021 replaced the Information Technology (Intermediaries guidelines) Rules, 2011 ("IT Rules, 2011").² The IT Rules, 2021 consists of three parts, of which Part I is preliminary and provides definitions. Part II, administered by MeitY, imposes obligations on intermediaries such as social media companies, digital messaging platforms and other entities which technically facilitate information exchange for end users. Finally, Part III, administered by the Ministry of Information and Broadcasting ("MIB"), deals with the regulation of publishers of news and current affairs (i.e., digital news media) and publishers of online curated content (i.e., OTT platforms). The IT Rules, 2021 hence, aim to regulate a large number of online service providers constituting the sum total of digital experiences of Indian internet users.
- 2.2. The IT Rules, 2021, whose legality is contentious, and undermines the fundamental right to freedom of speech and expression and privacy for millions of internet users in India. The IT Rules, 2021 have been unequivocally criticised by

¹ Ministry of Electronics and Information Technology, Government of India, Information Technology, 2022, <https://www.meity.gov.in/content/information-technology-act-2000-0>

² Ministry of Electronics and Information Technology, Government of India, Information Technology (Intermediaries guidelines) Rules, 2011, 11 April, 2011, https://www.meity.gov.in/writereaddata/files/GSR314E_10511%281%29_0.pdf

experts,³ civil society,⁴ digital rights groups,⁵ industry bodies,⁶ technology companies,⁷ technical groups⁸ and members of the press⁹. Special Rapporteurs from the United Nations have called these rules incompatible with “*international law and standards related to the right to privacy and to freedom of opinion and expression*” and sought their withdrawal.¹⁰

- 2.3. There are multiple court orders that record the legal deficiencies and constitutional injuries caused by the IT Rules, 2021.¹¹ Here, IFF’s work includes strategic litigation where it has provided legal representation to LiveLaw Media Pvt. Ltd. before the Kerala High Court which by order dated March 10th, 2021 has directed the Union Government to not take coercive action against LiveLaw Media Pvt. Ltd. under Part III of the IT Rules, 2021.¹² IFF is also representing Mr. T.M. Krishna in proceedings before the Madras High Court where a Division Bench of Court has stayed Rules 9(1) and 9(3) of the IT Rules, 2021 while observing that the oversight mechanism in the Rules may “*rob the media of its independence*”.¹³
- 2.4. Hence, on the basis of the clear and sufficient existing evidence, it is clear that the IT Rules, 2021 cause injury to the constitutional and democratic rights of Indian internet users. They are contrary to the mandate of the Supreme Court in *Shreya Singhal v. Union of India* and deserve a complete recall.¹⁴

³ Daphne Keller, Shreya Singhal case was one of the defining rulings of modern internet law, *The Indian Express*, 17 January, 2020 <https://indianexpress.com/article/opinion/columns/filtering-out-free-speech-shreya-singhal-case-supreme-court-6220277/>

⁴ Archana Sivasubramaium, Unpacking IT Rules, 2021, *Centre for Policy Research*, 23 April, 2021 <https://cprindia.org/unpacking-the-it-rules-2021/>

⁵ Rohin Garg, Dear MeitY, withdraw the new IT Rules, *Internet Freedom Foundation*, 23 March, 2021, <https://drive.google.com/file/d/1elhs46khdMd2ITWTE4ReFCli2s8lYuAU/view>; Also see: Analysis of Information Technology (Guidelines for Intermediaries and Digital Media Ethics Code) Rules, *Software Freedom Law Centre* <https://sflc.in/analysis-information-technology-intermediary-guidelines-and-digital-media-ethics-code-rules-2021>

⁶ The Wire Staff, ‘New IT Rules Against Fundamental Principle of News’: Digipub Writes to Prakash Javadekar, *The Wire*, 26 February, 2021, <https://thewire.in/media/digipub-prakash-javadekar-it-rules-digital-media>

⁷ What is traceability and why does WhatsApp oppose it?, *WhatsApp*, <https://faq.whatsapp.com/general/security-and-privacy/what-is-traceability-and-why-does-whatsapp-oppose-it>

⁸ Neeti Biyani, Internet Impact Brief: 2021 Intermediary Guidelines and the Internet Experience in India, *Internet Society*, 08 November, 2021, <https://www.internetsociety.org/resources/2021/internet-impact-brief-2021-indian-intermediary-guidelines-and-the-internet-experience-in-india/>

⁹ The Editors Guild of India [EGI] is deeply concerned about the notification of Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules 2021, *Editors Guild of India*, 05 March, 2021, <https://editorsguild.in/statements-issued/>

¹⁰ Ms. Irene Khan, Mr. Clement Voule and Mr. Joseph Cannataci, Letter to the Union Government of India numbered OL Ind 8/2021, <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gld=26385>

¹¹ Internet Freedom Foundation, Table summarising challenges to IT Rules, 2021 pending before High Courts, <https://docs.google.com/document/d/1kmq-AIRO1XpPaThvesl5xQg2nVz6UdmaKFAJ8AMTk/edit>

¹² Order dated 10 March, 2021 in *LiveLaw Media Pvt. Ltd. & Ors. v. Union of India & Anr*, WP(C) 6272 of 2021; Also see: *News Broadcasters Association & Ors. v. Ministry of Information Technology & Anr*, 2021, SCC OnLine Ker 2735, <https://drive.google.com/file/d/1Y4KO2PyGRPP99RPsNuRaAmzneSi4PYGI/view?usp=sharing>

¹³ Order dated 16 September 2021 in *T.M. Krishna v. Union of India & Anr.*, WP(C) 12515 of 2021, https://drive.google.com/file/d/1uaUYSD-0RZIO7AixvndPnwEGraq_4fNk/view?usp=sharing; Also see: Express News Service, Madras HC stays key clause: ‘May rob media of its independence’, *The Indian Express*, 17 September, 2021, <https://indianexpress.com/article/india/information-technology-rules-madras-high-court-stays-key-clause-may-rob-media-of-its-independence-7513901/>

¹⁴ *Shreya Singhal v. Union of India*, (2015), 5 SCC 1, Para 122, <https://indiankanoon.org/doc/110813550/>

