Nepal: Note on the Social Media Act (Bill), 2081

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Nepal has prepared a Social Media Act (Bill) 2081 (draft Act).[1] The Centre for Law and Democracy (CLD) was provided with an English translation of the draft Act in late January 2025 by its local civil society partner, Freedom Forum,[2] and that organisation, along with the Nepalese Media Lawyers Association,[3] also asked us to prepare an analysis of it. This Note[4] sets out our views on the draft Act according to international standards in this area.

We have been informed that the government of Nepal has made an informal commitment when drafting legislation in this area to respect UNESCO's *Guidelines for the Governance of Digital Platforms* (UNESCO Guidelines).[5] As part of the process of preparing the Guidelines, CLD wrote the working paper on international legal standards and better national practices for regulating platforms, *Legal Regulation of Platforms to Promote Information as a Public Good*.[6] We note that the draft Act is very far removed indeed from the standards set out in the UNESCO Guidelines, as we highlight in more detail below.

More generally, CLD finds the draft Act to be extremely problematical from an international law, and especially right to freedom of expression, perspective. Among other things, it places very extensive regulatory powers in the hands of government bodies, it imposes numerous broad and illegitimate restrictions on content for both users and platforms (including by

[1] The year is from the Nepali Calendar; the Bill was officially tabled in the upper house of parliament on 28 January 2025 in the Gregorian calendar.
[2] See https://freedomforum.org.np.
[3] See https://www.medialawyers.org.
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[5] Available at https://www.unesco.org/en/internet-trust/guidelines.
[6] Available at https://www.unesco.org/en/internet-trust/working-papers?hub=71542.

requiring them to take content down), and it utterly fails to put in place any systematic approach to address the harms caused by online content, which is the main thrust of the UNESCO Guidelines.

This Note is divided into six sections, namely The UNESCO Guidelines, Scope, Independence, Regulatory Measures, Content Restrictions and Sanctions.

The UNESCO Guidelines

There are a number of profound ways in which the draft Act simply fails to follow the UNESCO Guidelines. First, as mentioned above, the draft Act makes no effort whatsoever to provide for independent regulation of its rules. Instead, all of the regulatory powers under the draft Act are exercised directly by government actors. This is an absolute requirement of international law, which is reflected very strongly in the UNESCO Guidelines. This issue is addressed in more detail in the section on Independence below.

Second, again as mentioned above, the draft Act imposes a large number of overbroad content restrictions on platforms, users and "all persons". The UNESCO Guidelines are very clear that they only seek to address content which may legitimately be restricted under international law. Thus, the second paragraph of the Guidelines, under the heading "The objective of the Guidelines", states:

> The aim of the Guidelines is to safeguard the right to freedom of expression, including access to information, and other human rights in digital platform governance, while dealing with content that can be permissibly restricted under international human rights law and standards.

This issue is addressed in more detail below, under Content Restrictions.

At least as important as these concerns is the fact that the draft Act entirely fails to follow the main thrust of the UNESCO Guidelines, which is to put in place systemic regulatory regimes to address the structural harms created by the operations of social media platforms. The systemic approach promoted by the Guidelines focuses on where the real harm arises, which is in the multiplication and boosting of false, biased, harassing or otherwise problematical speech to the point where it actually starts to cause harm. As such, a key focus is to put in place regulatory regimes which ensure that platforms assess the overall impact of their operations and take steps to mitigate any harms caused by those operations. Thus, the first of five key principles which the Guidelines call on platforms to comply with is:

> Platforms conduct human rights due diligence, assessing their human rights impact, including the gender and cultural dimensions, evaluating the risks, and defining the mitigation measures.[7]

Instead of taking this approach, the draft Act focuses on individual expressions, taking them down and fining or imprisoning those who disseminate them, what might be termed a whack-a-mole approach.[8] There are at least two key problems with this approach. First, it will never succeed. Truly malevolent actors will easily find ways to circumvent the system and also just overwhelm it by the volume of their messages, while essentially innocent actors who unwittingly or thoughtlessly share or otherwise promote the problematical messages will be more likely to get caught by the system. Second, it involves penalising (restricting) individual speech acts which, on their own, simply do not cause enough harm to justify this. As such, these rules can never be legitimate as restrictions on freedom of expression. An example is banning false statements. Even intentionally false statements, otherwise known as lies, although the modern terminology for them is "disinformation", cannot legitimately be penalised. While it is not necessarily salutary, it is perfectly normal to lie, outside of specific circumstances, such as lying in court or committing perjury, and it is not appropriate to criminalise normal behaviour. It is different when platforms boost and promote lies to the point where they do start to cause real harm. And the solution for this is for the platforms to stop doing that, not to put the liars in prison!

