

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(Special Original Jurisdiction)

W.P. No. of 2021

T.M. Krishna,



...Petitioner

Versus

1. Union of India,
Represented by the Secretary,
Ministry of Electronics and Information Technology,
Electronics Niketan, 6 CGO Complex,
Pragati Vihar, Lodhi Road
New Delhi – 110003

2. Union of India,
Represented by the Secretary,
Ministry of Information and Broadcasting,
A-Wing, Shastri Bhavan,
New Delhi – 110001

...Respondents

AFFIDAVIT OF THE PETITIONER

I, T.M. Krishna



 do hereby
solemnly affirm and sincerely state as follows:

1. I am the Petitioner herein. I am well acquainted with the facts and circumstances of the case and I am competent to swear to this affidavit.
2. I am filing the present writ petition seeking a declaration that the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 (the “Intermediaries Rules 2021” or “Impugned Rules”) made under Sections 87(2)(z) and 87(2)(zg), read with Sections 69A(2) and 79(2) of the Information Technology Act, 2000 (the “IT Act 2000”) is *ultra vires* both the Constitution of India and the IT Act 2000.
3. I am a Karnatic music vocalist, cultural critic, and writer. I began performing at the age of 12 and since my debut concert at the Music Academy, Chennai, I have rendered concerts at various festivals and venues across the world. As a musician, I have been involved in a number of different collaborations in an effort to transcend the narrow confines of Karnatic music. I have performed with the Jogappas (transgender musicians) and I have co-conceptualised and performed *Karnatik Kattaikuttu*, an unusual aesthetic conversation between art forms and communities that belong to two ends of the social spectrum. I have also collaborated with the author Perumal Murugan in bringing to stage his often-subversive verses. I have helped bring into the Karnatik fold the poetry of the social reformer and philosopher Sree Narayana Guru. I am presently collaborating with Ashoka University on *The Edict Project*, which is an attempt at reimagining Ashoka’s

edicts in musical form. The project aims to engender vibrant and critical conversations around the edicts, from the aesthetic to the socio-political and academic.

4. As a public figure, I am engaged in, and I write on, matters both cultural and political. In 2016, I received the Ramon Magsaysay Award. The citation of my award noted that the board of trustees had recognised “[my] forceful commitment as artist and advocate to art’s power to heal India’s deep social divisions, breaking barriers of caste and class to unleash what music has to offer not just for some but for all.” I am an author of three critical works: *A Southern Music: The Karnatik Story*, which is a thesis on the history of Karnatic music, its aesthetics and underlying philosophy; *Reshaping Art*, a short essay on how art is made, performed and disseminated, and the role played by caste, class and gender in the processes of art and culture; and *Sebastian and Sons*, which is a history of the *mrdangam* and a story of the invisible keepers of a tradition, the *mrdangam* makers. Each of these works asks critical and often complicated and difficult questions surrounding the intersection of arts and culture with our political and social life. I am also engaged in, among other initiatives, the running of the Urur Olcott Kuppam Festival, as volunteer and organiser. The festival seeks to bring together different art forms to the commons.
5. I state that as an artist and cultural and political commentator, I cherish and attach particular value to my rights to free expression and privacy under the Constitution of India. For me, privacy, like music itself, is an experience. When I think of privacy, I think of life, intimacy, experience, discovery, security, happiness, the lack of fear and the freedom to create. I think of liberty, dignity, and choice, as facets inherent in me not just as an artist but as a human being. I took special joy in the Hon’ble Supreme Court’s judgment in *KS Puttaswamy v. Union of India*, 2017 10 SCC 1, when it recognised that the right to privacy was implicit in the guarantee of a right to life and personal liberty under Article 21. The Supreme Court, in its judgment, acknowledges the fact that privacy for an artist—and there is an artist in every human being—is solitude, not in the sense where one shuts themselves out from all contact, but in the sense of a relationship between the artist and her creative soul. Without privacy it’s impossible to create and perform. And the privacy that ought to be afforded to us all is intrinsically linked with our right to freedom of expression. Our Constitution contains a commitment to the liberty of imagination. Censorship *sans* reason offends this commitment. It is in furtherance of my rights to freedom of expression and privacy that I am filing the present writ petition. I submit that the Impugned Rules offend my right as an artist and cultural commentator by both imposing a chilling effect on free speech, and by impinging on my right to privacy. Part II of the Impugned Rules violate my rights as a user of social media services, while Part III of the same Impugned Rules are in breach of my rights as a creator of online content.
6. The challenge made to the Impugned Rules in this writ petition is predicated at two levels: it is my contention that the rules are in breach of my fundamental rights under Part

III of the Constitution and that the rules are also *ultra vires* its parent statute, that is the IT Act 2000.

7. Respondent No. 1 is the Union of India, represented by the Ministry of Electronics and Information Technology. This is the governing agency responsible for administration of the IT Act 2000 and other information technology-related laws. Respondent No. 1 is also responsible for administering Part II of the impugned Intermediary Rules titled '*Due Diligence by Intermediaries and Grievance Redressal Mechanism*'
8. Respondent No. 2 is the Union of India, represented by the Ministry of Information and Broadcasting. This is the governing agency now responsible for regulating '*Films and Audio Visual programmes made available by online content providers*' and '*News and current affairs content on online platforms*' (vide Gazette Notification No. S.O. 4040(E) dated 09.11.2020 amending the Government of India (Allocation of Business) Rules, 1961.) Respondent No. 2 also administers Part III of the Intermediary Rules titled '*Code of Ethics and Procedure and Safeguards in relation to Digital Media*'.