- 2.5. Despite engaging with the Ministry and challenging the legality of IT Rules in Court, the Government has continued to perpetuate the existing illegalities by introducing amendments detrimental to social media users' rights.¹⁵ On June 06, 2022, MeitY released a Press Note announcing the public consultation on the Proposed Amendment, 2022. Through these amendments, the Ministry aimed to *“provide additional avenues for grievance redressal apart from Courts and also ensure that the Constitutional rights of Indian citizens are not contravened by any Big-tech Platform by ensuring new accountability standards for SSMLs.”*
- 2.6. We sent our detailed submission on the Proposed Amendment, 2022 on July 04, 2022, highlighting how these new provisions, aimed at providing additional recourse to aggrieved users, do not “provide a force of law” as they are ultra-vires the safe harbour framework under Section 79 of the IT Act, 2000.¹⁶ Despite this illegality, the IT Amendment Rules, 2022 deals with complex issues of platform regulation that require detailed deliberation given the high chances of their outcomes being counterproductive.

3. Issues with the consultation process

- 3.1. The consultation process has been non-transparent and inconsistent right from 2018, when public consultation on IT Rules, 2021 first started, till the latest public consultation on the Proposed Amendment, 2022. Thus, before we list our concerns with the IT Amendment Rules, 2022, it is important to bring attention to this shortcoming.
- 3.2. On December 24, 2018, the Indian Express first broke the news about a “confidential” meeting between government officials and company representatives in which proposed amendments to the rules under Section 79 of the IT Act, 2000 were discussed.¹⁷ After learning about this private meeting regarding amendments to the guidelines for intermediary liability, we made available a complete copy of draft The Information Technology [Intermediaries Guidelines (Amendment) Rules] 2018 (“Draft Amendment Rules, 2018”) given the substantial public interest at stake.¹⁸ While, at first, MeitY denied any knowledge of any such meeting and the proposed changes, they subsequently

¹⁵ Kerala HC restrains coercive action on the operation of Part III of the Intermediaries Rules, 2021 for LiveLaw, *Internet Freedom Foundation*, 10 March, 2022, <https://internetfreedom.in/kerala-hc-grants-a-stay-of-the-operation-of-part-iii-of-the-intermediaries-rules-2021-to-livelaw/>

¹⁶ IFF's comments on the, “Proposed draft amendment to the IT Rules, 2021” dated July 04, 2022 numbered IFF/2022/067, https://drive.google.com/file/d/1wamOJoj_iGNOWMzIR62nKj4t0tKp1BM1/view

¹⁷ Seema Chishti, Govt moves to access and trace all 'unlawful' content online, *The Indian Express*, 24 December, 2018, <https://indianexpress.com/article/india/it-act-amendments-data-privacy-freedom-of-speech-fb-twitter-5506572/>

¹⁸ India must resist the lure of the Chinese model of online surveillance and censorship #IntermediaryRules #RightToMeme #SaveOurPrivacy, *Internet Freedom Foundation*, 24 December, 2018, <https://internetfreedom.in/india-must-resist-the-lure-of-the-chinese-model-of-surveillance-and-censorship-intermediaryrules-righttomeme-saveourprivacy/>

acknowledged them and initiated a public consultation on the proposed changes.¹⁹

- 3.3. Not only did the Draft Amendment Rules, 2018 lack any clear rationale, but the proposals themselves were substantively harmful to our fundamental rights to freedom of speech and privacy.²⁰ The Draft Amendment Rules, 2018 thus prompted a unanimous call by civil society organisations and digital rights experts for its recall.²¹ However, on February 25, 2021, we got hold of a copy of the IT Rules, 2021, which was entirely different in form and substance from the Draft Amendment Rules, 2018. Given that these Rules had been expanded to bring digital news platforms and OTT video content providers under government control, we released a draft version of the IT Rules, 2021 in public interest and called for a public consultation.²² The IT Rules, 2021, which were not put to public consultation in their final form, were notified in the official gazette a day later, on February 26, 2021.²³ This is contrary to the Pre-Legislative Consultation Policy dated February 05, 2014 issued by the Ministry of Law and Justice which required MeitY to publish a draft version of IT Rules, 2021.²⁴
- 3.4. The inconsistency continued in 2022, when MeitY, on June 02, 2022, released a notice dated June 01, 2022, seeking comments on the proposed draft amendments to Part I and II of the IT Rules, 2021.²⁵ On the same day, MeitY withdrew the proposal without any justification.²⁶ On June 06, 2022, MeitY issued and sought comments on the Proposed Amendment, 2022, which are identical to the draft published on June 02, 2022, along with a Press Note and/or Cover Note, which does not have any legal effect.²⁷ Such errors, hiccups and recalls during the consultation process significantly reduces its quality and sanctity.
- 3.5. We acknowledge and commend that there are positive efforts being made by MeitY to improve transparency and public participation by holding and giving

¹⁹ Ministry of Electronics and Information Technology, Government of India, Comments / suggestions invited on Draft of "The Information Technology [Intermediary Guidelines (Amendment) Rules] 2018, <http://meity.gov.in/content/comments-suggestions-invited-draft-%E2%80%9Cinformation-technology-intermediary-guidelines>

²⁰ IFF's comments/ suggestions on the draft Information Technology [Intermediary Guidelines (Amendment) Rules] 2018, 30 January, 2019, https://drive.google.com/open?id=1pDQt1M81spH66kv0CHcUk8P9U_Dp9_oc

²¹ Apar Gupta, We call on MeitY in our counter comments to withdraw the proposed changes to the Intermediary rules. They are unconstitutional and open to legal challenge, *Internet Freedom Foundation*, 16 February, 2019, <https://internetfreedom.in/a16022019/>

²² Latest Draft Intermediary Rules: Fixing big tech, by breaking our digital rights?, *Internet Freedom Foundation*, 25 February, 2021, <https://internetfreedom.in/latest-draft-intermediary-rules-fixing-big-tech-by-breaking-our-digital-rights/>

²³ Deep dive : How the intermediaries rules are anti-democratic and unconstitutional, *Internet Freedom Foundation*, 27 February, 2021, <https://internetfreedom.in/intermediaries-rules-2021/>

