

**Response to Draft Amendment to
the IT (Intermediary Guidelines
And Digital Media Ethics Code)
Rules, 2021**

**IT for Change
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Relating to due diligence by an intermediary under rule 3(1)(b)(v)

On 2nd January, 2023, the Ministry of Electronics and Information Technology (MeitY) notified the draft [Amendments to the Information Technology \(Intermediary Guidelines and Digital Media Ethics Code\) Rules, 2021](#) ('Draft Amendment') in relation to online gaming as well as due diligence by intermediaries under rule 3(1)(b)(v).

The object of the Draft Amendment relating to due diligence under Rule 3(1)(b)(v) seems to be to curb the dissemination of fake news and misinformation on online platforms. As the Rule originally stood, it required an intermediary, which now includes not only social media intermediaries and significant social media intermediaries, but also online gaming intermediaries, to inform users and cause them not to host, display, upload, modify, publish, transmit, store, update or share any information that deceives or misleads the addressee about the origin of the message or knowingly and intentionally communicates any misinformation or information which is patently false and untrue or misleading in nature. The Draft Amendment makes an addition to this provision by requiring the intermediaries to also prevent users from posting any information that is identified as 'fake' or 'false' by the fact check unit at the Press Information Bureau (PIB) of the Ministry of Information and Broadcasting or other agencies or departments authorized by the Central Government for this purpose.¹

Contemporary digital tools and social media platforms have allowed maliciously incorrect information to spread widely, before false facts can be challenged and removed. To tackle the spread of fake news, many fact checking initiatives have come to the forefront to debunk falsehoods and help online platforms as well as non-state actors like media organizations verify facts. For instance, Agence France Presse (AFP) collaborates with UNIC (United Nations Information Centres) teams in Colombia, Venezuela, Ecuador and Bolivia by sharing its fact checking technology in return for their daily news monitoring reports.² Another example is Colombiacheck, the fact checking initiative of Colombian NGO

¹ Note: This includes or, in respect of any business of the Central Government, by its department in which such business is transacted under the rules of business made under clause (3) of article 77 of the Constitution.

² UN combats disinformation during pandemic, United Nations. <<https://www.un.org/en/un-coronavirus-communications-team/un-combats-disinformatoin-during-pandemic>>

Consejo de Redacción (CdR).³ Further, Meta has partnered with independent third-party fact checkers that are certified through the non-partisan International Fact-Checking Network (IFCN).⁴

Many governments have also employed initiatives to tackle the widespread online misinformation/fake news. In Singapore, Protection from Online Falsehoods and Manipulation Act, or “POFMA”, seeks to tackle growing concerns over the scourge of fake news and misinformation communicated particularly through various online and social media platforms - including closed platforms, such as private chat groups and social media groups.⁵ As per the law, there are civil liability measures including strict fines, corrective and remedial measures against entities who share information deemed to be a ‘falsehood’ or a ‘false statement of fact’.⁶ In Brazil, before the elections in 2018, the Federal Police used Twitter to announce a new program to ‘identify and punish the authors of fake news’ ahead of the country’s presidential election.⁷

While fake news has emerged as a global topic of concern, there is a risk that efforts to counter it could lead to censorship, the suppression of critical thinking and other approaches contrary to human rights law. Therefore, a resolution adopted by the UN Human Rights Council on April 1, 2022 rejected measures that rely on censorship, and instead reaffirmed the essential role that the right to freedom of expression and the freedom to seek, receive and impart information play in countering disinformation.⁸ However, even this approach centered on freedom of expression is inadequate to counter fake news, misinformation, and disinformation if the algorithms of online platforms, including social media, continue to amplify only certain viewpoints, and prioritize sensationalism over reasoned debate and diversity. The engagement rate rather than veracity, quality or trustworthiness determines the prioritization of a content on social media. Consequently, today, whether one’s speech gets heard in the online space depends on how well one can exploit platform affordances of virality and algorithmic amplification of content. For instance, it has been observed that sexist content is allowed to be highly

