CENTRE FOR COMMUNICATION GOVERNANCE AT NATIONAL LAW UNIVERSITY DELHI

COMMENTS TO MEITY ON THE DRAFT AMENDMENTS TO THE INFORMATION TECHNOLOGY (INTERMEDIARY GUIDELINES AND DIGITAL MEDIA ETHICS CODE) RULES, 2021[1]

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Introduction and Summary of Recommendations

The Centre for Communication Governance at National Law University Delhi would like to thank the Ministry for Electronics and Information Technology ("**MeitY**") for the opportunity to provide comments on the draft amendments to The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 (hereinafter referred to as the "**Intermediary Guidelines**") and appreciate the Ministry's efforts to embed consultative processes in lawmaking. The draft amendments in their current form raise certain concerns that we believe merit additional scrutiny.

Our submission is limited to the proposed amendment to Rule 3(1)(b)(v) of the Intermediary Guidelines. In this regard, we note that:

(1) the terms "misinformation", "fake", and "false" are not defined in the Information Technology Act, 2000 ("**IT Act**") and encompass a broad spectrum of both legal and illegal content;

(2) Article 19(2) of the Constitution does not permit the State to restrict expression solely on the ground that it is false;

(3) the draft amendment permits government blocking of online content in a manner that does not adhere to the substantive and procedural safeguards prescribed in Section 69A of the IT Act and the Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules, 2009 ("**IT Blocking Rules**");

(4) the draft amendment fails to specify the individuals within government departments that are empowered to declare content "fake"; and

(5) there exist alternative measures that may have greater regulatory impact against the harms of misinformation without restricting content.

Analysis

Our comments below fully expand on the aforementioned issues and cumulatively form our response to the draft amendment to the Intermediary Guidelines that was released for public consultation by MeitY on 17th January 2023.

1. Misinformation, fake, and false content, include both unlawful and lawful expression

The terms "misinformation" or even "false" or "fake" content are widely interpreted to include various forms of content. Experts have identified up to seven sub-types of misinformation: imposter content; fabricated content; false connection; false context; manipulated content; misleading content; and satire or parody (Wardle 2020). These varied types of false content cause different types of harm (or no harm at all) and are treated differently under the law. For example, fabricated content may be harmful and reasonably restricted while satire is constitutionally protected speech.

The draft amendment's attempt to regulate online misinformation fails to provide sufficient guidance to the Press Information Bureau ("**PIB**"), and government departments and agencies to enable them to understand what sort of expression is permissible and what should be regulated. It effectively provides them with unfettered discretion to restrict both unlawful and lawful speech. As misinformation regulation raises freedom of expression concerns, it is necessary to have precise and targeted regulation based on a clear articulation of what constitutes misinformation.

When seeking to regulate misinformation, experts, platforms, and even other countries have drawn up far more detailed definitions of misinformation that take into consideration a host of factors (Gorwa 2019). These include:

(i) Intention: Whether the sharing of false information was done with a deliberate intent to deceive (Bayer et. al. 2019).

(ii) Form of sharing: Misinformation can take many forms including text, images, videos, and audio recordings, and can be spread through various platforms including social media, messaging apps, and traditional news outlets (Bayer et. al. 2019).

(iii) Virality: The number of people who are seeing the content and how that may lead to greater or lesser impact (Bayer et. al. 2019).

(iv) Context: The circumstances in which misinformation is created and shared and how that may lead to greater or lesser impact (Bayer et. al. 2019).

(v) Impact: Whether the misinformation has or may have a direct nexus with risks such as causing public panic, harming individuals, or undermining public trust in institutions (Bayer et. al. 2019).

(vi) Public interest value: even false or incorrect information may have some redeeming public interest value by raising the profile of public issues or stimulating public debate (Waldman 2018). For example, a news article may get a single fact wrong due to an honest mistake, but the article may still raise important public issues. Going even further, a humorous cartoon or article may deliberately use exaggerated or made-up statements to draw public attention to an issue using satire.

(vii) Public participation value: individuals may propagate false facts, beliefs, or ideas about matters of public concern under a genuine belief that the information they are sharing is true. Restricting such speech diminishes their ability to participate in public discourse (Post 2011).

A clear definition should acknowledge the potential multiplicity of context, content and propagation techniques. For example, Ex-Union Minister Ravi Shankar Prasad had previously articulated the definition of fake news as "a type of propaganda that consists of deliberate misinformation or hoax that is spread via traditional print and broadcast media or online social media. It can include text, visual, audio, data reports etc. Fake news is written and published with intent to mislead to damage an agency, an entity or a person to create disturbance and unrest often using sensational dishonest or outright fabricated headlines to increase readership, online sharing, and internet revenue. The typical attributes of fake news are that it spreads fast, is doctored, is incorrect, manipulated, intentional and unverified" (Sunilkumar 2018).

While not endorsing such a definition, we note that the definition at least acknowledges the complexity of the phenomenon and attempts to link the restriction of free expression to identified harms and constitutionally legitimate aims. By including an intention requirement, the former Union Minister's definition also seeks to exclude from restriction false information shared under an honest belief that it was true.

The draft amendment to Rule 3(1)(b)(v) restricts information merely because it is designated as "false", or "fake" without providing any additional guidance on how such determinations are to be made. False or fake speech may also be constitutionally protected, with the most prominent examples being satire and parody. Fake or false news may also have public interest or public participation value. In the absence of a more specific definition, the draft amendment will restrict both unlawful speech and constitutionally protected speech. It will thus constitute an overbroad restriction on free speech.