²⁴ Ministry of Law and Justice, Government of India, Pre-Legislative Consultation Policy numbered D.O. No. 11(35)/2013-L, 05 February 2014, <https://legislative.gov.in/sites/default/files/plcp.pdf>

²⁵ Ministry of Electronics and Information Technology, Government of India, Notice dated 01 June, 2022, <https://drive.google.com/file/d/1-Ap0beVi2v32juA-SaOgNQZsfvxOkM7q/view>

²⁶ MeitY publishes and then withdraws a proposal to amend IT Rules, 2021, *Internet Freedom Foundation*, 03 June 2022, <https://internetfreedom.in/meity-publishes-and-then-withdraws-a-proposal-to-amend-it-rules-2021/>

²⁷ Ministry of Electronics and Information Technology, Government of India, Press Note dated June 06, 2022 and Proposed draft amendment to IT Rules 2021, <https://www.meity.gov.in/writereaddata/files/Press%20Note%20dated%206%20June%2022%20and%20Proposed%20draft%20amendment%20to%20IT%20Rules%202021.pdf>

members of civil society and digital rights groups such as us an opportunity to attend the open, public consultation on the Proposed Amendment, 2022. We would like to note that we proactively wrote to MeitY asking for IFF to be invited to public consultations on Proposed Amendment, 2022, CERT-In Directions and the Draft India Data Accessibility & Use Policy 2022. However, we were not invited to the latter two in-person consultations, despite active engagement.

- 3.6. Here, objective criticism can help improve administrative foresight and public policy outcomes. Hence, the consultation on the Proposed Amendment, 2022 held on June 23, 2022 which saw participation from lawyers, IT experts, some members of the media as well as civil society organisations was a positive step that needs to be consistently practised. Hence, we urge MeitY to follow consistent procedures for open house discussions and publication of all stakeholder comments on its website which will increase stakeholder trust and engagement to everyone's benefit. Further, we hope that MeitY will promote healthy discussions during public consultations, wherein every organisation and individual are allowed as well as encouraged to express their apprehensions openly. This process will only be successful if these apprehensions and concerns are heard with an open mind, without any bias.

4. Analysis

4.1. Rule 3(1)

- 4.1.1 An amendment in 3(1)(a) and 3(1)(b) imposes an obligation on the intermediaries to prominently publish and inform its users of their rules and regulations, privacy policy or user agreement in English or any language specified in the Eighth Schedule to the Constitution in the language of the user's choice. This is a positive step in making the internet inclusive and representative of the Country's diversity. Our appreciation stems from the fact that it promotes user autonomy and choice by allowing the user to choose the language of his/her choice.
- 4.1.2 Rule 3(1)(a), earlier under the IT Rules, 2021, required intermediaries to, "*prominently publish...the rules and regulations, privacy policy and user agreement...*". However, under the Proposed Amendment, 2022 as well as the IT Amendment Rules, 2022, the phrase "*and ensure compliance of the same.*" has been inserted towards the end of Rule 3(1)(a), without actually specifying how social media platforms are expected to enforce such compliance. The phrasing also leads to ambiguity with respect to whether the intermediaries are expected to themselves comply or ensure user compliance of the privacy policy, rules, regulations and agreements. This gains significance as MeitY has also commenced issuing advisories to social media platforms requiring pro-active

removal of content.²⁸ Separately, privacy policies, rules and regulations and user agreements, are akin to private contracts between the intermediaries and their users. Mandating the intermediaries by threatening them with criminal prosecution, to ensure that their users comply with these contracts is an unwarranted interference with private enterprises. This follows from Rule 7 of the IT Rules, 2021 which clearly states the intermediary may be held liable for punishment under any law in case of failure to observe these rules.

IT Rules, 2021	Proposed Amendments, 2021	IT Amendment Rules, 2021
3(1)(a) the intermediary shall prominently publish on its website, mobile based application or both, as the case may be, the rules and regulations, privacy policy and user agreement for access or usage of its computer resource by any person;	3(1)(a) the intermediary shall prominently publish on its website, mobile based application or both, as the case may be, the rules and regulations, privacy policy and user agreement for access or usage of its computer resource by any person and ensure compliance of the same.;	3(1)(a) the intermediary shall prominently publish on its website, mobile based application or both, as the case may be, the rules and regulations, privacy policy and user agreement in English or any language specified in the Eighth Schedule to the Constitution for access or usage of its computer resource by any person in the language of his choice and ensure compliance of the same;

Figure 1: Changes in clause 3(1)(a)

4.1.3 Rule 3(1)(b) now states “the intermediary shall inform....and shall make reasonable efforts to cause the user of its computer resource not to host, display, upload, modify, publish, transmit, store, update or share any information...”. This Rule did not include the phrase “shall make reasonable efforts to cause” in the IT Rules, 2021, which was limited to just informing the users about its rules and regulations, privacy policy, and user agreements. However this is still an improvement as compared to the Proposed Amendment, 2022, which included the phrase “shall cause the user” instead of “shall make reasonable efforts to cause”. The former may increase the compliance burden of platforms to ensure removal of content, listed from (i) to (x) under Rules 3(1)(b), irrespective of a complaint from any user.

²⁸ Letter by Ministry of Electronics and Information Technology numbered 20(5)/2022-CL dated 29 June, 2022, https://www.meity.gov.in/writereaddata/files/advisory%20to%20social%20media%20platforms_removal%20of%20communal%20hated%20content_june%202022%20.pdf

IT Rules, 2021	Proposed Amendments, 2021	IT Amendment Rules, 2021
3(1)(b) the rules and regulations, privacy policy or user agreement of the intermediary shall inform the user of its computer resource not to host, display, upload, modify, publish, transmit, store, update or share any information that,	3(1)(b) the intermediary shall inform the rules and regulations, privacy policy or user agreement of the intermediary to the user and shall cause the user of its computer resource not to host, display, upload, modify, publish, transmit, store, update or share any information that,—	3(1)(b) the intermediary shall inform its rules and regulations, privacy policy or user agreement to the user in English or any language specified in the Eighth Schedule to the Constitution in the language of his choice and shall make reasonable efforts to cause the user of its computer resource not to host, display, upload, modify, publish, transmit, store, update or share any information that,—