³ Being essential in Colombia means fact-checking for many diverse audiences, TikTok, mural newspapers and memes, IFCN, <<https://factcheckingday.com/articles/47/being-essential-in-colombia-means-fact-checking-for-many-diverse-audiences-tiktok-mural-newspapers-and-memes>>

⁴ How Meta’s third-party fact-checking program works, Meta. <<https://www.facebook.com/formedia/blog/third-party-fact-checking-how-it-works>>

⁵ Parliament: Fake news law covers closed platforms like chat groups and social media groups, says Edwin Tong, StraitsTimes. <<https://www.straitstimes.com/politics/parliament-fake-news-law-covers-closed-platforms-like-chat-groups-and-social-media-groups>>

⁶ Singapore Fake News Laws: Guide to POFMA (Protection from Online Falsehoods and Manipulation Act), Singapore Legal Advice. <<https://singaporelegaladvice.com/law-articles/singapore-fake-news-protection-online-falsehoods-manipulation/#whatwhats>>

⁷ FENAPEF, Twitter. <<https://twitter.com/FENAPEF/status/950741290790150145>>

⁸ UN: Human Rights Council adopts resolution on disinformation, Article 19. <<https://www.article19.org/resources/un-human-rights-council-adopts-resolution-on-disinformation/>>

visible since it finds high currency among users, but feminist content that may be unpopular is relegated to the back pages of social media platforms.

Further, a recent investigation by ProPublica documented how Google's automated digital ad operation placed ads from major brands on global websites that spread false claims on topics such as vaccines, Covid-19, climate change, and elections, particularly in languages other than English.⁹ Considering that a significant source of revenue for many digital content platforms is advertisements,¹⁰ such ad-placement practices that prioritize higher user engagement have made it profitable to host false, misleading and toxic content. Therefore, no measure to counter fake news and misinformation will be fully effective, unless we confront the attention economy logic of social media intermediaries and require them to infuse diversity in their content curation and recommendation algorithms. Due to the complexity of considerations, fact-checking and removal alone will not solve the problem of online fake news; rather, what is of material significance is the effective oversight and regulation of platform algorithms. Therefore, the Draft Amendment, although an important step, needs to be reframed with due cognizance of the informational economy and its technological mechanics.

Nevertheless, the Draft Amendment is an important step towards curbing online misinformation and fake news, and below we highlight some practical considerations that need to be addressed for its effective implementation:

1. Need to Define the Terms 'Fake' or 'False':

The Draft Amendment does not give any guidance on what constitutes 'fake' or 'false' information. This is in contrast to the legislations of many other countries that define the corresponding term used to denote fake news. For example, under Singapore's POFMA law, a "false statement of fact" is defined as "a false or misleading statement which a reasonable person would consider to be a representation of fact."¹¹ The Australian Code of Practice on Disinformation and Misinformation (the 'Code'), defines the term misinformation as (a) digital content (often legal) that is verifiably false or misleading or deceptive;

⁹ Craig Silverman, How Google Ads is funding misinformation around the world, Scroll.in
<<https://scroll.in/article/1036862/how-google-ads-is-funding-misinformation-around-the-world>>

¹⁰ Megan Graham, Digital ad spend grew 12% in 2020 despite hit from pandemic, CNBC
<<https://www.cnbc.com/2021/04/07/digital-ad-spend-grew-12percent-in-2020-despite-hit-from-pandemic.html>>

¹¹ Singapore Fake News Laws: Guide to POFMA (Protection from Online Falsehoods and Manipulation Act), Singapore Legal Advice.
<<https://singaporelegaladvice.com/law-articles/singapore-fake-news-protection-online-falsehoods-manipulation/#whatwhats>>

(b) is propagated by users of digital platforms; and (c) the dissemination of which is reasonably likely (but may not be clearly intended) to cause harm.¹²

Disinformation and misinformation are aspects of a wider, multifaceted social problem that involves a range of offline and online behaviors that propagate information threatening to undermine established democratic processes or public goods such as public health. Concepts such as ‘disinformation’, ‘misinformation’, and ‘fake news’ mean different things to different people, and can become politically charged when they are used by people to attack others who hold different opinions on value-laden political issues on which reasonable people may disagree.¹³