Legislative History of the IT Act 2000 and the Intermediaries Rules 2021

9. The IT Act 2000 is an Act of Parliament that was notified on 17 October 2000. Its enactment was prompted by a Model Law on Electronic Commerce drafted by the United Nations Commission on International Trade Law in 1996. The idea behind the Model Law was to encourage a standardising of legislation across jurisdictions with a view to facilitating e-commerce. The IT Act 2000 was therefore a mechanism that was meant to acknowledge and grant legal sanctity to electronic trade, electronic transactions and electronic communication, among other things. To that end, the law enabled the consideration of electronic documents and materials as evidence.
10. On 05.02.2009, the Information Technology (Amendment) Act, 2008 was notified. Through this amending law a slew of changes was made to the IT Act 2000. These included the introduction of Section 66A (later declared unconstitutional by the Hon'ble Supreme Court in *Shreya Singhal v Union of India*, (2015) 5 SCC 1), the substituting of the existing Section 69 with a new Section 69, Section 69A and Section 69B. The new Section 69 empowered the government to issue directions for interception or monitoring or decryption of any information through any computer resource, while Section 69A allowed it to issue directions to block public access to any information through a computer resource.
11. Additionally, the 2009 amendment also substituted Section 79, which earlier granted immunity to intermediaries in certain circumstances. Under the new Section 79 the existing burden of proof was reversed. Intermediaries were now no longer required to prove that the offence or contravention was committed without their knowledge or that they had exercised all due diligence to prevent the commission of such an offence. Instead, intermediaries were only required to follow the guidelines issued by the

- Respondent No. 1 and expeditiously remove unlawful content after receiving actual knowledge of the same or on being notified by the appropriate Government or its agency.
12. On 07.02.2011, the then Ministry of Communications & Information Technology released the Information Technology (Intermediaries Guidelines) Draft Rules, 2011 for public consultation. On the back of an opaque consultative process, Respondent No. 1 notified the Information Technology (Intermediaries Guidelines) Rules, 2011 (the “**Intermediaries Rules 2011**”) on 11.04.2011, prescribing due diligence standard and other guidelines for intermediaries, in exercise of its powers under Section 87(2)(zg) read with Sections 69A and 79 of the IT Act 2000.
13. In 2015, the Hon’ble Supreme Court in *Shreya Singhal (supra)* delivered a judgment on the constitutional validity of Sections 66A, 69A and 79 of the IT Act 2000, and the Rules framed under Section 87(2)(zg) read with Sections 69A and 79 of the Act. The Hon’ble Supreme Court struck down Section 66A as *ultra vires* the Constitution. It ruled that the provision was vague and overbroad and, therefore, in violation of Article 19(1)(a). However, it upheld Section 69A and the rules framed thereunder on the basis that the law contained inbuilt safeguards that ensured that content would be removed only when “necessary” on the basis of specified grounds and that intermediaries would be liable only for their failure to comply with state directions. The Court also upheld Section 79(3)(b) and the Intermediary Rules, 2011 although it read down these provisions by holding that an intermediary is required to expeditiously take down content *only* upon receiving actual knowledge from a court order or on being notified by the appropriate government or its agency.
14. In the meantime, Respondent No. 1 deliberated over further amendments to the Intermediaries Rules 2011. On 24.12.2018 it published a copy of a draft Information Technology [Intermediary Guidelines (Amendment)] Rules 2018 on its website, seeking comments from the public. Notably, this draft did not contemplate regulation of OTT Platforms and Digital News Media.
15. While so, on 09.11.2020 *vide* Gazette Notification No. S.O. 4040(E) dated 09.11.2020, the President of India amended the Government of India (Allocation of Business) Rules, 1961 to confer Respondent No. 2 with jurisdiction over ‘*Films and Audio Visual programmes made available by online content providers*’ and ‘*News and current affairs content on online platforms*’.
16. In January 2021, it was reported that the Hon’ble Union Minister of Information and Broadcasting intended to release guidelines for OTT platforms, since the Ministry had purportedly received several complaints against web-series’ that were streaming on OTT platforms.
17. On 25.02.2021, without any prior public consultation, the Hon’ble Union Ministers of Respondent Nos. 1 and 2 Ministries announced the issuance of the Impugned Rules at a

press conference. Shortly thereafter, on the same date, the Impugned Rules were notified in the gazette, superseding the Intermediaries Rules 2011. The Impugned Rules are purported to have been made in exercise of powers conferred under Sections 87(1) and 87(2)(z) and 87(2)(zg) of the IT Act 2000.

18. The substantive changes introduced by the Intermediaries Rules 2021 are described in further detail for the convenience of this Hon'ble Court in a document titled "Table Comparing Corresponding Provisions of the Intermediaries Rules 2011 and Intermediaries Rules 2021", which is filed together with this writ affidavit as part of the Petitioner's Typed Set of Documents.

Part III of the Impugned Rules

19. In brief, Part III of the Impugned Rules seeks to regulate "publishers of news and current affairs content" and "publishers of online curated content" by imposing on them a "Code of Ethics". This Code of Ethics is contained in the Appendix to the Impugned Rules. It is made binding on publishers of online curated content through Rule 9, and it is enforced through a three-tier regulatory mechanism: self-regulation by publishers at Level I, self-regulation by self-regulating bodies of publishers at Level II, and oversight by the central government at Level III.

20. The oversight by the government is conducted through an Inter-Departmental Committee that is established under Rule 14. This committee will examine complaints made against content and make recommendations to the Ministry. The Ministry will then take those recommendations into consideration and issue appropriate orders and directions for compliance by the publisher.