Figure 1: Changes in clause 3(1)(b)

- 4.1.4 Most importantly, the obligation on intermediaries to ‘cause’ removal of content was in direct violation of the decision of the Hon’ble Supreme Court in *Shreya Singhal v. Union of India*.²⁹ In that case it was held that intermediaries must takedown content only on the basis of ‘actual knowledge’ in the form of directions from the Union Government under Section 69A or orders from competent courts or public authorities acting under law. Contrary to the decision, the Proposed Amendment, 2022, as a result of the phrase “*shall cause*” under Rule 3(1)(b), required intermediaries to become arbiters of permissible speech and suppress speech based on vague grounds. We were concerned that this may lead to threats of criminal prosecution if they do not proactively takedown speech which according to the Union Government, violates the grounds stated in Rule 3(1)(b). Thus, the implication of the change in phrase from “*shall cause*” to “*shall make reasonable efforts to cause*” is a positive one, however increased compliance burden as well as proactive and arbitrary censorship by the intermediaries still remains a possibility.
- 4.1.5 Rules 3(1)(b), which lists the grounds on which content must be removed by the intermediaries, has been significantly amended as compared to the IT Rules, 2021. Rule 3(1)(b)(ii) removes the word “*defamatory*” as well as the phrase “*or otherwise inconsistent with or contrary to the laws in force*”. The phrase “*promoting enmity between different groups on the grounds of religion or caste with the intent to incite violence*”. This phrase is similar to the phrase used in Section 153A of the Indian Penal Code, except the part “*with the intent to incite violence*”.³⁰ By requiring the intermediary to “*make reasonable efforts to cause*

²⁹ *Shreya Singhal v. Union of India*, (2015) 5 SCC 1

³⁰ The Indian Penal Code, 1860, Section 153A, <https://indiankanoon.org/doc/345634/>

the user not to... share [enumerated] information", the intermediary has been tasked with interpreting the standard of obscenity or "ethnically objectionable" or what constitutes "deceives or misleads ... about the origin of the message or is "patently false and untrue" under Indian law, and decide whether these must be taken down.

- 4.1.6 Sub-clause (vi) under Rule 3(1)(b), which was earlier numbered as (v) in the IT Rules, 2021 and Proposed Amendment, 2022, has too been amended. What earlier read as "*....knowingly and intentionally communicates any information which is patently false or misleading in nature but may reasonably be perceived as a fact*" has now been amended to read "*knowingly and intentionally communicates any misinformation or information which is patently false and untrue or misleading in nature*". Firstly, the term "*information*" has been replaced with the phrase "*misinformation or information*" without defining it or elaborating on its meaning. At surface level, such a phrasing creates confusion because misinformation by its definition is shared unintentionally and thus a user cannot possibly intentionally communicate misinformation.³¹ Misinformation is described as the act of sharing false content, but without the intent, i.e. the person sharing it doesn't realise that it is false or misleading.³²
- 4.1.7 Secondly, private platforms and intermediaries are now obliged to decide on what information is communicated intentionally, which could lead to subjective and arbitrary censorship. The question also arises whether the intermediaries are competent to determine intent in every case, given that millions of content are generated everyday in contextually different ways. Such definitional ambiguity increases lack of clarity, which may pose a challenge in consistent application of grounds, without allowing for opportunities of misuse and arbitrary censorship.
- 4.1.8 Two cosmetic changes include the addition of "*untrue*" and the deletion of "*but may reasonably be perceived as a fact*". However, the inclusion of the latter in IT Rules, 2021 did add a layer of clarity and acted as an additional benchmark which worked towards decreasing the possible misuse of this sub-clause.
- 4.1.9 Sub-clause (x) under Rule 3(1)(b) which states "*is patently false and untrue, and is written or published in any form, with the intent to mislead or harass a person, entity or agency for financial gain or to cause any injury to any person*" has been deleted. Thus, instead of the earlier ten sub-clauses, the IT Amendment Rules, 2022 list only nine.
- 4.1.10 The Proposed Amendment, 2022 added sub-clause (m) and (n) to Rule 3(1). The former states, "*the intermediary shall take all reasonable measures to ensure accessibility of its services to users along with reasonable expectation of due*

³¹ Claire Wardle, Understanding Information disorder, *First Draft*, 22 September, 2020, <https://firstdraftnews.org/long-form-article/understanding-information-disorder/>

³² Ibid

diligence, privacy and transparency” and the latter states, “*the intermediary shall respect the rights accorded to the citizens under the Constitution of India.*” While both the sub-clauses have been retained in the IT Amendment Rules, 2022, the phrase “*including in the articles 14, 19 and 21*” has been added in Rule 3(1)(n) towards the end.

- 4.1.11 We appreciate that the amendment requires platforms to respect the constitutional rights of Indians. However, the rule does not appear to be practically or judicially enforceable, and thus must be rephrased given that constitutional duties of state instrumentalities cannot be extended to private entities. As a result of the phrasing of this amendment, there will inevitably be a lack of clarity with respect to its enforceability. The vagueness of the amendments doesn’t clarify whether it proposes that fundamental rights can now be judicially enforced against private platforms. Further, there is little legal basis in statute, or justification provided rendering this insertion suspect.

4.2. Rule 3(2)

- 4.2.1 Rule 3(2)(a)(i) requires intermediaries to acknowledge complaints within 24 hours and resolve them within a period of fifteen days from the date of its receipt. This rule largely remains the same from the IT Rules, 2021, except for replacing the term “*dispose off*” with “*resolve*”. Rule 3(2)(a) also included two provisos to sub-clause (i). The first proviso imposed an obligation on intermediaries to act upon certain complaints as expeditiously as possible and resolve them within 72 hours of such reporting. These complaints are limited to complaints in the nature of request for removal of information or communication link relating to clause (b) of sub- rule (1) of rule 3, except sub-clauses (i), (iv) and (ix). However, justification for restricting intermediaries from expeditiously resolving complaints relating to sub-clauses (i), (iv) and (ix) have not been provided by MeitY.
- 4.2.2 Further, the constricted time frame within which the intermediary must resolve complaints is not only difficult to comply with but will inevitably lead to incorrect and hasty decision making, especially given the large numbers of user complaints received by them on a daily basis. In 2020, the French constitutional authority declared the main provisions of the ‘Avia law’ (France’s legislation on hate speech) unconstitutional because it required platforms to take down content within extremely short periods, which often leads to over censorship and poses a grave threat to free speech.³³
- 4.2.3 The amended clause still doesn’t address the existing concern around the fact that the Grievance Redressal Officer (“GRO”) for intermediaries other than significant social media intermediaries are not required to furnish reasons for the

³³ Decision no. 2020-801 DC of June 18, 2020, *Constitutional Council*, <https://www.conseil-constitutionnel.fr/decision/2020/2020801DC.htm>

decision taken regarding complaints received by them. There is thus no obligation on these intermediaries to furnish reasons either to the complainant or even to the user whose content may have been removed.