In India, only the Indian Penal Code, 1860 provides for criminal provisions to curb the spread of fake news (Sections 153, 295, 499 & 500 IPC). Currently, there is no official legal definition of what can be considered as ‘fake’ or ‘false’ in the context of misinformation. Hence, without defining ‘fake news’, it will not be possible to determine whether the empowered government entity’s decision to consider a piece of information as ‘fake’ or ‘false’ is within the reasonable restrictions¹⁴ under Article 19(2) of the Constitution of India, 1950. This lack of clarity may also lead to an inundation of appeals to be scrutinized through judicial review.

Further, it is also necessary to be cognizant of gender-related considerations while creating legislative or regulatory approaches to tackling misinformation. There is gender-blindness in many of the responses to misinformation and disinformation, which risks missing the subtle differences in how false content often targets women and girls, and overlooking differences in the way people from different gender-based locations respond to the content concerned. It is important to note that established patterns of online behavior include gendered attacks online, ranging from abuse and threats of sexual violence to digital security and privacy breaches.¹⁵

¹² Point 3.6, The Australian Code of Practice on Disinformation and Misinformation (The Code), Digital Industry Group Inc <<https://digi.org.au/wp-content/uploads/2022/12/Australian-Code-of-Practice-on-Disinformation-and-Misinformation-FINAL--December-22-2022.docx.pdf>>

¹³ The Australian Code of Practice on Disinformation and Misinformation (The Code), Digital Industry Group Inc <<https://digi.org.au/wp-content/uploads/2022/12/Australian-Code-of-Practice-on-Disinformation-and-Misinformation-FINAL--December-22-2022.docx.pdf>>

¹⁴ Article 19(2) -(6), Constitution of India, 1950.

¹⁵ Balancing Act: Countering Digital Disinformation While Respecting Freedom of Expression, Broadband Commission for Sustainable Development. <<https://www.broadbandcommission.org/publication/balancing-act-countering-digital-disinformation/>>

Recommendation: The Draft Amendment should clearly define what constitutes ‘false’ or ‘fake’ information. It is also important to lay down the criteria that will be used by PIB and other fact checking agencies to determine something as ‘fake’ or ‘false’ information. Such clarity is important to enable those aggrieved by the decision of PIB and other agencies to challenge the same before the court or an appropriate authority. It would also help in assessing whether the order to remove a particular content amounts to a reasonable restriction and is based on any of the permissible grounds under Article 19(2) of the Constitution. Further, due to the differential impact of fake news, misinformation, and disinformation on women and other gender minorities, the definition of ‘fake’ or ‘false’ information and criteria to determine the same should be sensitive to gender considerations.

2. Due Process of Law in Fact Checking Regulatory Practices

Article 19(1)(a) of the Constitution guarantees freedom of expression and the right to seek, receive and impart information and ideas of all kinds, regardless of frontiers and through any media. While freedom of opinion is absolute, freedom of expression may be restricted under certain circumstances as long as such restriction is reasonable. For restriction to be reasonable, it should be backed by a law, necessary and proportionate for achieving a legitimate purpose, and not confer unfettered discretion in implementing the restriction.¹⁶ Currently, the Draft Amendment lacks several procedural safeguards in the process of fact-checking by agencies like PIB, thereby casting a shadow on the legitimacy and reasonableness of restriction of speech sought to be imposed by Rule 3(1)(b)(v).

There is no provision in the Draft Amendment by which the fact checking unit like the PIB has to publish its decision and give reasons for adjudging a particular piece of information as ‘false’ or ‘fake’ and hence to be removed by internet intermediaries. This renders the restriction imposed on speech unreasonable by conferring an unfettered discretion on the fact checking agencies. This is not in tune with Article 19(2) of the Constitution, and therefore constitutes a direct threat to freedom of expression, which is a form of censorship.¹⁷ It also goes against the Supreme Court ruling in *Anuradha Bhasin v. Union of India* that any order that affects the liberty of people must be notified directly and reliably.¹⁸ Further, there is also

¹⁶ Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, UN General Assembly, A/HRC/23/40)

¹⁷ Disinformation and freedom of opinion and expression: Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Irene Khan, UN General Assembly, A/HRC/47/25, June 21 - July 9, 2021. <<https://digitallibrary.un.org/record/3925306?ln=en>>

¹⁸ *Anuradha Bhasin v. Union of India*, AIR 2020 SC 1308.

no opportunity for the concerned parties to be heard by the fact checking body or to present documents/evidence to prove the veracity of the information posted by them.