21. The processes instilled by Part III of the Impugned Rules create a culture of executive oversight of online speech that is wholly inimical to the right to freedom of expression. The rules establish vague responsibilities on producers of online curated content that will only inevitably lead to a chilling of the creative process. Independent creators who are keen to stretch the boundaries of cultural and social acceptance will find themselves thwarted by a law that sanctions arbitrary ministerial supervision. It is submitted that in granting the Union executive the power to determine whether an expression violates the law the Rules are in breach of the basic values that underpin free speech. It is submitted that this role under India's constitutional scheme ought only to be performed by an independent judicial body. Indeed, the Impugned Rules grants no such room for autonomous oversight.

22. Furthermore, the Appendix containing the Code of Ethics is decidedly vague and unclear. It directs publishers of online content to conform to a set of guidelines that stand outside the constitutional scheme. For example, The Code of Ethics requires publishers of online curated content to "take into consideration India's multi-racial and multi-religious context" and exercise "due caution" when featuring the activities, beliefs, practices, or

views of any racial or religious group. Should such publishers fail to exercise “due caution” the content in question may be blocked on recommendations made by the Inter-Departmental Committee. This obligation that is imposed on the publishers is indeterminate and overbroad and is bound to have a chilling effect on speech. There can be little doubt that Article 19(1)(a) of the Constitution doesn’t provide a license for hate speech. But any law that seeks to forbid hate speech of any kind ought to be clear and precise. In the absence of clarity, the inevitable result is that publishers will block not only speech that is illegitimate but also perfectly acceptable speech that seeks to stretch the boundaries of social, religious and cultural constructs. As an artist and critic, this vagueness in the Code of Ethics is especially concerning to me. As someone interested in exploring the boundaries of Karnatic music and in taking the art form beyond its existing, narrow social confines, the endeavour of my art is to ask difficult questions. My apprehension today is that the work that I produce in trying to reshape art and in dissenting from the conventional mores of society will fall foul of the Code of Ethics contained in the Impugned Rules. Indeed, publishers of online curated content, facing the threat of sanctions imposed by Part III of the rules, are likely to err on the side of caution.

23. I submit that the Impugned Rules, which are vague and indeterminate, will thwart artists from raising difficult questions against existing aesthetic, gender and caste hierarchies in Karnatic music, and will thwart dissenters who question prevailing cultural mores. A reading of the Code of Ethics contained in the Impugned Rules makes it impossible to glean what will be considered by the Union government as acceptable speech in the online world. In any event, it is submitted that determining what is acceptable isn’t the sole prerogative of the government. It is a role that ought to be fashioned in accordance with the constitutional scheme, which the Rules manifestly fail to do.

24. Beyond violating the rights to privacy and freedom of expression of producers of online content, the Impugned Rules, I am advised to submit, are also *ultra vires* the IT Act 2000. The legislation simply does not contemplate regulation of digital news media and publishers of online curated content.

25. For all these reasons, I am left with little choice but to assail the validity of Part III of the Impugned Rules.

Part II of the Impugned Rules

26. Part II of the Impugned Rules is similarly antithetical to fundamental rights. I submit that I am especially concerned as a musician and cultural critic of the chilling effect on speech and expression that the part produces. The Internet was famously meant to serve as a democratising force, as an avenue that unlike traditional spaces such as television channels, newspapers, magazines, stadia and auditoriums, would be open to all, where speech can exist free of its conventional structural barriers. However, Part II of the Impugned Rules upends this vision. It vests private intermediaries with excessive power in shaping what speech is permitted and what speech is not. In the face of potential

criminal liability, with business concerns in mind, these private bodies will inevitably compromise values inherent in the idea of freedom of speech and expression. Empirical research conducted by the Centre for Internet and Society demonstrates that prior to the judgment in *Shreya Singhal*, intermediaries were over-complying with take down requests for censorship, unmindful of the legitimacy of such requests. Even the Hon'ble Supreme Court in *Shreya Singhal* recognised that intermediaries should not be placed in a position of acting as judges and evaluating the millions of requests they receive to disable access to online content, thereby reading down the requirement of "actual knowledge" in Section 79 of the IT Act 2000 to mean the actual knowledge from a court order or actual knowledge of a notification from an appropriate government agency in respect of unlawful content. The impugned Rules, specifically Rules 3(2)(b) and 4(2), have the effect of undoing this judgment, by treating intermediaries as gatekeepers of online content.

27. The problem with vesting power in unaccountable private intermediaries has been acknowledged by the UN Special Rapporteur on Freedom of Expression in his 2018 Report on Online Content Regulation. The report acknowledges that while in the light of legitimate State concerns such as privacy and national security, the appeal of regulation is understandable, the making of rules "involve risks to freedom of expression, putting significant pressure on companies such that they may remove lawful content in a broad effort to avoid liability. They also involve the delegation of regulatory functions to private actors that lack basic tools of accountability. Demands for quick, automatic removals risk new forms of prior restraint that already threaten creative endeavours in the context of copyright. Complex questions of fact and law should generally be adjudicated by public institutions, not private actors whose current processes may be inconsistent with due process standards and whose motives are principally economic." The report further recommends that "States should refrain from adopting models of regulation where government agencies, rather than judicial authorities, become the arbiters of lawful expression. They should avoid delegating responsibility to companies as adjudicators of content, which empowers corporate judgment over human rights values to the detriment of users."
28. I submit that for artists and musicians a chilling effect on speech is especially harmful. It tends to altogether quell the creative process and makes it impossible for a person to think imaginatively, beyond conventional boundaries, and create art that is politically and socially salient.
29. Furthermore, the Impugned Rules are also offensive in the function creep that they engender. This function creep is manifest in Rule 4(4). It is submitted that intermediaries cannot claim any right to host or provide access to content depicting child sexual abuse or rape. And indeed, the State has a legitimate responsibility to ensure that such content is not depicted on the Internet. But Rule 4(4) goes beyond those aims and requires intermediaries to endeavour to use tools for auto-deletion to remove content that has

previously been disabled under rule 3(1)(d) of the Impugned Rules. Thus, a technology that is apparently meant to identify information depicting rape or child sexual abuse will now be enabled to bring down other forms of content too. A function creep of this kind has a distinct and deleterious effect on fundamental rights.

