

IN THE HIGH COURT OF JUDICATURE AT MADRAS
(SPECIAL ORIGINAL JURISDICTION)

W.P Nos. 12515 OF 2021

T.M Krishna

Vs

..... Petitioner

1. Union of India
Represented by its Secretary
Ministry of Electronics and Information Technology
Electronics Niketan, 6 CGO Complex,
Lodhi Road
New Delhi- 110003
2. Union of India
Represented by its Secretary
Ministry of Information and Broadcasting
A-Wing Shastri Bhavan
New Delhi- 110003

.....Respondents

COMMON SHORT COUNTER AFFIDAVIT ON BEHALF OF RESPONDENT NO.1

I, S. Sathyanarayanan S/o Late P.Subramanian, aged 44 presently serving as Scientist D, having office at 6, CGO Complex, Lodhi Road, New Delhi - 110003 do hereby solemnly affirm and sincerely state as follows:

1. I submit that I am the authorised signatory and I am authorized to file this counter affidavit on behalf of the 1st Respondent herein. I am well acquainted with the facts and circumstances of the case, as borne out of the available records.
2. I am filing this Short Counter Affidavit to provide further clarity into the legal and factual circumstances surrounding the instant Writ Petition.
3. I deny all allegations and averments stated in the Writ Petition, except those that are specifically admitted hereunder, and put the Petitioner to strict proof of the same.
4. I state that the instant Writ Petition has been filed seeking a writ of declaration that the Information Technology (Intermediary Guidelines and Digital Media Ethics) Rules, 2021 ("IT Rules") made under Section 87(2)(z) and Section

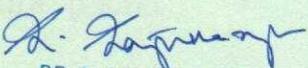

DR. S. SATHYANARAYANAN
Scientist 'D'
Government of India
Ministry of Electronics & Information Technology
6, CGO Complex, Lodhi Road, New Delhi-110 003

87(2)(zg) is *ultra vires* of both the Constitution of India and the IT Act 2000. A similar writ petition seeking near identical relief has been filed in W.P 13055/2021.

5. The Petitioners have assailed the Rules on the following grounds:
 - a. That the IT Rules suffer from the vice of vagueness;
 - b. That the IT Rules are couched in broad terms and are therefore overbreadth;
 - c. That the IT Rules create a chilling effect on free speech;
 - d. That the IT Rules suffer from the vice of excessive delegation;
 - e. That the IT Rules are in violation of Article 19(1)(a);
 - f. That the IT Rules are in violation of Article 19(1)(g);
 - g. That the IT Rules are fraught with arbitrariness and executive excesses;
 - h. That the IT Rules are in violation of Right of Privacy under Article 21;

6. I submit that the IT Rules, 2021 have been lawfully enacted under the provisions of Information Technology Act, 2000 and rules framed hereunder with the endeavour to regulate all digital and intermediary platforms from publishing unlawful content. In furtherance of the same, the IT Rules were enacted and it consists of three parts:
 - (i) Part I - This section defines the various governing aspects and entities that are covered under the rules.
 - (ii) Part II - Due diligence by intermediaries and grievance redressal mechanism.
 - (iii) Part III - Code of Ethics and Procedure and Safeguards in relation to Digital Media.

7. I submit that the rights guaranteed under Article 19 are not absolute and are subject to the limitations under Article 19(2) and 19(6). A common thread that runs across all the reasonable restrictions is public interest and it is beyond any pale of doubt that restrictions may be imposed on freedoms for the interest of the public at large. The Rules have been clearly enacted *bona fide* for the benefit of the public and its intention is to ensure adequate regulation of digital and


 DR. S. SATHYANARAYANAN
 Scientist 'D'
 Government of India
 Ministry of Electronics & Information Technology
 6, CGO Complex, Lodhi Road, New Delhi-110 003

intermediary platforms. The rules are in public interest to ensure regulation of unlawful content.

DELAY IN FILING COUNTER AFFIDAVIT

8. Preliminarily, I submit that the delay in filing of this Short Counter affidavit is neither wilful nor wanton. The brief circumstance surrounding this challenge is that various cases have been filed before different High Courts challenging the IT Rules 2021. These challenges are not streamlined and uniform. Some cases challenge the Part II of the Rules relating to "Intermediary due diligence" and while other cases challenge the Part III of the Rules relating to "Digital Media and Code of Ethics." But all the cases commonly seek to declare the "IT Rules, 2021" as *ultra vires* both the Constitution of India and the IT Act, 2000. There are, at present, 19 Writ Petitions pending before various High Courts in the country and each of them emanate out of a set of unique circumstances and consequently each writ petition contains various wide-ranging grounds.
9. I further submit that, despite differing grounds, the ultimate prayer in all Writ Petitions largely remained the same. Therefore, there was an overbearing need for the Union to present a consistent uniform stand before all High Courts across the Country. The need to ensure such consistency led to the delay in finalising the affidavit. The delay was only on account of the need to ensure consistency in the pleadings of the Union and the delay was consequently not wilful nor was it wanton.
10. Parallely, in furtherance of the object of ensuring consistency, the Union must also disclose that Transfer Petitions has been filed by the Union of India before the Hon'ble Supreme Court seeking to transfer 17 Writ Petitions pending before various High Courts of the country for a common adjudication before the Hon'ble Supreme Court by tagging the same with cases related to OTT regulation pending before the Hon'ble Supreme Court [W.P.(C) No. 1080/2020-Shashank Shekhar Jha &Anr Vs UOI &Ors (which in turn is tagged with SLP(C) No. 10937/2019 Justice for Rights Foundation Vs UOI &Ors and TP(C) No. 100-105/2021 Union of India Vs Sudesh Kumar Singh &Ors)].