It is also concerning to note that the Draft Amendment does not provide any recourse for affected parties against the decisions made by fact-checking bodies, in terms of not removing the content pending a judicial determination or judicial review after action is taken. This violates due process of law, and, in effect, makes the government the final arbiter of truth which is not desirable in a democratic society. 'Due process of law' implies that all established rules and procedures that eventually provide safeguards for the protection of individual rights are available. This is why several international human rights instruments require that States restrict content only pursuant to an order by an independent and impartial judicial authority.¹⁹

Many countries have adopted laws that grant authorities excessive discretionary powers to compel social media intermediaries to remove content that they deem illegal, including what they consider to be misinformation or fake news. Failure to comply is sanctioned with significant fines and/or content blocking. This has been the case, for example, in Kenya²⁰, Pakistan²¹, Brazil,²² and the Russian Federation.²³ In effect, such laws lead to the suppression of legitimate online expression, with limited or no due process or without prior court order and contrary to requirements of article 19(3) of the International Covenant on Civil and Political Rights. In keeping with the call for radical transparency by David Kaye, former UN Special Rapporteur on freedom of opinion and expression, States should refrain

¹⁹ Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, UN General Assembly, A/HRC/38/35, Apr. 6, 2018. <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/096/72/PDF/G1809672.pdf?OpenElement>>

²⁰ Mandates of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression and the Special Rapporteur on the situation of human rights defenders, Office of The High Commissioner For Human Rights Palais Des Nations, OI Ken 10/2017, July 26, 2017.

<https://www.ohchr.org/sites/default/files/Documents/Issues/Opinion/Legislation/OL_KEN_10_2017.pdf>

²¹ Mandates of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression and the Special Rapporteur on the situation of human rights defenders, Office of The High Commissioner For Human Rights Palais Des Nations, OI PAK 3/2020, March 19, 2020.

<<https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gld=25108>>

²² Mandates of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression and the Special Rapporteur on the situation of human rights defenders, Office of The High Commissioner For Human Rights Palais Des Nations, OI BRA 6/2020, July 3, 2020.

<<https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gld=25417>>

²³ Mandates of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression and the Special Rapporteur on the situation of human rights defenders, Office of The High Commissioner For Human Rights Palais Des Nations, OI RUS 4/2019, May 1, 2019.

<https://www.ohchr.org/sites/default/files/Documents/Issues/Opinion/Legislation/OL_RUS_01_05_19.pdf>

from adopting models of regulation where government agencies, rather than judicial authorities, become the arbiters of lawful expression.

If the Draft Amendment comes into effect, there is also a likelihood of unreasonable restriction on free speech and a consequent curtailment of media freedoms. Recognizing the challenges of freedom of expression in the media in the digital age, Irene Khan, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, recognized the role of state censorship of content and forms of media regulation. Media freedom and the safety of journalists are in dangerous decline in almost every region of the world. Weaponization of the law against journalists is a major threat to media freedom and prior censorship is deemed disproportionate control of the media. Outright banning of particular media outlets or websites violate the principle of necessity and proportionality. Such concerns have also been echoed by several Indian news media organizations, including the Editors' Guild of India²⁴. Hence the Draft Amendment's effect on media freedom must be recognized and the fact checking system should have clear, transparent procedures in order to steer clear of over-regulation of online content by the state.

Recommendation: The Draft Amendment should require the decisions made by PIB and other fact checking agencies to be published, along with the reasons behind their decision. Such a transparency measure will help promote greater accountability as well as respect for human rights by both the government-appointed fact checking entity as well as the intermediary. With such information made public, users will also be able to understand what kind of content falls within the categories of misinformation, which will also inform their internet and social media usage.