30. Furthermore, the efficacy of automated tools is still a matter of deep contention. These tools are still nascent and there is substantial evidence that demonstrates that technology providing for automated identification can lead to erroneous results. The use of artificial intelligence also raises a number of ethical concerns. Free speech is dependent on the equalising of existing biases and prejudices prevalent in society. But AI invariably hangs on those extant biases in identifying purportedly illegitimate speech. It is submitted that the widespread belief that automated tools are somehow objective and free of human prejudices is erroneous. Big data is inherently unfair. Algorithms are written by humans and they contain within them the very same prejudices and biases that society is replete with. In that sense, data merely mirrors human society.
31. It is my submission that the use of automated tools of censorship are in and of itself a violation of my fundamental rights. Neither the intermediary nor a user such as I have under the Impugned Rules a right to be heard prior to the restriction of speech or to appeal the order of an automated tool. Furthermore, the use of these tools by their very design leads to the imposition of prior restraints on speech. These restraints can be lethal to the creative process and can prove especially harmful not only to political dissenters but also to musicians and other creative artists.
32. Part II of the Impugned Rules also strikes at my right to privacy. Rule 4(2) makes it mandatory for every significant social media intermediary to enable tracing of originators of information on its platform, purportedly in furtherance of Section 69 of the IT Act 2000. However, the rule is so vaguely worded that it is difficult to gather precisely what the social media intermediary will have to do in order to identify the first origination of information. These nebulous stipulations will only lead to consequences that impinge on privacy given that social media intermediaries will likely adopt tools that are unmindful of privacy in seeking conformity with the authority of the law.
33. I submit that there are few things more important to an artist than her right to privacy. Indeed, without the protection of privacy it is impossible for an artist to perform freely. The creative process, which might involve challenging existing social norms, whether it is norms concerning political views, views about religion, caste, and social life, or existing mores governing obscenity and sexuality, requires a space that is wholly secluded and private. The provision of this space has been recognised as a fundamental right by the Hon'ble Supreme Court in its 9-judge bench verdict in *KS Puttaswamy v. Union of India*, 2017 10 SCC 1. Part II of the Impugned Rules through the traceability norms it imposes on intermediaries offends this promise.

34. Now, therefore, left with no alternative and efficacious remedy, I am invoking the writ jurisdiction of this Hon'ble Court under Article 226 of the Constitution to challenge the Intermediaries Rules 2021 on the following amongst other grounds, which are taken in the alternative and without prejudice to one another:

GROUND

- A. It is submitted that the Impugned Rules contravene fundamental rights guaranteed to me under Part III of the Constitution of India. Specifically, I submit that the Impugned Rules are in breach of my rights under Articles 14, 19(1)(a), 19(1)(g) and 21.

The Impugned Rules violate the right to free speech guaranteed under Article 19(1)(a) of the Constitution.

- B. In compelling producers of online curated content to conform to a set of nebulous guidelines termed as a "Code of Ethics," Part III of the Impugned Rules imposes illegitimate restrictions on the right to freedom of expression guaranteed under Article 19(1)(a) of the Constitution. As part of a set of general principles laid down in the Appendix to the Impugned Rules, the Code of Ethics directs publishers to take into consideration a slew of factors beyond those that are stipulated as grounds on which reasonable restrictions can be made on speech under Article 19(2). For example, it directs publishers to "take into consideration India's multi-racial and multi-religious context and exercise due caution and discretion when featuring the activities, beliefs, practices, or views of any racial or religious group." These directions are bound to force the hand of publishers to act against the interests of preserving the marketplace of ideas and in the interests of their own businesses. What is more, these directions will also lead directly to the restriction of speech on unconstitutional grounds. For instance, the Inter-Departmental Committee constituted under the Impugned Rules will be at liberty to recommend to the Union of India that speech that the committee finds offensive to a person's religious belief ought to be removed, although Article 19(2) permits no such restriction on speech. In thus restricting speech, Part III of the Impugned Rules breaches Article 19(1)(a).
- C. It is submitted that the Code of Ethics contained in Part III of the Impugned Rules is likely to create a chilling effect on speech, where creators of content will self-censor themselves and produce art that is acceptable to the state, rather than art which, otherwise legitimate, pushes the boundaries of societal, religious, political, and cultural norms. It is submitted that the kindling of a chilling effect, as held by the Hon'ble Supreme Court in *Shreya Singhal (supra)* is in violation of the right guaranteed under Article 19(1)(a) of the Constitution.
- D. It is submitted further that the Rules run contrary to the positive duty to protect artistic speech recognized by the Hon'ble Supreme Court in *Indibily Creative Pvt Ltd. v. State of West Bengal*. (2020) 12 SCC 436, which affirmed the decision of this Hon'ble Court in

S. Tamilselvan v. State of Tamil Nadu, 2016 SCCOnLine Mad 5960. The decision in *Tamilselvan* – given in the context of the novel ‘Madhorubagan’ by Prof. Perumal Murugan– recognized that there was a positive duty under Article 19(1)(a) to protect artistic speech and as such, the State could not rely on its duty to maintain law and order to placate non-State actors who disagree with certain types of speech through censorship; and thus, the State could not compel artists to change their stand based on the views of non-State players. Part III of the Rules run contrary to the obligation to protect free speech and are tantamount to the dereliction of this duty of the State by instead requiring artists to self-censor in the name of law and order. *Indibily (supra)* reaffirmed the positive obligation of the State “to create and maintain conditions in which the freedoms guaranteed by the Constitution can be exercised, [otherwise] there is a real danger that art and literature would become victims of intolerance.”