2. Restricting information solely on the ground that it is "false" is constitutionally impermissible

Article 19(2) of the Constitution of India permits the State to place reasonable restrictions on free expression in the interests of the sovereignty, integrity, or security of India, its friendly relations with foreign States, public order, decency or morality, or contempt of court. In *Kaushal Kishor v*

State of Uttar Pradesh (judgment dated 3 Jan. 2023), a Constitution Bench of the Supreme Court ruled that the grounds listed in Article 19(2) are exhaustive and free speech cannot be restricted for reasons beyond those set out in Article 19(2). This principle applies to online content as well. In *Shreya Singhal v Union of India* (judgment dated 24 Mar. 2015), the Supreme Court ruled that government orders for removing content under Section 79 of the IT Act must be limited to the grounds outlined in Article 19(2) of the Constitution. Thus, the State cannot place restrictions on online expression for reasons beyond those set out in Article 19(2).

The current proposal restricts content solely on the ground that it has been declared "false" or "fake" by the PIB or a government department. The ground of "falsehood" is not a constitutionally justified reason to restrict free speech. If the government were to restrict "false information that may imminently cause violence", such a restriction would be permissible as it would relate to the ground of "public order" in Article 19(2). However, restricting content solely on the ground that the PIB or a government department has found the content to be "false" imposes a restriction on free expression beyond what is permitted by Article 19(2) and is thus unconstitutional. Restrictions on free expression must have a direct nexus with the aims set out in Article 19(2) and must be necessary and proportionate restrictions on citizens' rights.

3. The draft amendment does not adhere to the procedures set out in Section 69A of the IT Act and the IT Blocking Rules

In *Shreya Singhal v Union of India* (judgment dated 24 Mar. 2015), the Supreme Court upheld Section 69A of the IT Act because *inter alia*: (i) the grounds to restrict content in Section 69A were consistent with Article 19(2); and (ii) the procedure under the IT Blocking Rules provided important procedural safeguards including a notice, hearing, and written order that could be challenged in courts. Therefore, it is evident that the constitutionality of the government's blocking power over online content is contingent on the substantive and procedural safeguards that Section 69A and the IT Blocking Rules provides. This is in line with Supreme Court doctrine that requires restrictions on fundamental rights to be constitutionally compliant and adhere to the requirements of natural justice and due process (*Kranti Associates Pvt Ltd v Masood Ahmed Khan*, Supreme Court judgment dated 8 Sep. 2010 and *Maneka Gandhi v Union of India*, Supreme Court judgment dated 25 Jan. 1978).

The draft amendment to Rule 3(1)(b)(v) would permit government restrictions of content in a manner that does not adhere with these important statutory safeguards that dictate when and how content may be blocked. The draft amendment would allow the government to restrict free expression merely because it is "false". If adopted, this would circumvent the crucial substantive safeguards provided by Section 69A, which only permits the government to restrict expression for reasons consistent with Article 19(2). Additionally, the draft amendment has no specific procedure for notice, hearing, or written order when content is declared "false" and removed. The draft

amendment would allow content to be removed solely based on a unilateral determination made by the PIB or a government department.

4. The draft amendment fails to specify who may determine content is "false" and request removal

The draft amendment states that content may be identified as "fake" by the PIB, any authorised agency, or "in respect of any business of the Central Government, by its department in which such business is transacted." However, the draft amendment does not specify which individuals within a government department are authorised to decide that content is "fake" and request its removal. This lack of specification could lead to individuals without relevant expertise restricting content in an unconstitutional manner and may also result in conflicting requests from different government departments. Unlike the IT Blocking Rules, the draft amendment fails to clearly identify who has the authority to block content and the procedure for doing so.

5. Alternate methods to counter the spread of misinformation that do not mandate removal of content

We note that any response to misinformation must be based on empirical evidence as to the prevalence and harms of misinformation on social media platforms. This requires social media companies to increase transparency and also facilitate researcher access to data. However, even based on existing research, we note that there exist alternate methods to regulate the spread of online misinformation that may have a greater regulatory impact than the approach adopted in this draft amendment while also preserving free expression (Porter and Wood 2021, Gaozhao 2021).

Effective responses such as labelling or flagging misinformation or promoting media literacy aim to empower end-users and encourage voluntary collaboration between independent fact checkers and social media intermediaries without mandating content removal. We note that there does not yet exist widespread legal and industry consensus on standards for independent fact-checking, but organisations such as the 'International Fact-Checking Network' (IFCN) have laid down certain principles that independent fact-checking organisations should comply with.

Requiring platforms to work with IFCN compliant fact-checking organisations to label content and also provide links to the fact-check would provide users valuable context and increase the media literacy of users, all without necessitating content removal. Users could also be notified by platforms if they have interacted with content that has subsequently been labelled by a platform pursuant to an IFCN compliant fact-check. Such measures represent targeted responses to misinformation that can be instituted as consensus builds on standards for independent fact checking on social media.

In the longer term, platforms could also be required to spend a fixed sum on promoting media and digital literacy within India through workshops and promotional works and support a robust network of independent fact-checkers, including in regional languages. We note that where speech is unlawful and directly threatens public order or the security of the State, the Union Government remains empowered to block content under Section 69A of the IT Act. Thus, abstaining from a content removal approach to misinformation under the current proposal does not directly result in a reduction of the State's capacity to combat such unlawful speech.

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