 DR. S. SATHYANARAYANAN
 Scientist 'D'
 Government of India
 Ministry of Electronics & Information Technology
 6, CGO Complex, Lodhi Road, New Delhi-110 003

11. I further clarify that the delay was not account of the aforesaid transfer petition and that the delay is solely attributable to the need to ensure consistent defence to the multiplicity of proceedings before the Hon'ble High Courts across the Country. It is once again reiterated that the delay was neither malicious nor intentional.

RATIONALE AND JUSTIFICATION FOR NOTIFICATION OF IT RULES 2021

12. I submit that before adverting to the constitutionality of the provisions it would be necessary to understand the rationale and justification that necessitated the introduction of the aforesaid rules.

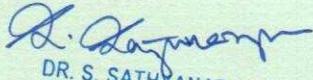
13. I submit that these Rules substantially empower the ordinary users of digital platforms to seek redressal for their grievances and command accountability in case of infringement of their rights. In this direction, the following developments are noteworthy:

A. There was a **Calling Attention Motion** on the misuse of social media and spread of fake news in the Rajya Sabha and the Minister had conveyed to the house on 26/07/2018, the resolve of the Government to strengthen the legal framework and make the social media platforms accountable under the law. He had conveyed this after repeated demands from the Members of the Parliament to take corrective measures.

B. The **Ad-hoc committee of the Rajya Sabha** laid its report on 03/02/2020 after studying the alarming issue of pornography on social media and its effect on children and society as a whole and recommended for enabling identification of the first originator of such contents. One of the Committee's recommendations pertains to on tracing the first originator and reads as follows:

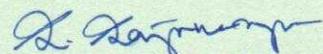
"2.2 Permit breaking of end-to-end encryption to trace distributors of child pornography:

The Committee recommends modifying the IT (Intermediary Guidelines) Rules 2011 to include the ability to trace the originator or sender of the message shared on end-to-end encryption platforms in cases where CSAM


DR. S. SATHYANARAYANAN
 Scientist 'D'
 Government of India
 Ministry of Electronics & Information Technology
 6, CGO Complex, Lodhi Road, New Delhi-110 003

that has been shared has come to the attention of law enforcement agencies."

- C. There were growing concerns of safety and security of users particularly women and children on the internet. The Supreme Court in the Suo-Moto Writ petition (Prajwala case - Prajwala Suo Moto Writ Petition Criminal No. 3/2015) directed that a committee be constituted to advise the Court "on the feasibility of ensuring that videos depicting rape, gang rape and child pornography are not available for circulation." Google, Facebook, WhatsApp, Yahoo and Microsoft were impleaded as parties in this case. The Court The Hon'ble Supreme Court of India by its order dated 11.12.2018 directed as follows: "*The Government of India may frame the necessary Guidelines / SOP and implement them within two weeks so as to eliminate child pornography, rape and gang rape imageries, videos and sites in content hosting platforms and other applications.*"
- D. There were many Court Hearings/ Grievances filed for expeditious removal of Contents outraging Modesty of a Women/ Non-Consensual Imagery. (e.g. in X vs. UoI W.P. No.1082 of 2020 - High Court of Delhi).
- E. During 2018, Writ Petitions titled *Antony Clement Rubin v. UoI* (WP No. 20774) and *Janani Krishnamurthy v. UoI* (WP No. 20214 of 2018) were filed before the Hon'ble Madras High Court praying for "*linking of Aadhar or any Other Govt Identity to social media accounts*" and "*monitoring by special task force for the instances of all sorts of cyber defamation, bullying, stalking etc*". That Prof. Kamakoti of IIT Madras has submitted report before the Hon'ble Madras High Court relating to traceability of first information without breaking the encryption on encrypted platforms such as WhatsApp.
- F. The Hon'ble Supreme Court, vide order dated 24.09.2019 in Transfer Petition (Civil) No. 1943- 1946/2019 titled *Facebook Inc. vs. Union of India* observed that there are various messages and content spread/shared on the social media, some of which are harmful i.e. they may incite violence, may be against sovereignty and integrity of the country, may be used for committing crimes, etc. In such circumstances, the Court held it imperative that there is a properly



DR. S. SATHYANARAYANAN
Scientist 'D'

Government of India
Ministry of Electronics & Information Technology
6, CGO Complex, Lodhi Road, New Delhi-110 003

framed regime to find out the persons/institutions/bodies who are the originators of such content/messages. The Court further noted that *"We must also highlight that de-encryption, if available easily, could defeat the fundamental right of privacy and de- encryption of messages may be done under special circumstances but it must be ensured that the privacy of an individual is not invaded. However, at the same time, the sovereignty of the State and the dignity and reputation of an individual are required to be protected. For purposes of detection, prevention and investigation of certain criminal activities it may be necessary to obtain such information. Deencryption and revelation of the identity of the originator may also be necessary in certain other cases, some of which have been highlighted hereinabove."*

The Supreme Court vide order dated 24/09/2019 had directed the Ministry of Electronics and Information Technology to expeditiously finalise the Intermediary Rules and Notify them.