- E. It is submitted that the language of the Code of Ethics contained in the Impugned Rules makes it impossible to understand what might be considered by the government as acceptable speech in the online world. As a result, musicians such as I will be forced into creating art under an atmosphere of state oversight. Art is at its most sublime when it emanates through a free and democratic mind. When art is tethered to arbitrary standards set by the state, it loses its meaning, and it no longer remains free. In imposing these burdens on artists and cultural commentators and critiques, Part III of the Impugned Rules is in clear breach of the fundamental right to freedom of expression.
- F. It is respectfully submitted that Part III of the Impugned Rules grants to executive authorities, in particular an Inter-Ministerial Committee and the Respondent No. 2, a wide and untrammelled power to determine which forms of expression impinge on the Code of Ethics contained in the Appendix. The conferral of this authority is in the teeth of established jurisprudence under Article 19(1)(a). A more proportional response to online speech that goes beyond permissible limits would have involved the establishment of an independent judicial body to examine complaints that are in breach of the law. Indeed, the Impugned Rules, through Part III, does not so much as envisage oversight of the executive through independent judicial fora.
- G. It is submitted that the definitions of “publisher of online curated content” and “online curated content” contained respectively in Rule 2(u) and Rule 2(q) derive their meanings from each other. It is unclear from a reading of these definitions as to precisely who constitutes a publisher of online curated content, to whom Part III of the Impugned Rules would apply. I submit that on a proper reading of these definitions, content published by artists such as I would not qualify us as publishers of online curated content. However, the vagueness of the definitions leads to the fear that the Respondent No. 2 might seek to impose the rigour of Part III of the Impugned Rules not only to OTT operators and online digital media, but also to independent and individual content creators. This lack of clarity is by itself in violation of the right under Article 19(1)(a) of the Constitution.

- H. It is submitted that Part III of the Impugned Rules also fails to satisfy the now well-established test of reasonableness under Article 19(2). The Hon'ble Supreme Court has held that reasonableness of a law is tested by the doctrine of proportionality (*Justice K.S. Puttaswamy vs Union of India*, (2017) 10 SCC 1; and *Anuradha Bhasin vs Union of India*, (2020) 3 SCC 637). The test contains four features: (a) A measure restricting a right must have a legitimate goal (legitimate goal stage); (b) The measure must constitute a suitable means of furthering this goal (suitability or rationale connection stage); (c) There must not be any less restrictive but equally effective alternative (necessity stage); (d) The measure must not have a disproportionate impact on the right holder (balancing stage). Part III clearly falls foul of stages (c) and (d) of this test. A vague Code of Ethics made binding on online content producers and made enforceable by executive whim cannot under any circumstances be regarded as the least restrictive measure available to ensure that online speech conforms to constitutional standards. It is submitted that given that the Impugned Rules *prima facie* impinge on the right to free speech, the burden must lie on the Second Respondent to show this Hon'ble Court that it considered alternatives to the Impugned Rules and that the Impugned Rules in fact constitute the least restrictive measure available to the State. Furthermore, the restrictions imposed by the Impugned Rules travel far beyond what is necessary to ensure that online content producers conform to constitutional standards. In doing so, the Impugned Rules clearly impose a burden that is especially harmful to right-holders.
- I. Additionally, it is my respectful submission that Part II of the Intermediary Rules 2021 also restricts my fundamental right to freedom of speech and expression guaranteed under Article 19(1)(a). The restrictions imposed by the part are vague, unjust and arbitrary and do not fall within the scope of the term "reasonable restrictions" contained in Article 19(2). It is well established that speech can only be restricted on the grounds stated in Article 19(2) and only by making laws that are "reasonable". It is also well established that rules and regulations that are vague, unclear and overbroad are by their very nature outside the scope of Article 19(2), in part because of their chilling effect of encouraging self-censorship and of forcing persons to deter from lawful expressions merely out of the fear of state sanction.
- J. In the present case, the Intermediary Rules 2021 impose vague and opaque demands on social media intermediaries leading to a direct and tangible effect on the right to freedom of speech and expression of users. This impact is all the more deleterious on artists and musicians for whom free speech constitutes the very essence of their existence. It is submitted that citizens, when they lack clarity on what is permissible speech, will doubtless self-censor themselves and avoid uttering or expressing speech that is otherwise legitimate. By way of example, Rule 3(1)(b)(x) of the Impugned Rules requires intermediaries to warn users against posting content that is "*patently false and untrue...with the intent to mislead or... cause any injury to any person*", and under Rule 3(1)(c), to terminate access or remove the non-compliant information in case of violation

of this rule. The cumulative impact of Rules 3(1)(b)(x) and 3(1)(c) leaving it to intermediaries to remove content on a “voluntary basis” or on the basis of a complaint [under Rule 3(2)] are decidedly vague. It’s simply not clear how these rules will in fact be applied in practice. It’s not clear who decides what is “patently false and untrue”. All of this only leads to a chilling effect on social media users. Artists will be pushed towards self-censorship, thereby violating the rights of the general public to receive information, guaranteed under Article 19(1)(a).