It is also necessary to lay down a clear and transparent procedure for the fact checking process, including opportunity for any affected persons to be heard and to submit supporting documents or evidence before the fact checking body.

²⁴ Any News PIB's Fact-Check Unit Calls 'Fake' Must Be Taken Down: MeitY Proposal, The Wire. <<https://thewire.in/government/any-news-pibs-fact-check-unit-calls-fake-must-be-taken-down-meity-proposal>>. See also, The embarrassment that is PIB Fact Check: Who fact-checks this 'fact checker'?, NewsLaundry. <<https://www.newslaundry.com/2020/05/26/the-embarrassment-that-is-pib-fact-check-who-fact-checks-this-fact-checker>>

The Draft Amendment should have a clear provision allowing for a judicial review process of all government decisions to take down content deemed as ‘false’ or ‘fake’. For instance, under Singapore’s POFMA law, while a Minister of any government agency may assert, in his or her judgment, that a particular statement is a falsehood, the final decision on whether a statement is false or not, after assessing all the evidence put forward by the parties, is made by the court. Fact checking process instituted by the Draft Amendment should have procedural safeguards and grievance redressal steps for the user that tie back to the existing due diligence structures under Rule 4, as attempted for the online gaming counterparts under Rule 4A and Rule 4B.

3. Ensuring Fairness of Fact Checking Entities and their Independence

The International Fact Checking Network (IFCN) at Poynter, which is a non-profit media institute and newsroom, requires fact checkers to have “a commitment to non-partisanship and fairness” and have introduced an application and vetting process so that they do not ‘unduly concentrate’ on one side.²⁵ Such forms of commitment are essential for all fact checking bodies including the PIB and allied bodies that will be empowered under the Draft Amendment so as to ensure that facts are not unduly suppressed. This gains special importance in light of reports that have questioned the authenticity of fact-checking done by PIB. Therefore, to ensure public confidence and legitimacy in the fact checking decisions made by PIB and other agencies designated by the Central Government, express provisions have to be made in the Draft Amendment about the measures and procedures to safeguard the independence and fairness of these bodies and their decisions.

Apart from ensuring independence and fairness, it is also necessary to ensure that PIB and other agencies that may be designated by the Central Government to undertake fact checking have the required expertise to do so. For instance, IFCN consists of a pool of assessors who are journalism and media experts who know the fact-checking context in their countries and act as the first filter for each application received. Such a systematic structure must be there for particular fact-checking executive teams being set up in India.

²⁵IFCN Code of Principles <<https://www.ifcncodeofprinciples.poynter.org/>>

This point needs to be stressed in light of the recent notification by MeitY constituting three Grievance Appellate Committees (GAC) to decide appeals against decisions of social media intermediaries under Rule 3A, and the lack of expert members in these committees. None of the members of the three committees is a representative of civil society NGOs, or the journalism community. They are from unrelated backgrounds such as banking, armed forces, railways etc.²⁶ A similar situation should be avoided in case of the fact-checking agencies designated by the Draft Amendment.

Recommendation: The Draft Amendment should incorporate procedural safeguards to secure the fairness and independence of members of the fact checking agencies like PIB. In the interest of fairness and independence, it is also not prudent to entrust government departments with fact checking of online content. Further, it should also make provision to ensure that the membership of the fact checking bodies is representative and transparent and have the required expertise to make a contextual and nuanced determination of the veracity of information in a plural and diverse country like India that guarantees freedom of expression to all its citizens. Particularly, it is important to have adequate gender representation in the membership to counter gender-based misinformation and disinformation. Such requirements are necessary to infuse public trust and integrity in the fact checking process.

²⁶ IT Rules 2021: Government notifies three Grievance Appellate Committees, Times of India, <<https://timesofindia.indiatimes.com/gadgets-news/it-rules-2021-government-notifies-three-grievance-appellate-committees-to-address-users-complaints/articleshow/97411544.cms>>