G. Other significant reasons for enacting the IT Rules 2021 include:

- i. Significant expansion of online intermediary ecosystem;
- ii. Growth of online social media platforms and their influencing capabilities;
- iii. International developments in social media regulation;
- iv. Compelling need to have a framework to deal with messages which have become viral and have resulted in riots, mob lynching or other heinous crimes including those concerning dignity of women and sexual abuse of children;
- v. Alignment with the requirements of the Law Enforcement Agencies (LEAs) and other Appropriate Government or their agencies.
- vi. vi. Need to refine and modernize the intermediary liability framework;

14. The developments in both the social as well as technological sphere makes it clear that there the March of Law was both warranted as well as necessary. The circumstances necessitated the Union to formulate the aforesaid rules. It was clear that the regulations that existed prior did not afford adequate protection to women and children in particular.

THE IT RULES WERE FRAMED AFTER CONSIDERABLE PUBLIC CONSULTATIONS



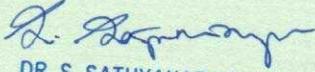
DR. S. SATHYANARAYANAN
Scientist 'D'

Government of India
Ministry of Electronics & Information Technology
6, CGO Complex, Lodhi Road, New Delhi-110 003

15. I further submit that the Rules were framed after holding public consultations with stakeholders. The Petitioners have contended that the rules were framed without any consultation but however that is not true. The Ministry of Electronics and Information Technology (MeitY) prepared draft Rules and invited public comments on 24/12/2018. MeitY received 171 comments from individuals, civil society, industry association and organizations. 80 counter comments to these comments were also received. These comments were analyzed in detail and an inter-ministerial meeting was also held and accordingly, these Rules have been finalized. The detailed document of the draft of Intermediary Rules and the comments received has been made available on MeitY Website.

**THE IT RULES 2021 CONTAINS THE FOLLOWING SALIENT FEATURES RELATING TO
ADMINISTRATION OF SOCIAL MEDIA BY THE RESPONDENT MINISTRY**

16. I submit that the IT Rules lays down the Due Diligence to be followed by Intermediaries. Intermediaries and social media must follow due diligence, failing which safe harbour provisions will not apply to them.
17. I further submit that the rules also mandate that Intermediaries and social media intermediaries must establish a grievance redressal mechanism for receiving resolving complaints from the users or victims.
18. I also state that the rules mandates that Intermediaries shall remove or disable access within 24 hours of receipt of complaints of contents that exposes the private areas of individuals, show such individuals in full or partial nudity or in sexual act or is in the nature of impersonation including morphed images etc.
19. The rules also state classify social media intermediaries into two distinct types- Social Media Intermediaries (SMI) and significant social media intermediaries(SSMI). The ambit and purport of this classification is to encourage innovations and enable growth of new social media intermediaries.
20. In addition to the aforesaid, Additional Due Diligence to be followed by a Significant Social Media Intermediary:


DR. S. SATHYANARAYANAN
 Scientist 'D'
 Government of India
 Ministry of Electronics & Information Technology
 6, CGO Complex, Lodhi Road, New Delhi-110 003

- i. Appoint a resident Chief Compliance Officer who shall be responsible for ensuring compliance with the Act and Rules.
 - ii. Appoint a resident Nodal Contact Person for 24x7 coordination with law enforcement agencies.
 - iii. Appoint a Resident Grievance Officer who shall perform the functions mentioned under Grievance Redressal Mechanism.
 - iv. Publish a monthly compliance report mentioning the details of complaints received and action taken on the complaints.
 - v. SSMI shall enable identification of the first originator of the information that is required only for the purposes of prevention, detection, investigation, prosecution or punishment of an offence related to national security and public order related offences and in relation with rape, sexually explicit material or child sexual abuse material punishable with imprisonment for a term of not less than five years. Intermediary shall not be required to disclose the contents of any message or any other information to the first originator.
 - vi. SSMI shall have a physical contact address in India published on its website or mobile app or both.
 - vii. Voluntary User Verification Mechanism: Users who wish to verify their accounts voluntarily shall be provided an appropriate mechanism to verify their accounts.
 - viii. Giving Users an Opportunity to Be Heard: In cases where SSMI removes or disables access to any information on their own accord, then a prior intimation for the same shall be communicated to the user who has shared that information with a notice explaining the grounds and reasons for such action. Users must be provided an adequate and reasonable opportunity to dispute the action taken by the intermediary.
21. Furthermore, an intermediary upon receiving actual knowledge in the form of an order by a court or being notified by the Appropriate Govt. or its agencies through authorized officer should not host or publish any information which is prohibited under any law in relation to the interest of the sovereignty and integrity of India, public order, friendly relations with foreign countries etc.



DR. S. SATHYANARAYANAN
Scientist 'D'
Government of India

Ministry of Electronics & Information Technology
6, CGO Complex, Lodhi Road, New Delhi-110 003

22. I submit that the rules also makes provision for direct requests for content takedown in specific cases of content relating to breach of bodily privacy, impersonation, morphed imagery of the concerned individual in order to address the immediate need to prevent harm and emotional distress, particularly in instances of revenge porn and other similar instances.

23. Another salient feature of the rules is that it provides for clear timelines in respect of the various actions contemplated under the rules. The timelines are given below:

- i. Grievance Redressal: 24 hours for acknowledgement/15 days for disposal.
- ii. Information takedown from platform upon actual knowledge based on court order or notice from appropriate government authorised by law: 36 hours
- iii. Providing information on a lawful request: 72 hours
- iv. Removal of revenge porn and other similar content: 24 hours

CONSTITUTIONAL VALIDITY OF THE IT RULES 2021

24. I further submit that the Rules have been framed under unambiguous provision of law and it has been constituted after making adequate consultations and taking into account the necessary social and technological issues that necessitated regulation. Therefore, the rules do not suffer from any legal or constitutional infirmity.