K. I submit that apart from being vague, Part II of the Impugned Rules also fails to satisfy the test of reasonableness under Article 19(2). The part fails both the necessity and balancing stages of the proportionality test. It infringes rights to a greater extent than necessary in seeking to achieve the otherwise legitimate purpose of intermediary regulation, and, in the process, disproportionately burdens both intermediaries and users, as demonstrated below

(a) Rule 3(2)(a) allows any user to make a complaint about online content that they deem to be violative of the impugned Rules (e.g. content that the user *perceives* to be defamatory, libellous, insulting on the basis of gender, patently false etc.) or “*on any matters pertaining to the computer resources made available by an [intermediary].*” Intermediaries must now act as gatekeepers of online content and decide the user complaint within 15 days, without any obligation to hear the content creator. Rule 3(2)(b) imposes a stringent timeline of 24 hours for intermediaries to make a *prima facie* determination of whether any material (i) exposes (the undefined) private area of an individual; (ii) shows partial or full nudity; (iii) depicts sexual conduct or sexual acts; or (iv) is in the nature of impersonation; and to then remove or disable access to such content. The effect of Rule 3(2) will lead to overbroad and excessive censorship by intermediaries who have a commercial incentive to avoid potential liability by erring on the side of shutting down speech. This is especially so because the Impugned Rules do not contain any provision, similar to the proviso under Section 67B of the IT Act that exempts work that is in the interest of art, literature, science or learning or other objects of general concern or of bona fide heritage or religious concern. Given that Rule 3(2)(a) provides the intermediaries with 15 days to dispose of an aggrieved person’s complaint, forcing them to take an interim decision within 24 hours will result in over-censorship and the takedown of legal and lawful content.

(b) Rule 3(1)(d) goes beyond the erstwhile Rule 3(4) of the erstwhile Intermediary Rules, 2011 and suffers from similar problems of overbreadth, causing an ensuing chilling effect. The erstwhile Rule 3(4) read with the clarification dated 18.03.2013 and *Shreya Singhal (supra)* made it clear that the intermediary had to only *acknowledge* a complaint within 36 hours and had one month to respond to the same. However, Rule 3(1)(d) of the impugned Rules requires intermediaries to *act* within 36 hours to disable access to the specified content. Such a short time period makes it virtually impossible for intermediaries to scrutinize requests received from law enforcement

agencies to ascertain their legitimacy, competency, and whether they *prima facie* comply with Articles 19(2) of the Constitution. In granting an intermediary only 36 hours to make a takedown based on government request, or to face the threat of sanctions under Rule 7 in the alternative, the Impugned Rules fosters a culture of over-compliance with government requests, that is in direct breach of the right to freedom of expression.

- (c) The risk of over-censorship is further borne from the fact that Part II of the impugned Rules fail to comply with principles of natural justice and due process. Rules 3(1)(d) and 3(2)(b) fail to provide adequate notice and opportunity to be heard to the person aggrieved by such action or the original content creator, and do not provide for any appeal against the interim and/or final decision of an intermediary disabling access to their content under Rule 3(2). Thus, artists will be forced to rely on the discretion of the intermediaries and will be subject to heckler's veto, where a targeted ideological attack to one's creation can result in its takedown. In fact, the intermediary also cannot appeal against, or even engage with, a government order seeking take down of certain content under the broad heads of Rule 3(1)(d), virtually permitting the executive branch to have unbridled discretion in taking a *suo motu* decision to take down content that it deems to affect decency or morality, defamatory etc. and risks affecting speech that is politically sensitive or in the nature of advocacy or criticism.
- (d) Rule 7 lays down harsh and disproportionate punishment on intermediaries, including loss of safe harbour protection under Section 79 of the IT Act 2000 and potential criminal prosecution, for failure to comply with the Rules. There is no gradation of penalties for non-compliance with the Rules. Nullifying the immunity of intermediaries makes them personally liable for content posted online and will incentivise intermediaries to zealously disable and remove even legitimate speech, which might be seen as offensive or somehow displeasing to the government or other powerful forces in society. It would, in effect, result in snuffing out dissenting and contrarian voices under pressure wielded by majoritarian groups.

The Intermediaries Rules 2021 violate Article 19(1)(g), and they cannot be justified as a reasonable restriction under Article 19(6).

- L. It is submitted that the right to practise any profession, or to carry on any occupation, trade or business, guaranteed by Article 19(1)(g) of the Constitution includes the rights of artists and musicians to ply their trade. The Impugned Rules strikes at this right by imposing onerous and irrational obligations on intermediaries. The rules virtually compel social media corporations to alter the technical architecture of their platforms. In doing so, the rights of individuals, including my right, to utilise these platforms in furtherance of the right to freedom to trade and business stands affected. The right under Article 19(1)(g) can only be limited by reasonable restrictions under Article 19(6), In the present

case, the Impugned Rules are grossly disproportionate and impinge deeply on fundamental rights.

- M. Rule 4 imposes additional obligations on intermediaries having more than 50 lakh registered users, but it is manifestly vague about the situations where the number of users of an intermediary may fluctuate or cases where users do not register themselves with the intermediary. The obligations under Rule 4 can be imposed on any intermediary included in the list notified by the Central Government under Rule 6, subject to certain vague criteria applied by the government.
- N. Rule 4(4) which pushes for technology-based automated tools or appropriate mechanisms with appropriate controls to proactively identify and remove unlawful content rests on the faulty assumption that building and deploying these tools is technologically and economically feasible for all intermediaries. If this obligation was imposed on all intermediaries, as is possible due to the potential of misuse contained in Rule 6, smaller businesses which do not have the resources to develop, upgrade and maintain such technology will be driven out of the industry.
- O. Part III of the Impugned Rules similarly impinges on the right under Article 19(1)(g) by effectively thwarting artistic freedom. To an artist her right to freedom of trade and profession is intrinsically linked to an ability to think and create independently and sans the burdens imposed by state censorship. The vague set of guidelines imposed through of Code of Ethics in Part III are in breach of this right to artistic liberty.

The Intermediaries Rules 2021 violate the fundamental right to privacy under Article 21 of the Constitution.