- 4.2.4 The second proviso which has been added states “*Provided further that appropriate safeguards may be developed by the intermediary to avoid any misuse by users*”. This is an addition as compared to the IT Rules, 2021, but has been retained from the Proposed Amendment, 2022, where it was first included.

4.3. Rule 3(A)

- 4.3.1 The IT Amendment Rules, 2022 include a separate Rule 3A titled “Appeal to Grievance Appellate Committee(s)” right after Rule 3. The first mention of the Grievance Appellate Committee (“GAC”) is in Rule 2(1) which introduces a sub-clause (ka) under clause (k). Sub-clause (ka) defined the GAC as a “*grievance appellate committee constituted under rule 3A*”. Rule 3A(1) empowers the Union Government to establish, by notification, one or more GAC(s) within three months from the date of commencement of the IT Amendment Rules, 2022.
- 4.3.2 Through the introduction of GAC(s), MeitY seeks to establish a Committee consisting of Union Government appointed officials/members for adjudication of any appeals against the decision of social media platforms to remove or not remove content. Such a provision is concerning as this would make the Union Government (rather than an independent judicial or a regulatory body) the arbiter of permissible speech on the internet. It would incentivise social media platforms to suppress any speech that may not be palatable to the government, public officials or those who can exert political pressure.³⁴ Moreover, this proposal will also empower the government to censor speech on grounds not stated under Section 69A of the IT Act, 2000 or Article 19(2) of the Constitution thereby being a colorable power to restrict access to information.³⁵ Hence, the possibility of the GAC delivering biased decisions is also highly likely.
- 4.3.3 The creation of the GAC also raises concerns around its legal basis. Firstly, it is a settled principle of law that adjudicatory bodies which settle disputes between parties can only be constituted by the legislature.³⁶ In absence of a law enacted by the Parliament empowering the executive, the GAC will be unconstitutional. IT Amendment Rules, 2022 are an amendment to a delegated legislation and not a statute passed by the Parliament. Secondly, and in any case, any rule notified by the executive must be traceable to the parent act, which in this case is IT Act,

³⁴ MeitY publishes and then withdraws a proposal to amend IT Rules, 2021, *Internet Freedom Foundation*, 03 June, 2022, <https://internetfreedom.in/meity-publishes-and-then-withdraws-a-proposal-to-amend-it-rules-2021/>

³⁵ Ibid

³⁶ *State of Himachal Pradesh v. Raja Mahendra Pal & Ors.* (1999) 4 SCC 43 at Para 9, <https://indiankanoon.org/doc/906698/>; See also: *Union of India v. Madras High Court Bar Association*, (2010) 11 SCC 1 at Para 90, https://main.sci.gov.in/pdf/SupremeCourtReport/2010_v%206_piv.pdf; See also: *L Chandra Kumar v. Union of India*, (1997) 3 SCC 261, <https://indiankanoon.org/doc/1152518/>

2000. However, the IT Act, 2000 does not contemplate appointment of any such committee. Without a legislative basis the Union Executive does not have the power to create bodies such as the GAC, which can have an immediate and far-reaching impact on citizens' fundamental rights, with little to no procedural safeguards built into the scheme of the IT Rules, 2021.³⁷ For instance, there is a complete silence on the public disclosure of appeals or the decisions taken by the GAC or whether content creators and users will have an opportunity to be heard before the GAC.

- 4.3.4 It is worth noting that the Bombay High Court³⁸ and the Madras High Court³⁹ have already stayed Rules 9(1) and 9(3) contained in Part III of IT Rules, 2021 which subjected any content published by publishers of digital news media or OTT platforms, to governmental oversight. These rules were stayed for the same reasons we have critiqued the proposed creation of GAC, i.e. they made government-appointed committee the arbiter of permissible speech and which could censor contents for grounds extraneous to Article 19(2) of the Constitution without providing any procedural safeguards to protect the fundamental rights of citizens. Hence, there exists the real possibility of ambiguity in enforcement and absence of regulatory clarity that will emerge due to court challenges to the constitution of the GAC following the reasoning of orders already passed on the IT Rules, 2021.
- 4.3.5 Rule 3A(2) states the composition for each GAC, which will consist of a chairperson and two whole time members appointed by the Union Government. It also mentions that one of three GAC members shall be a member ex-officio and two shall be independent members. However, it doesn't clarify whether the chairman will be a member ex-officio or not. Further, by allowing an ex-officio member to be on the GAC, MeitY has essentially put a bureaucrat on the Committee. The proposed Rule 3(3)(a) under the Proposed Amendment, 2022 used the term "*constitute*" instead of "*establish*" and used the phrase "*and such other Members*" instead of the now used phrase "*two whole time members*". What remains consistent is the power of the Union Government to appoint the GAC(s).
- 4.3.6 Rule 3A(3) allows any person aggrieved by a decision of the Grievance Officer to appeal to the Grievance Appellate Committee against it, within a period of 30 days from the date of receipt of the decision taken by the Grievance Officer. A similar provision was included in Rule 3(3)(b) of the Proposed Amendment, 2022, which read "*Any person aggrieved by an order made by the Grievance Officer under clause (a) and clause (b) of sub-rule (2) of rule 3 may prefer an appeal to*

³⁷ Ibid

³⁸ Order dated August 14, 2021 in *Agij Promotion of Nineteen One Media Pvt. Ltd. & Ors. v. Union of India & Anr.*, 2021, SCC OnLine BOM 2938, <https://drive.google.com/file/d/10Ng6Ve2pXTf2G78UHBfGntwMndKpQLqj/view?usp=sharing>

³⁹ Order dated 16 September 2021 in *T.M. Krishna v. Union of India & Anr.*, WP(C) 12515 of 2021, https://drive.google.com/file/d/1uaUYSD-0RZIO7AixvndPnwEGraq_4fNk/view?usp=sharing

the GAC". However, the sub-rule has been changed, as it now doesn't include the phrase "*under clause (a) and clause (b) of sub-rule (2) of rule 3*". What remains unclear is whether the "*person aggrieved*" has to be the user who originally raised the grievance with the GRO appointed by the intermediaries, or if any person, whether or not directly aggrieved by the decision of the intermediary, may raise such an appeal.