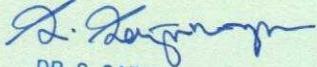
25. The IT Rules were framed under Section 87 of the IT Act. The relevant rule is extracted herein under:

"87. Power of Central Government to make rules.-

(1) The Central Government may, by notification in the Official Gazette and in the Electronic Gazette, make rules to carry out the provisions of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:-

(z) the procedures and safeguards for blocking for access by the public under sub-section (3) of section 69 A;


 DR. S. SATHYANARAYANAN
 Scientist 'D'
 Government of India
 Ministry of Electronics & Information Technology
 6, CGO Complex, Lodhi Road, New Delhi-110 003

(zg) the guidelines to be observed by the intermediaries under sub-section (2) of section 79;"

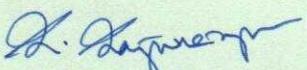
26. Thus, it is amply clear that there is no question of excessive delegation or delegation of essential legislative function.

27. I further submit that the IT Rules have been framed under section 87 of the existing Information Technology Act, 2000. Such Rules were framed in 2011 as well. New Rules have superseded the old Rules to meet the requirements of time and new developments in the field of technology.

28. The Government of India is empowered under Section 79(2)(c) to prescribe guidelines for the intermediary to observe due diligence while discharging its duties under this Act and also observes such other guidelines as the Central Government may prescribe in this behalf.

29. Additionally, the rules are not new, but an amendment to the already existing rules (Intermediary Guidelines 2011) which has been upheld as constitutionally valid by the Hon'ble Supreme Court of India in the case of *Shreya Singhal Vs UOI* (2015) 5 SCC 1. That the intermediary (due diligence) rules as provided in Part II of the IT Rules 2021 are mere amendments/extensions to the Information Technology (Intermediaries Guidelines) Rules, 2011, which was the subject matter in *Shreya Singhal* case before the Supreme Court. The Hon'ble Supreme Court examined all the provisions of Information Technology (Intermediaries Guidelines) Rules, 2011 and found them not ultra vires to the Constitution. The Hon'ble Supreme Court examined all the provisions of Information Technology (Intermediaries Guidelines) Rules, 2011 in a threadbare manner and held :

"Section 79 is valid subject to Section 79(3)(b) being read down to mean that an intermediary upon receiving actual knowledge from a court order or on being notified by the appropriate government or its agency that unlawful acts relatable to Article 19(2) are going to be committed then fails to expeditiously remove or disable access to such material. Similarly, the Information Technology "Intermediary Guidelines", Rules 2011



DR. S. SATHYANARAYANAN
Scientist 'D'

Government of India
Ministry of Electronics & Information Technology
6, CGO Complex, Lodhi Road, New Delhi-110 003

are valid subject to Rule 3 sub-rule (4) being read down in the same manner as indicated in the judgment.

[Para 119 of Judgement]

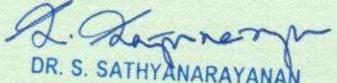
30. Part II of the IT Rules, 2021 states the Due Diligence to be observed by the intermediaries and the Grievance Redressal Mechanisms that has to be undertaken by the intermediaries.

31. I submit that rule 3 of the IT Rules, 2021 states about the due diligence to be observed by an intermediary, including SMI and SSMI while discharging its duties. Rule 4 of the IT Rules, 2021 states about the additional due diligence to be observed by the SSMI, within three months from the date of notification of the threshold under clause (v) of sub-rule (1) of rule 2. By notification dated 25th February 2021, it was notified that social media companies with more than 50 lakh registered users will be considered '**significant social media intermediaries (SSMI)**'. Rule 4 applies only to SSMI who have more than 50 lakhs of registered users.

32. Rule 3 of the IT Rules, 2021 focuses upon the due diligence to be observed by an intermediary including social media intermediary (SMI) and significant social media intermediary (SSMI) while discharging its duties thereby providing a clear picture of the functions to be undertaken by the intermediaries. The definitions of SMI and SSMI are carved out below:

- a. "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;
- b. "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;

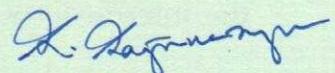
33. As per rule 3(1), the intermediary shall publish on its platform (website or mobile) the privacy policy, user agreement/terms of use for accessing or using the intermediary platform. Such privacy policy, user agreement/terms of use


 DR. S. SATHYANARAYANAN
 Scientist 'D'
 Government of India
 Ministry of Electronics & Information Technology
 6, CGO Complex, Lodhi Road, New Delhi-110 003

must inform the user of the platform not to host, display, upload, modify, publish, transmit, store, update or share any information as prescribed under rule 3(1)(b) as follows:

- “(i) belongs to another person and to which the user does not have any right;*
(ii) is defamatory, obscene, pornographic, paedophilic, invasive of another’s privacy, including bodily privacy, insulting or harassing on the basis of gender, libellous, racially or ethnically objectionable, relating or encouraging money laundering or gambling, or otherwise inconsistent with or contrary to the laws in force;
(iii) is harmful to child;
(iv) infringes any patent, trademark, copyright or other proprietary rights;
(v) violates any law for the time being in force;
(vi) deceives or misleads the addressee about the origin of the message or knowingly and intentionally communicates any information which is patently false or misleading in nature but may reasonably be perceived as a fact;
(vii) impersonates another person;
(viii) threatens the unity, integrity, defence, security or sovereignty of India, friendly relations with foreign States, or public order, or causes incitement to the commission of any cognisable offence or prevents investigation of any offence or is insulting other nation;
(ix) contains software virus or any other computer code, file or program designed to interrupt, destroy or limit the functionality of any computer resource;
(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;”