- P. Rule 4(2) requires significant social media intermediaries to enable the identification of the “first originator” of information on its computer resource. This means that significant social media intermediaries are required to alter their existing infrastructure to “fingerprint” each message, in the process defeating end-to-end encryption of users’ messages. By enabling traceability, Rule 4(2) also virtually ends anonymity on the internet, a right that is otherwise an intrinsic facet of privacy. While Rule 4(2) is meant to apply only to a specific range of cases to investigate the crimes that may be committed by a minuscule minority, in order to implement it, significant social media intermediaries will have to change their technical infrastructure for *every* user, thus compromising the privacy of *every* user. This is so because intermediaries will need to establish a capacity to identify the first originator of information of a message as well as the first originator of a message within the territory of India, thus exposing the entire chain of communication to surveillance. Compromising the rights of *every* citizen to privacy in order to effectively prosecute crimes committed by a few is *per se* disproportionate, as it places on the entire citizenry a *presumption of criminality*.

- Q. Further, the language used in Rule 4(2) is so vague that it is difficult to glean precisely what the social media intermediary will have to do in order to identify the first origination of information. It is respectfully submitted that any attempts to weaken encryption to enable traceability would not satisfy the objective of ensuring secure use of the electronic medium. On the contrary, modification of tried and tested encryption protocols such as the Signal Protocol or creation of backdoors and key escrow systems would undermine the privacy and security of all users. This view is supported by the UN Special Rapporteur, David Kaye, who in his 2015 Report cautioned against the use of encryption weakening mechanisms because any inbuilt vulnerabilities which are intended to provide access to law enforcement agencies could be exploited by criminals as well. A similar observation has also been made in the Report of the Justice Srikrishna Committee on Data Protection in which the Committee criticized the Government for mandating low encryption standards in license agreements with telecom service providers because “this poses a threat to safety and security of the personal data of data principals.”
- R. Additionally, the Hon’ble Supreme in *K.S. Puttaswamy (supra)* has held that “*Privacy has both positive and negative content. The negative content restrains the state from committing an intrusion upon the life and personal liberty of a citizen. Its positive content imposes an obligation on the state to take all necessary measures to protect the privacy of the individual. (...) Informational privacy is a facet of the right to privacy. The dangers to privacy in an age of information can originate not only from the state but from non-state actors as well.*”. In this context, the Hon’ble Supreme Court also referred to the report of a Group of Experts on privacy, constituted under the erstwhile Planning Commission, which recommended nine privacy principles, including the following:
- a. Collection limitation: A data controller shall only collect personal information from data subjects as is necessary for the purposes identified for such collection.
 - b. Purpose Limitation: Personal data collected and processed by data controllers should be adequate and relevant to the purposes for which it is processed. A data controller shall collect, process, disclose, make available, or otherwise use personal information only for the purposes as stated in the notice after taking consent of individuals. If there is a change of purpose, this must be notified to the individual.

By virtue of Rule 4(2), significant social media intermediaries will now be forced to collect and retain data about all their users simply to be able to respond to an order in relation to the first originator passed by a competent authority. As per Rule 3(1)(h), data retention would be required for 180 days even after closure of accounts. Such mass retention of information of all the users is *per se* contrary to the principle of proportionality set out in *K.S Puttaswamy (supra)*. What is more, in the absence of a data protection law this also permits the unlawful retention and use of such personal data for

inter alia profiling users without their consent, which is most apparent in cases where the user has deleted her account but is denied a right to remove her presence from the intermediary for six more months.

- S. Next, Rule 4(4) requires significant social media intermediaries to develop automated tools for censorship. To achieve an artificial intelligence model that can detect offending posts, and automatically remove them, these intermediaries will have to collect large amounts of user generated data, including all activities of its users on the intermediary's website/mobile application, in disproportionate violation of the right to privacy.

The Intermediaries Rules 2021 violate Article 14 of the Constitution.

(i) Manifest Arbitrariness

- T. That a manifestly arbitrary law, in whatever form made, violates Article 14 is today well-established. In *ShayaraBano vs Union of India & Others* (2017) 9 SCC 1, the Hon'ble Supreme Court defined manifest arbitrariness as a law made capriciously, irrationally and/or without adequate determining principle. In the present case, it is submitted that the entirety of Part III of the Impugned Rules lacks an adequate determining principle. It grants to an Inter-Departmental Committee whimsical authority to act as arbiter of all speech on the Internet. Furthermore, it permits the Second Respondent to not only make a complaint against a certain piece of content, but also decide upon that complaint, acting in the process as a "judge in its own cause."

(ii) Excessive Delegation

- U. It is a well-established proposition of law that delegation of a core legislative function renders a statute or rules unconstitutional, and that a legislature cannot delegate its essential legislative function. The legislature must lay down the legislative policy and principle so as to afford the delegate proper guidance in implementing the same. It is also well settled that the executive cannot sub-delegate rule making powers unless such a power is expressly granted by the parent legislation. In the present case, Rule 4(2) requires messaging-related significant social media intermediaries to enable the identification of the "first originator" of information on their platform. However, neither the parent statute nor the impugned Rules provide any guidance on how to interpret this obligation or what changes significant social media intermediaries need to make to their product design, apart from the fact that the term "first originator" has not been defined. The Rules are impermissibly vague and leave it up to the intermediaries to determine whether Rule 4(2) requires them to (a) compulsorily collect the real-name/identity information of all its users and prohibit anonymity online; (b) compulsorily verify the identity of their users through KYC processes, which were earlier only required for intermediaries offering services such as banking; (c) mandatorily increase their collection and storage of metadata that will enable them to trace the origin of a message; (d) create

backdoors or key escrow systems to enable traceability of the originator; or (e) stop the practice of end-to-end encryption and disappearing messages on their platform. Therefore, Rule 4(2) must be struck down since the discretion that the Executive confers on private intermediaries is excessive and vague.