- 4.3.7 Rule 3A(4) requires the GAC to deal with user appeals expeditiously and to make an endeavour to resolve the appeal within 30 calendar days from the date of receipt of the appeal. The only language change here as compared to the Proposed Amendment, 2022 is that Rule 3(3)(c) of the latter included the term "*dispose of*" instead of "*resolve*". The obligation to resolve user appeals within 30 days raises several doubts around the feasibility of going through a bulk of appeals within the constricted time limit, the competence of the GAC to resolve user complaints, and the future of unresolved user complaints after 30 days.
- 4.3.8 This approach will also fail to match on the scalability as can be demonstrated by some numbers. A popular Indian social media platform reported that it received about 4.68 million user complaints in September 2022.⁴⁰ Even if 1% of these user complaints reach the GAC, it will have to deal with at least tens of thousands of appeals per month. This number would vary and might even be significantly higher if other social media platforms with a higher audience are considered. Furthermore, the number will also rise as more people seek to exercise this option, whether in good faith or bad. Such a volume of determination will require a full fledged adjudicatory apparatus and human resources staffing with persons having judicial training. Given this is unlikely, the possible outcome could be a process of sub-selection of such appeals by the GAC from the thousands it will receive each month. Without any applicable, or legal framework for selection for appeals, there is likely an arbitrary "*pick and choose policy*", leading to appearance, or the existence of bias. It is thus neither desirable nor advisable for this committee to attempt to operate at such a scale.
- 4.3.9 Rule 3A(5) and Rule 3A(6) did not feature in the Proposed Amendment, 2022 in its entirety. Rule 3A(5) states that the GAC, while dealing with an appeal, may seek assistance from any person having requisite qualification, experience and expertise in the subject matter. In a welcome move, Rule 3A(6) requires the GAC to adopt an online dispute resolution mechanism wherein the entire appeal process, from filing of appeal to the decision thereof, will be conducted digitally.
- 4.3.10 Rule 3A(7), which mandates intermediaries to comply with every order passed by the GAC, was included in the Proposed Amendment, 2022. However, it has now been expanded to increase the compliance burden on intermediaries by stating that a report reflecting their compliance with the GAC order must be uploaded on

⁴⁰ ShareChat Transparency Report, <https://help.sharechat.com/transparency-report/september-2022>

their website. On the other hand, there appears to be no obligation on the GAC to provide the intermediary, complainant as well as the affected user with the reasoning and justification behind its decision. In the absence of such transparent reporting mechanisms, the accountability of the government-appointed committee is further reduced.

- 4.3.11 On a broader level, the creation of GAC(s) is reflective of attempts to address systemic issues that are caused by broader societal-level problems by merely aggregating individual decisions. Such an approach is likely to lead to failure since these problems are neither repeatable nor broadly applicable, given the complexities involved. According to Evelyn Douek, lecturer at Harvard Law School, attempts to solve underlying systemic issues by relying on decisions taken about individual pieces of content are made to produce what she calls “accountability theatre”.
- 4.3.12 We strongly urge that, in the absence of statutory backing and rules which would ensure the independence of GAC, such an oversight mechanism must not be constituted. This is a further reason why there is the need for a wider consultation beyond the safe harbour framework under Section 79 of the IT Act, 2000 that may lead to a rights respecting framework and a legislative basis for the creation of a regulatory body.

5. Broad Recommendations

- 5.1. We recognise the market imbalance and information asymmetry resulting from big social media companies acting as gatekeepers. We also acknowledge the concerns that are arising due to deplatforming. Conversely, we’ve also seen that the lack of transparency and accountability have led to documented instances of the partisan, biased and inconsistent enforcement of content moderation practices in India, not just in the past few years but for a really long time. We believe that issues around content moderation must not only be looked at from the perspective of legal liability, but also from the economic perspective of market power asymmetry. A pro-competition regulatory framework must thus be preferred, wherein interoperability is ensured to maintain openness and to reduce the power imbalance among social media platforms. Efforts must also be made by the government to acquire a greater understanding of the role of social media platforms in India. To that end, the government must endeavour to build / encourage building institutional capacity so as to sustain and encourage research around online speech, content moderation and platform accountability in India.
- 5.2. Simultaneously, the regulation framework must abide by internationally accepted human rights standards. The government must refrain from directly undertaking moderation of online content, while also establishing independent authorities as a check against concentration of power by a few social media platforms. Most

importantly, the scope of regulation must be restricted to “*illegal content*” rather than “*legal but harmful content*” as it enables private entities to become arbiters of permissible speech.⁴¹