34. It is clear from the above that the government does not block any content under this provision. This provision applies only between the intermediary and the user, in so far that the intermediary shall inform the user not to publish any content which is specifically prohibited herein. Further the prohibited content is already part of the *Intermediary Guidelines 2011* which has been upheld by the Hon’ble Supreme Court in *Shreya Singhal v. UOI (2015) 5 SCC 1*. That the rule 3(1)(c) has been notified primarily to ensure that the users comply strictly with the rules and regulations, privacy policy or user agreement for access or usage of the computer resource of an intermediary. Basically, a duty has been cast on the intermediary, in the language of “shall” appearing in Rule 3(1)(c) to remind the



DR. S. SATHYANARAYANAN

Scientist 'D'

Government of India

Ministry of Electronics & Information Technology
 6, CGO Complex, Lodhi Road, New Delhi-110 003

users, at least once every year that in case of non-compliance with the aforesaid rules, the intermediary has the right to terminate the usage and access rights of such users immediately. This right to terminate upon non-compliance has been bestowed upon the intermediary to curb the malpractices plaguing our country, most specifically those related to the categories specified in rule 3(1) (b) (i) to (x).

35. Further, rule 3(1)(c) simply requires the intermediaries to remind the users, who have already agreed to the rules and regulations for accessing the usage of the computer resource, that non-compliance may lead to termination of access. A mere reading of the rules would make it clear that the users have not been barred to host, display, upload, modify, publish, transmit, store, update or share any information which is available on the computer resource of the intermediary. Only such information which is, for instance, defamatory, obscene, pornographic, paedophilic, invasive of another's privacy, including bodily privacy etc., will be agreed by the user not to be shared. The aforesaid does not, in any way, create a chilling effect with respect to exercise of freedom of speech and expression. The grounds as laid down under rule 3(1)(b)(ii) also indeed meets the requirements of placing restrictions on freedom of speech and expression, as these grounds are exact mirror copy of the grounds as were enumerated under *Intermediary Guidelines of 2011*, the constitutional validity of which is already upheld by the Hon'ble Supreme Court in *Shreya Singhal v. UOI (2015) 5 SCC 1*. Thus, only under applicable law in force and as per the restrictions specified under Article 19(2), rule 3(1)(b) imposes certain reasonable restrictions upon the users. The above rule is well within the sphere of Article 19(2) of the Constitution.

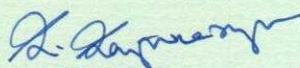
36. It is submitted that the ambit of rule 3(1)(b) & rule 3(2)(b) are completely different and the effect of the same cannot be brought at par or equated with one another even for the sake of an argument. The cumulative impact of rules 3(1)(b) and 3(1)(c) and the threat of termination of access or usage rights does not induce a chilling effect on the users. Instead, it causes the users to be more vigilant and mindful while posting/sharing any content online, making the internet a safe place to communicate.



DR. S. SATHYANARAYANAN
Scientist 'D'

Government of India
Ministry of Electronics & Information Technology
6, CGO Complex, Lodhi Road, New Delhi-110 003

37. The IT Rules only prescribe blocking of such content that is violative of any law in force for the time being. This is clearly contained in Rule 3(1)(d).
38. Further, the IT Rules do not impose any penalties/ sanctions on users who post content in contravention of the IT Rules. The only ramifications are removal of such content/ termination of access of such user by the intermediary, which may be challenged by the user under grievance redressal mechanisms specifically set out in the IT Rules, or by way of judicial review.
39. In the absence of additional civil/ criminal liability, mere removal of content/ blocking of access of users *vis a vis* information which is in any case unlawful, cannot be tantamount to creating a chilling effect on speech and expression.
40. It is further submitted that rule 3(2)(b) stipulates the intermediary to remove content in 24 hours on receipt of a complaint from an individual or any person on his behalf relation to any content which is prima facie in the nature of any material which exposes the private area of such individual, shows such individual in full or partial nudity or shows or depicts such individual in any sexual act or conduct, or is in the nature of impersonation in an electronic form, including artificially morphed images of such individual, take all reasonable and practicable measures to remove or disable access to such content which is hosted, stored, published or transmitted by it. Rule 3(2)(b) has been brought in force to ensure that the victims of online posting of pictures against their wishes, can seek recourse to the mechanism to be set up by the intermediary so that the same may be all reasonable and practicable measures to remove or disable access to such content which is hosted, stored, published or transmitted by it. Rule 3(2)(b) is to protect the victim of malicious acts and it is a matter for such a person, who is affected by such posting, to raise a complaint to the concerned authority. The petitioners cannot sit in judgment over "the content which is partial nudity and which is not" because the petitioners have no role to play in it and should not be affected by any such removal if the victim so desires it. Victim's requirement for removal of content (partial nudity) is the essential criteria as per this provision.


DR. S. SATHYANARAYANAN
Scientist 'D'
Government of India
Ministry of Electronics & Information Technology
6, CGO Complex, Lodhi Road, New Delhi-110 003

41. Further, rule 3(2)(b) protects the dignity of the person whose pictures on the computer resource negatively impacting his/her dignity. The content removal within 24 hours timeline does not resulting in over censorship and it has to be seen in seen in light of the sensitive issue that the same is dealing with and the protection of victim's dignity, which is utmost priority. Rule 3(2)(b) have been issued for the benefit & protection of victims whose sensitive pictures have been leaked online. It is a beneficial rule. Removal of a partially nude picture from its computer resource, on the basis of a complaint received from the victim of such picture, can in no way be said to affect the right of freedom of speech and expression of an artist.