- V. Rule 4(4) must also be struck down on the grounds of excessive delegation inasmuch as the Respondent No. 1 is attempting to sub-delegate the power to remove unlawful content to private and unaccountable intermediaries, without providing any guidance on the kind of automated tools that ought to be deployed.

The Intermediaries Rules 2021 are *ultra vires* the IT Act 2000.

- W. The Impugned Rules are stated to have been made in exercise of powers conferred under Section 87(2)(z) and 87(2)(zg) of the IT Act 2000. However, Part II of the Rules clearly travel beyond this conferred authority. Section 87(2)(z) allows the central government to make rules providing for the procedures and safeguards for blocking for access by the public under sub-section (3) of section 69A of the IT Act 2000. Section 87(2)(zg) allows the central government to make rules providing for the guidelines to be observed by the intermediaries under sub-section (2) of section 79. Section 79 deals with exemptions from liability of intermediaries. Its legislative history makes clear that the intention behind the clause was to introduce “safe harbour” for intermediaries, who did not exercise control over the content on their platform. The Impugned Rules however use this safe harbour clause to impose onerous obligations on intermediaries. In particular:

- a. Rule 4(2)’s obligations make it mandatory for every significant social media intermediary to enable tracing of originators of information on its platform, purportedly in furtherance of Section 69 of the IT Act 2000. Apart from the fact that Rule 4(2)’s mandate to identify first originators is not envisaged under Section 69 and is beyond the parent legislation, the impugned Rules are also not framed under Section 69 of the IT Act or its concomitant rule-making power, Section 87(2)(y).
 - b. The stringent timeline of 36 hours prescribed by Rule 3(1)(d) for intermediaries to remove unlawful content on receipt of a court order or government order is contrary to Section 69A of the IT Act 2000 and the Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules, 2009 (“**IT Blocking Rules of 2009**”). Section 69A and the Blocking Rules thereunder—as pointed out by the Hon’ble Supreme Court in *Shreya Singhal (supra)*—are a complete code for blocking access to unlawful content on the internet and they provide a detailed procedure to be followed prior to blocking of content.
- X. The Intermediaries Rules 2021 also contravene the existing scheme of the IT Act 2000 which already contains separate provisions for interception, monitoring and decryption of electronic communication under Section 69 and which prescribes standards for

encryption under Section 84A. For instance, Rule 3(1)(j) which requires intermediaries to provide information or assistance to any government agency within 72 hours is inconsistent with Section 69 of the IT Act 2000 and Information Technology (Procedure and Safeguards for Interception, Monitoring and Decryption of Information) Rules, 2009. The term “information or assistance” used in Rule 3(1)(j) is wide enough to include requests for interception, monitoring or decryption of communication, which are strictly governed by Section 69 of the IT Act 2000 and the Rules notified thereunder. Rule 3(1)(j) is thus an attempt by the Respondents to expand the scope of electronic surveillance by notifying rules under Section 79, without following the deliberative parliamentary process to amend Section 69 of the Act. Similarly, Rule 4(2) in so far as it requires modifications to the technical design of encrypted platforms to enable traceability is beyond the scope of the parent provision, i.e., Section 79 of the IT Act 2000. It is important to note that the power to prescribe encryption standards and methods originates from Section 84A of the IT Act 2000, and not Section 79, which is a safe harbour provision.

Y. It is submitted that the entirety of Part III of the Impugned Rules is *ultra vires* the IT Act 2000. It is submitted that no part of the IT Act 2000 confers power on the Respondent No. 2 to regulate Digital News Media or Online Content Producers through an Inter-Departmental Committee or otherwise and as such the rules made under Part III are wholly *ultra vires* the purported parent Act.

35. I am approaching this Hon'ble Court on the above grounds and other grounds to be raised at the time of hearing as there is no alternative and efficacious remedy available to me.

36. I state that I have not filed any other Writ Petition or initiated any other legal proceedings in respect of the relief sought in this Petition.

37. The entire cause of action for the instant writ petition has arisen in Chennai given that Chennai is my place of residence and the place from which I produce my music and art, which today stands impeded by the Impugned Rules.

38. I state that the *prima facie* case against the Impugned Rules is wholly in my favour. The Rules clearly impinge on the right to freedom of expression and the burden lies on the State to establish that the Rules constitute a “reasonable restriction” under Article 19(2). Given the disproportionate burden that the Impugned Rules places on artists and musicians, the balance of convenience is also in my favour and irreparable damage will accrue should the Impugned Rules not be stayed pending disposal of the writ petition.

39. I state that I have not filed any other petition seeking similar relief before any other Court including this Hon'ble Court.

In the circumstances, it is humbly prayed that this Hon'ble Court may be pleased to:

- 1) Issue a Writ of Declaration or any other appropriate Writ, Direction, or Order in the nature of a Writ of Declaration and declare the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 notified on 25.02.2021 as *ultra vires* both the Constitution of India and the Information Technology Act, 2000; and pass such other and further order(s) as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case; and
- 2) Grant an order of interim stay of the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 notified on 25.02.2021 pending disposal of this writ petition and thus render justice.

Solemnly affirmed at Chennai on
this the day of May, 2021
and he having signed his name
in my presence

BEFORE ME

ADVOCATE, CHENNAI

CHENNAI DISTRICT
HIGH COURT - MADRAS
(Special Original Jurisdiction)
W.P. No. of 2024

...Petitioner

...Respondent

WRIT PETITION

He R

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SURIYTH PARTHASARATHY ()
SUDASIKHA PARTHASARATHY ()
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COUNSEL FOR THE PETITIONER