- 5.3. While, in general we do not dispute the need to regulate the internet, they need to be based and follow democratic and constitutional principles. The IT Rules, 2021 continue to raise grave civil liberty concerns and also have serious implications on the freedom of speech and expression as well as the right to privacy of users of the internet. Thus, the above mentioned issues deserve further scrutiny, and so we request firstly for their recall and a fresh public consultation process in line with the Pre-Legislative Consultation Policy adopted on February 5th, 2014 (circular no. 11 (35)/ 2013-L.I.)⁴² on platform regulation.
- 5.4. Given the significant and wide-ranging implications of the IT Rules, 2021 as well as the IT Amendment Rules, 2022, we believe the government must also publish a white paper underlining the government’s intent with respect to intermediary liability and online content regulation. On a broader level, the government should make an honest effort to understand the issue at hand, and the underlying factors affecting it. Furthermore, the Ministry of Law and Justice must undertake a study to bring some clarity on what provisions of the current laws, such as the Indian Penal Code, 1860, apply to the laws governing online speech in India.
- 5.5. To this extent, we believe the MeitY must revive the erstwhile Cyber Regulations Advisory Committee (“CRAC”) under Section 88 of the IT Act, 2000. IFF filed an RTI with MeitY dated February 13, 2019, seeking information on the dates and copies of minutes of each meeting held by the CRAC, the constitution of CRAC as of February, 2019, as well as all the policy decisions that the CRAC advised the Central Government on.⁴³ Upon receiving incomplete information by MeitY we filed a first appeal without any meaningful response on the activities of the CRAC.⁴⁴ Hence, we request that the CRAC be reconstituted with an adequate amount of representation from experts, academics, technologists and civil society organisations. We stress this aspect only because earlier constitutions of the committee witnessed low amounts of participation from the aforementioned groups.⁴⁵
- 5.6. We further ask that any future version of the IT Rules, 2021 substantially engage with the recommendations put forth by the Standing Committee on Subordinate

⁴¹ Watching the watchmen - Content moderation, governance, and freedom of expression, *Article 19*, 2021, https://www.article19.org/wp-content/uploads/2021/12/Watching-the-watchmen_FINAL_8-Dec.pdf

⁴² Legislative Department, Ministry of Law and Justice, Government of India, ‘Pre Legislative Consultation Policy, *Ministry of Law and Justice, Government of India*, 05 February, 2014, <https://legislative.gov.in/documents/pre-legislative-consultation-policy>

⁴³ RTI filed with MeitY by Internet Freedom Foundation dated February 13, 2019, https://drive.google.com/file/d/108nlwwCeJqzYhZ_ejP7_B2qpSGYbg8po/view

⁴⁴ RTI filed with MeitY by Internet Freedom Foundation dated April 15, 2019, <https://drive.google.com/file/d/1LrfdEw4DEF8o36B6oXBLZRihwBeSXdb/view>

⁴⁵ Pranesh Prakash, No Civil Society Members in the Cyber Regulations Advisory Committee, *The Centre for Internet & Society*, 09 January, 2013, <https://cis-india.org/internet-governance/blog/cyber-regulations-advisory-committee-no-civil-society>

Legislation's report on the IT Rules, 2011, which too had recommended making the CRAC functional again [Section F (Para 79)].⁴⁶ These recommendations also included:

- 5.6.1 Removing any definitional vagueness to prevent misuse [Section A (Para 25)].
- 5.6.2 Ensuring that any decision to remove content is taken by an independent authority [Section B (Para 49)].
- 5.6.3 Providing procedural safeguards when content is removed such as an obligation to provide reasoned order, a right to be heard to the content creator and the right to appeal the decision of the authority [Section B (Para 49)].
- 5.6.4 Creating a minimum requirement for any forthcoming regulatory framework, so that such provisions provide a basic level of operational transparency [Section B (Para 49)].

6. Clause-by-clause analysis

Rules	Comments/Suggestions	Reasoning and Support
Rule 2(1)(ka)	A GAC will act as an oversight mechanism against decisions of GRO, who were required to be appointed by all social media platforms under Rule 2(2) of the IT Rules, 2021. In the absence of rules which ensure the independence of the GAC, we strongly suggest that such a body not be constituted (Broad reasons and justifications are provided above - See Section 4.3).	The constitutional validity of the IT Rules, 2021 was challenged before several High Courts. The Bombay ⁴⁷ and Madras High Courts ⁴⁸ stayed Rules 9(1) and 9(3) under Part III that sought to establish an oversight mechanism over digital news publishers and OTT platforms, warning that it may ' <i>rob the media of its independence</i> '. Instead of addressing these existing concerns, MEITY has sought to establish an oversight mechanism over social media intermediaries as well. Such a move will seriously threaten the free expression of millions of Indians and in effect have similar implications as the IT Rules, 2021, which have been stayed by constitutional courts.
Rule 3(1)(a)	The amendment to this clause extends the compliance obligation of the intermediary by not only asking it to prominently publish the	The phrasing of the amendment is vague and lacks clarity over how such compliance is to be ensured by the intermediaries. Social media platforms may risk losing their

⁴⁶ Committee On Subordinate Legislation (2012-2013), 'The Information Technology (Intermediaries Guidelines) Rules, 2011, Lok Sabha Secretariat, 21 March, 2013, [https://eparlib.nic.in/bitstream/123456789/64846/1/15_Subordinate_Legislation_31.pdf#search=The%20Information%20Technology%20\(Intermediaries%20Guidelines\)%20Rules.%202011.%20Committee%20on%20Subordinate%20Legislation%2015](https://eparlib.nic.in/bitstream/123456789/64846/1/15_Subordinate_Legislation_31.pdf#search=The%20Information%20Technology%20(Intermediaries%20Guidelines)%20Rules.%202011.%20Committee%20on%20Subordinate%20Legislation%2015)

⁴⁷ Order dated August 14, 2021 in *Agij Promotion of Nineteen One Media Pvt. Ltd. & Ors. v. Union of India & Anr*, 2021 SCC OnLine Bom 2938, <https://drive.google.com/file/d/10Ng6Ve2pXTf2G78UHBfGntwMndKpQLqi/view?usp=sharing>