42. It is submitted that rule 4 of the IT Rules, 2021 relates to the additional functions to be performed by the SSMI. Rule 4 casts certain duties upon the SSMI in addition to the duties laid down under Rule 3. Under rule 4(2), the SSMI providing services primarily in the nature of messaging shall enable the identification of the first originator of the information on its computer resource only on the ground:

A. Required by a judicial order passed by a court of competent jurisdiction or an order passed under Section 69 of the Information Technology Rules 2009, which shall be supported with a copy of such information in electronic form.

B. Further, the scope for exercising such power by the court of competent jurisdiction is strictly limited to the conditions laid down under Rule 4(2), which are as follows:

- a. *Provided that an order shall only be passed for the purposes of prevention, detection, investigation, prosecution or punishment of an offence related to the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, or public order, or of incitement to an offence relating to the above or in relation with rape, sexually explicit material or child sexual abuse material, punishable with imprisonment for a term of not less than five years:*
- b. *Provided further that no order shall be passed in cases where other less intrusive means are effective in identifying the originator of the information:*



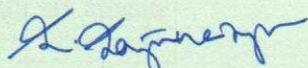
DR. S. SATHYANARAYANAN
Scientist 'D'

Government of India
Ministry of Electronics & Information Technology
6, CGO Complex, Lodhi Road, New Delhi-110 003

- c. *Provided also that in complying with an order for identification of the first originator, no significant social media intermediary shall be required to disclose the contents of any electronic message, any other information related to the first originator, or any information related to its other users:*
- d. *Provided also that where the first originator of any information on the computer resource of an intermediary is located outside the territory of India, the first originator of that information within the territory of India shall be deemed to be the first originator of the information for the purpose of this clause.*

43. Thus, it is pertinent to note that the SSMI are authorised to enable the identification of the first originator of the information on its computer resource only by a judicial order. The rule granting powers to the SSMI comes with a set of checks and balances and hence is a procedure established by law. The purpose behind rule 4(2) is that by seeking details of the first originator, the Central Government is enlarging the present scope of the rules for effective investigation purposes only. It has also been noticed that the fake messages/CSAM has the potential to rupture the community fabric in no time and often led to serious public order problems. With the new amendment, the Central Government is seeking the details of the original perpetrators behind publication/transmission of fake news/CSAM. Thus, the Supreme Court in the 2018, *Puttuswamy* judgement has also rightly observed that the right to privacy must be considered in relation to its function in society and be balanced against other fundamental rights. In a catena of judgments, the Hon'ble Supreme Court has also held that the right to privacy is not an absolute right, and it can be regulated within the realm of permissible grounds. Hence, the above rule is completely rational and enacted to serve a larger purpose.

44. Rule 4(4) of the IT Rules, 2021 relates to removal of CSAM content. The technology-based solutions such as automated tools prescribed under the IT Rules 2021 are based on the recommendations of the Committee constituted in the case of *In Suo Moto Writ (Crl.) No(S). 3 Of 2015 Re: Prajwala Letter Dated 18.2.2015 Videos of Sexual Violence and Recommendations (2018) 17 SCC 79: (2018) 7 Scale 720 dated 18-05-2018.*

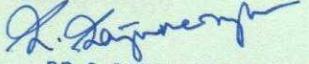

 DR. S. SATHYANARAYANAN
 Scientist 'D'
 Government of India
 Ministry of Electronics & Information Technology
 6, CGO Complex, Lodhi Road, New Delhi-110 003

45. The said rule applies only to SSMI and not all intermediaries. The purpose behind the rule is to ensure that all SSMI shall endeavour to deploy technology-based measures, including automated tools or other mechanisms to proactively identify information that depicts any act or simulation in any form depicting rape, child sexual abuse or conduct, whether explicit or implicit, or any information which is exactly identical in content to information that has previously been removed or access to which has been disabled on the computer resource of such intermediary under clause (d) of sub-rule (1) of rule 3. The rule does not apply to any new content, but applies only to content which has been removed or disabled under rule 3(1)(d).
46. The rule further comes with a set of conditions to be adhered to by the SSMI under rule 4(4) as follows: An intermediary has to display notice for users attempting access such information clearly stating that such information has been identified by the intermediary under the categories referred to in this sub-rule:
- a. *Provided that the measures taken by the intermediary under this sub-rule shall be proportionate having regard to the interests of free speech and expression, privacy of users on the computer resource of such intermediary, including interests protected through the appropriate use of technical measures:*
 - b. *Provided further that such intermediary shall implement mechanisms for appropriate human oversight of measures deployed under this sub-rule, including a periodic review of any automated tools deployed by such intermediary:*
 - c. *Provided also that the review of automated tools under this sub-rule shall evaluate the automated tools having regard to the accuracy and fairness of such tools, the propensity of bias and discrimination in such tools and the impact on privacy and security of such tools.*
47. Hence it is apparently clear that this rule is not applicable for all intermediaries but only for SSMIs and the rule is limited for specific content only which is already a disabled content by virtue of a court order or the order of the appropriate government or its agency only (rule 3(1)(d)). The allegations in the


 DR. S. SATHYANARAYANAN
 Scientist 'D'
 Government of India
 Ministry of Electronics & Information Technology
 6, CGO Complex, Lodhi Road, New Delhi-110 003

writ petitions that the rule 3(1)(d) does not afford any opportunity to the person or notified or being heard before taking down and is violative of the principles of natural justice is not maintainable. Content removed under rule 3(1)(d) is based on the order of the court of competent jurisdiction or on being notified by the Appropriate Government or its agency. The court and the government or its agency will always pass an order and notification after following the principles of natural justice. The above mentioned provision acts as checks and balance on the actions of the intermediary. Hence the aspersions cast in the writ petitions are not maintainable.

