Brief elaboration of some points made during stakeholder consultation on "Legitimate Restrictions on Freedom of Online Speech: Creating Balanced Approach: From Deadlock to Dialogue" Held by FICCI on 4th of September, 2012

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Article 19(2) of our constitution clearly lists out the legitimate exceptions to freedom of expression (FoE), and it is obvious that no law can transgress or go beyond these provisions. However, given changing social contexts as well as media possibilities, the normative debate on how these provisions are interpreted and applied will and should continue. However, everyone does agree that, whatever be the outcomes of these dynamic debates, there is certainly an 'X' kind of content that must attract state action against. It is useful to separate the normative and legal debate around what this 'X' kind of content can/ should be from discussions on *what process of state action should be followed vis a vis any such content* which is in accordance to our constitutional and other legal provisions and also meet the canons of natural justice. Most often we get caught in cross talks across these two somewhat different types of discussions that prevents any useful progress on either of them.

1. It will therefore be useful to undertake ***a separate focused dialogue only on the appropriate process of state action vis a vis legitimate exceptions to FoE***. It is important to discuss and clearly lay out who can act, on whose authority, under what kinds of conditions, what specific processes of due diligence must be undertaken and how, what kinds of notices with what time periods need be issued to which all parties, what kind of different situations may justify different procedures, and so on.

2. Specifically, since blocking avenues of FoE potentially (if done without sufficient basis) constitutes violation of human rights, in the same way as arresting a person does, ***the executive actions in this regard must be subject to judicial or quasi-judicial confirmation*** (as in the case of arrest, which has to be notified to a magistrate within 24 hours). Such confirming authority must also allow the 'offending party' to defend itself at the time of such confirmation, or as soon as possible thereafter.

3. Since the online environment is a seamless space from personal to closed group to public communication, and used reflexively by all kinds of people and ages, any executive action of blocking/ removing content and possible prosecution ***should carry specifically justification about the intent and impact*** (or potential impact) of the content under question and should not be based merely on the inherent nature or kind of content (except in very extreme cases like child pornography). Such justification for each act of content removal/blocking must be recorded in writing by the executive authority and counter-approved by the confirming judicial/ quasi-judicial authority.

4. There should be clear higher level avenues for appeal against executive actions that block/ remove content.

5. Subject to sensitivity of the information involved, which justification should be appropriately recorded and confirmed by a judicial/ quasi-judicial authority, the government should institute its own processes of maximum transparency vis a vis various actions regarding content blocking/removal, justifications therefore, final outcomes of the process and so on.

6. Section 69 A 2 of the IT Act (2008) requires that "the procedure and ***safeguards*** (emphasis added) subject to which such blocking for access by the public may be carried out shall be such as may be prescribed." ***Appropriate rules laying out such processes and safeguards must be developed,*** taking into account the above described points, and others that may be found relevant from various submissions.