⁴⁸ Order dated 16 September 2021 in *T.M. Krishna v. Union of India & Anr.*, WP(C) 12515 of 2021, https://drive.google.com/file/d/1uaUYSD-0RZIO7AixvndPnwEGraq_4fNk/view?usp=sharing

	rules, regulations, privacy policy, etc., but also ensuring “<i>compliance of the same</i>”. These amendments seek to overturn years of jurisprudence surrounding intermediary protections as well as the Supreme Court judgement in <i>Shreya Singhal vs Union of India</i>.⁴⁹ This is not permissible under the constitutional scheme of India. In the absence of clarity over how the intermediaries can ensure compliance, this amendment must be withdrawn.	intermediary protection under the IT Act if a Court determines that they failed to comply with the IT Rules, 2021. Since millions of pieces of content are generated on multiple social media platforms, in a variety of contextually different ways every day, it makes it almost impossible for intermediaries to exercise complete control over what users choose to say or do on their platforms. Thus, intermediary protections are necessary as they restrict content removal by social media platforms as a response to government orders or court directions for removal of content. This model is internationally recognised and was even set out by the Supreme Court in the landmark judgement of <i>Shreya Singhal vs Union of India</i>.⁵⁰
Rule 3(1)(b)	Amendment to Rule 3(1)(b) requires intermediaries to “<i>make reasonable efforts to cause the</i>” users not to post certain kinds of content. While this is an improvement from the phrase “<i>shall cause</i>” as included in the Proposed Amendment, 2022, it is an unwelcome change compared to the IT Rules, 2021. The latter required intermediaries to only “<i>inform</i>” their users about the kind of content they could not host, display, publish, etc. The amended clause must be withdrawn.	The amended phrase leaves scope for proactive monitoring and scanning of all user generated content. It could also disproportionately affect politically inconvenient or controversial speech, and potentially lead to arbitrary censorship. It may also enables private entities to become arbiters of permissible speech which is in violation of the directions of the Hon’ble Supreme Court in <i>Shreya Singhal vs Union of India</i> where the Court held that intermediaries cannot decide permissibility of any content without an order of a court or an order by the Government. Thus, this amendment must be withdrawn.
Rule 3(1)(b) (i) to (ix)	Amendments in sub-clauses (i) to (ix) have ambiguous phrasing which will lead to arbitrariness. The inclusion of the phrase “<i>knowingly and intentionally communicates any misinformation or information</i>” is problematic because neither has misinformation been defined, nor has criteria for determining intent been specified. Therefore, vague terms and phrases must be withdrawn or adequately defined.	Inclusion of vague, subjective and undefined terms in Rule 3(1)(b), such as “<i>misinformation</i>”, can make consistent application extremely challenging and prone to misuse. This may cause social media platforms to become pro-active arbiters of permissible speech which is already resulting in issues given existing lack of natural justice, transparency and accountability as noted by MeitY. It may also potentially lead to arbitrary censorship.

⁴⁹ *Shreya Singhal v. Union of India*, (2015), 5 SCC 1, Para 122, <https://indiankanoon.org/doc/110813550/>

⁵⁰ Ibid

Rule 3(1)(m)	While we appreciate that the amendment requires platforms to take reasonable measures to ensure accessibility as well as privacy and due process, the term "accessibility" is vague and is not defined.	The term "accessibility" could also mean "visual accessibility" or even "access to services". Hence, there is not much clarity around the term itself. It may be used as a basis to question decisions of social media intermediaries to suspend or terminate accounts in response to violation of the former's rules.
Rule 3(1)(n)	We appreciate that the amendment requires platforms to respect the constitutional rights of Indians. However, the clause does not appear to be practically or judicially enforceable, and thus must be rephrased given that constitutional duties of state instrumentalities cannot be extended to private entities.	As a result of the phrasing of this amendment, there will inevitably be a lack of clarity with respect to its enforceability. The vagueness of the amendments doesn't clarify whether fundamental rights can now be judicially enforced against private platforms. Further, there is little legal basis in statute, or justification provided rendering this insertion suspect.
Rule 3(2)(a)(i)	Rule 3(2)(a)(i) requires resolution of requests for content removal within 72 hours. This may potentially lead to arbitrary censorship by intermediaries and suppression of free speech, in an attempt to avoid the legal consequences of the IT Rules, 2021. Such a short timeline will create the possibility of disposal of grievances without application of mind and may lead to arbitrary restriction on speech.	The obligation to address any user generated complaint within 72 hours is not only difficult to comply with but will inevitably lead to incorrect decision making, and as a result, arbitrary censorship of speech. Concerns around the competence of intermediaries to resolve complaints also arise, given that million pieces of content are generated everyday in contextually different ways. An empirical study conducted by The Centre for Internet and Society points out that intermediaries tend to over-comply with such takedown requests to limit their liability and this has a chilling effect on free speech and expression of all users. ⁵¹
Rule 3(A)	IT Amendment Rules, 2022, without a legislative basis, seeks to subject content on social media platforms to the direct scrutiny of the Government by permitting users to appeal decisions of the platforms to the GAC. But in any scenario, if the GAC is constituted, the IT Rules, 2021 must provide the complainants/ content creators a right of hearing before the GAC	The creation of the GAC, through the amendments, is without legislative backing since the amendments will be issued by the Ministry to its own Rules, and not by the Parliament to a statutory legislation. Furthermore, the amendment doesn't even provide a right of hearing before the Committee to complainants / content creators or state the procedure the Committee will follow. It also fails to state

⁵¹ Rishabh Dara, Intermediary Liability in India: Chilling Effects on Free Expression on the Internet, *The Centre for Internet & Society*, 27 April, 2012, <https://cis-india.org/internet-governance/chilling-effects-on-free-expression-on-internet>

	and state the procedure that the GAC will be obliged to follow. It must also state the minimum qualifications and functions of the Committee members.	the minimum qualifications to be on the Committee.
Rule 3A(2)	Rule 3A(2) states that one of the three GAC members will be an ex-officio member appointed by the Union Government. Given the wide-ranging impact the GAC may have on online free speech, it must not consist of a bureaucrat, if it is in fact appointed.	By allowing an ex-officio member to be on the GAC, MeitY has essentially put a bureaucrat on the Committee. Such a provision is concerning as this would make the bureaucracy (rather than an independent judicial or a regulatory body) the arbiter of permissible speech on the internet.
Rule 3A(4)	Rule 3A(4) requires the GAC to endeavour to resolve user appeals within 30 calendar days from the date of receipt of the appeal. Given the large number of appeals that would fall before the GAC, it is unlikely that these bodies will be able to adequately deal with them. Thus, the creation of GAC is not feasible.	A popular Indian social media platform reported that it received about 4.685 million user complaints in September 2022. Even if 1% of these user complaints reach the GAC, it will have to deal with at least tens of thousands of appeals per month, which seems highly challenging. Further, such a volume of determination will require a full fledged adjudicatory apparatus and human resources staffing with persons having judicial training.