48. Further, it is also submitted that the SSIMs can develop their own automated tools or licence any tool for compliance to rule 4(4) of the IT Rules 2021. The benefits of using such automated tools for tracing and removing unlawful content specified in rule 4(4) overweighs any such concerns raised in the writ petitions.
49. Furthermore, rule 7 states that where an intermediary fails to observe these rules, the provisions of sub-section (1) of Section 79 of the Act shall not be applicable to such intermediary and the intermediary shall be liable for punishment under any law for the time being in force including the provisions of the Act and the Indian Penal Code.
50. In respect of rule 7 it is submitted that Section 79(1) clearly informs that the intermediaries have to adhere to Section 79(1) of the IT Act, 2000. If an intermediary does not comply with the said rule, then the exemption clause under Section 79(1) does not apply to such intermediaries and hence if any unlawful act is committed on its platform, then they will also be held liable for the same.
51. The primarily the relationship in the digital platforms is only between the Platform and the User. The government has only a limited role in seeking removal of content or seeking information only when a complaint is received by the government and not otherwise. The IT Rules 2021 only governs the right to publish, download or remove content and it does not by itself make a user


DR. S. SATHYANARAYANAN
 Scientist 'D'
 Government of India
 Ministry of Electronics & Information Technology
 6, CGO Complex, Lodhi Road, New Delhi-110 003

criminally liable for posting content. Criminal liability is a consequential action which commences when the penal provisions of an existing laws in force is violated by the user. The purpose behind rule 7 is to ensure that the intermediaries must adhere to the rules as specified under IT Rules, 2021 which is in furtherance of the protection of fundamental rights of the common users.

52. The rules are in conformity with the fundamental rights such as 'right to equality', 'freedom of speech and expression' and 'privacy' morefully enshrined under Articles 14, 19 and 21 of the Constitution of India. Only under applicable law in force and as per the restrictions specified under Article 19(2) the unlawful content is identified and disabled through the intermediary. Core value contained in Art 19(1)(a) has not been disturbed. The rights guaranteed under Article 19(1)(a) and Article 19(1)(g) of the Constitution are to be read along with clauses (2) and (6) of Article 19 which carve out areas in respect of which valid legislation can be made and the Rules follow the same judicial principle. Rules strikes a proper balance between the freedom guaranteed in Article 19(1)(g) and the social control permitted by clause (6) of Article 19.

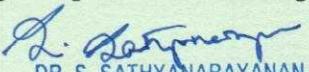
53. That the Hon'ble Supreme Court of India has affirmed the Right to Privacy as a fundamental right in Justice K.S. Puttaswamy case. Disclosure of information without the user's consent and purposes other than required by law will be unlawful and violate individuals' privacy. It is not violative of the principles as laid down in *K.S. Puttaswamy v. Union of India*, (2017) 10 SCC 1, as rule 4(2):

(a) falls in the zone of reasonableness,

(b) does not suffer from manifest arbitrariness, and

(c) provisions of law which are adopted are proportional to the object and needs sought to be fulfilled by the law.

54. It is further stated that the test to determine manifest arbitrariness is to decide whether the enactment is drastically unreasonable and/ or capricious, irrational or without adequate determining principle. When the impugned rule is read in its entirety alongwith its provisos, it can very easily be deciphered that much caution has been exercised, at each step, by the answering Respondent starting


 DR. S. SATHYANARAYANAN
 Scientist 'D'
 Government of India
 Ministry of Electronics & Information Technology
 6, CGO Complex, Lodhi Road, New Delhi-110 003

with the requirement of a court order requiring the intermediary to share the necessary information, to listing of specific offences in relation to which an order may be passed, to making sure that no order shall be passed in cases where other less intrusive means are effective, and most importantly that the intermediary shall not be required to disclose the contents of any information related to its other users. Thus, adequate principles have been determined; the rule is completely rational and enacted to serve a larger purpose.

55. It is also stated that the Supreme Court has rightly observed that the right to privacy must be considered in relation to its function in society and be balanced against other fundamental rights, which includes the need of the competent authorities for prevention investigation, prosecution of criminal offences including safeguards against threat to public security. In a catena of judgments, the Hon'ble Supreme Court has held that the right to privacy is not an absolute right, and it can be regulated within the realm of permissible grounds inter alia including national security, prevention/detection/investigation of a crime etc. [Refer: Puttuswamy (supra)]. Thus, when an important countervailing interest is shown to be superior, the right to privacy can be intruded upon. [*Govind vs State of M.P.* 1975 SCC (2) 148]. Thus, the right to privacy of individuals is balanced with the legitimate state aim by way of a narrow incursion thereto on the basis of permissible markers as set out in the Impugned Provision.

56. I also that "freedom of expression and speech" does not entitle or grant right to publish or circulate manipulative/fake messages to create "public order" situations. In catena of judgments, the Supreme Court has opined that the freedom of expression and speech is not absolute and placed reasonable restrictions. Likewise, the right to privacy is although a fundamental right but it is not unlimited and absolute.

57. It is further submitted that the Rules are not violative of Art. 14 of the Constitution. The challenge based on Article 14 is rebuffed in two prongs. Firstly, In the case of Intermediary it is submitted that it is not violative of Article 14 for the following grounds:


DR. S. SATHYANARAYANAN
Scientist 'D'

Government of India
Ministry of Electronics & Information Technology
6, CGO Complex, Lodhi Road, New Delhi-110 003

i. No authority has been empowered (Govt. or Platform) to take an arbitrary action. The order for removal of any content which is unlawful and falls within the Article 19(2) is being invoked only after following the checks and balances as stipulated within the rules. As per the proviso of Rule 3(1) (d) any content to be removed on being unlawful is issued only by the:

ii. Court order

iii. On being notified by the Authorized agency notified by the Appropriate Government.

iv. No other executive other than the Appropriate Government or its agency is empowered to issue order for removal of content.

58. Furthermore, in the case of SSMI, the SSMI remove contents in the following two conditions:

i. Based on the court order or on being notified by the Appropriate Government or its authorized agency;

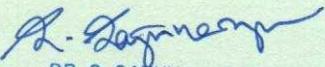
ii. While removing contents on their own accord under clause (b) of subrule (1) of rule 3 on its own accord, the SSMI (being larger platforms), are bound to follow the due diligence as per rule 4(8) by which such SSMI shall ensure the following:

a) to provide the user a notification for explaining the action being taken and the reasons for taking such action;

b) to provide an adequate and reasonable opportunity to dispute the action being taken and request for the reinstatement of access to the account and it may be decided within a reasonable time;

c) that the Resident Grievance Officer maintains appropriate oversight over the mechanism for resolution of any disputes raised by the user.

59. It is clear from the above that the Executive is not over empowered to take down content and that only through a court order or order by the appropriate government that the content is disabled. Further the above clearly highlights that user is protected against arbitrary action of the platforms. These adequate checks and balances show that the rules are not arbitrary.



DR. S. SATHYANARAYANAN
Scientist 'D'

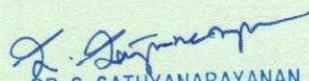
Government of India
Ministry of Electronics & Information Technology
6, CGO Complex, Lodhi Road, New Delhi-110 003

RULES ENHANCE THE SAFETY OF WOMEN AND CHILDREN

60. The new IT Rules, 2021 have a clear focus on enhancing safety of women & children. Various provisions of these Rules, as stated in Part-II, focus on enhanced safety of women and children. These include:
- A. Specific inclusion of certain requirements to be explicitly conveyed in terms and conditions [vide clause (b) in sub-rule (1) of rule 3].
 - B. Reporting by the aggrieved individual in respect of content such as revenge porn and similar content breaching physical privacy and taking action within 24 hours for content removal [vide clause (b) of sub-rule (2) in rule 3].
 - C. Enhanced grievance redressal mechanism by intermediaries [vide clause (a) of sub-rule (2) in rule 3].
 - D. In case of significant social media intermediaries, there is also an additional provision for a Resident Grievance Officer, a Chief Compliance Officer and a nodal contact person; all to be residents in India; and a physical contact address of the significant social media intermediary to be in India (vide subrule (1) in rule 4 and sub-rule (5) in rule 4).
 - E. The Rules also have provisions that intermediary shall cooperate with Law Enforcement Agencies (LEA) to identify the first originator of information related to rape and child sexual abuse material (CSAM) imagery for prosecution (vide sub-rule (2) in rule 4).
 - F. The significant social media intermediaries shall endeavour to deploy technology-based measures to identify any act or simulation of rape and children engaged in any sexually explicit act, in accordance with the safeguards in the Rules (vide sub-rule (4) in rule 4).

COMMON USERS ARE PROTECTED UNDER THE IT RULES 2021

61. The IT Rules, 2021 are meant to benefit a common user, who is using any intermediary platforms. These Rules specially provide for establishment of a robust grievance redressal mechanism (including appointing a Resident Grievance officer for SSMI), a physical contact address in India for communication (for SSMI), expeditious removal of content violative of physical


DR. S. SATHYANARAYANAN
 Scientist 'D'
 Government of India
 Ministry of Electronics & Information Technology
 6, CGO Complex, Lodhi Road, New Delhi-110 003

privacy (generally considered as revenge porn material), facilitation of periodic reminders (at yearly intervals) and hence knowledge of privacy policy and other terms and conditions offered by the intermediary, prior notice before content/account deletion/suspension in certain cases, voluntary verification, etc. These features are likely to benefit all concerned. These measures are intended to empower users in the online space, particularly with respect to significant social media intermediaries. The Rules, by providing these mechanisms and remedies, empower the users to safeguard their privacy and other legal rights and avail redressal of grievances.

62. I crave leave of this Hon'ble Court to raise additional submissions on law as well as fact at a later point in time.

63. It is finally submitted that the IT Rules 2021 is in consonance with the Constitution of India. The notion 'welfare of the people is the supreme law' (Salus Populi Suprema Lex) has been taken into prime consideration while framing the IT Rules 2021. Businesses must be legally compliant to the law of the land.

Therefore, for all the reasons stated hereinabove, this Hon'ble Court may be pleased to hold that the IT Rules, 2021 neither contains any unlawful restrictions nor imposes any burdensome compliances upon the intermediaries affecting the ease of business. In view of the above, it is prayed that the writ petitions may be dismissed as not maintainable and thus render justice.

Solemnly affirmed at Chennai on
This 25 day of August 2021 and
signed his name in my presence


DR. S. SATHYANARAYANAN
Scientist - D
Government of India
Ministry of Electronics & Information Technology
6, CGO Complex, Lodhi Road, New Delhi-110 003

BEFORE ME

Attested
Rakesh Maheshwari

RAKESH MAHESHWARI
Scientist 'G' & Group Coordinator (CLES)
Government of India
Ministry of Electronics & Information Technology
6, CGO Complex, Lodhi Road, New Delhi-110 003