As such, the fundamental approach taken in the draft Act not only fails to conform to the UNESCO Guidelines but it will also fail to achieve the objectives it has set for itself, while also creating a lot of unfairness.

Recommendation

- The whole approach taken in the draft Act should be reconsidered in favour of one which is aligned with the UNESCO Guidelines, including by putting in place a co-regulatory system for the regulation of platforms which focuses on the systemic risks created by their operations, rather than trying to prohibit individual speech acts.

[7] Note 5, para. 30(a).

[8] This approach involves trying to stop a persistent problem by addressing it each time it appears, rather than by focusing on the root causes of the problem. It is derived from an arcade game where the aim was to use a mallet to hit moles which kept popping up all over the board.

Scope

According to section 3 of the draft Act, anyone wishing to operate a "social media platform" (platform) must obtain a licence. Many of the obligations in the draft Act which follow apply to a "licensed entity", i.e. a social media platform (see, for example, section 12). The draft Act does not define "social media platform" in one place, instead opting to define "platform" and "social media" separately.

A "platform" is defined rather circularly in section 2(d) to cover any "social media platform created in cyberspace through electronic technology, enabling internet users to exchange ideas or information and engage in social interactions" between different types of users (individuals, groups and institutions). It is explicitly defined to cover "apps, websites, blogs, AI tools, or similar digital platforms". The essence of this definition is that a platform exists in cyberspace and enables users to exchange ideas and information, and engage in social interactions. It may be noted that exchanging ideas and information already represents a social interaction, such that this additional condition adds nothing. For its part, "social media" is defined in section 2(i) as a system which "enables interactive communication between individuals, groups, or institutions and facilitates the dissemination of content" through digital devices. This does not really add anything to the definition of "platform", since that already incorporates the idea of enabling users to exchange information and ideas.

Any website which allows for the posting of user-generated content would fall within the scope of this definition, since it would allow users to exchange information and ideas. Thus, in addition to what we normally understand as a social media platform, this would cover most media outlets and bloggers, many civil society websites, a lot of official websites and even many retail or service business websites. In other words, this subjects and important part of the World Wide Web to a licensing scheme. There is, furthermore, no attempt, either in the definitions or in section 3, setting out the requirement for social media platforms to obtain a licence, to limit this in any way to entities which have some sort of connection to Nepal, for example in terms of their content, legal establishment or users. Thus, an interactive website of a company based in Zambia, selling products to Zambians, would be required by this definition to obtain a licence in Nepal.

Beyond the vast overbreadth from the point of view of licensing, the scope of this is also very problematical in terms of the positive obligations it imposes on social media platforms, for example to establish a representative in Nepal (section 14) or to provide a "round the clock" complaint-handling team (section 15). These issues are addressed in more detail below, under Regulatory Measures.

In contrast to this, key provisions in the European Union's Digital Services Act[9] are limited to intermediaries which offer services in the European Union (Article 13), do not apply to small enterprises (Article 19),[10] or apply only to "very large online platforms", defined as those with at least 45 million users in the EU (Section 4, Articles 25-33).

The scope of the draft Act is not only vast in terms of the social media platforms it covers. Section 2(k) also defines a very wide range of activities as constituting "use of social media", including not only posting, sharing and commenting but also tagging or even mentioning or "engaging in any similar activity" on social media. Thus, technically, a civil society report disseminated via social media discussing ("mentioning") problematical content on platforms would be classified as a use. There is also no attempt to distinguish between primary activities, such as posting material, and secondary activities, such as merely liking or sharing it. While it is unfortunate when users share or like problematical content, this is often done without much thought and cannot be compared to the primary activity of creating the content. The definition of "misuse of social media" in section 2(j) is similarly broad. These definitions are particularly problematical given the very extensive obligations which are imposed on users.

Recommendations

- A much narrower definition of social media platform should be used in the draft Act which, among other things, requires an appropriate connection to Nepal before any platform would be covered.
- Consideration should be given to excluding, at least from some of the positive obligations, smaller platforms.
- The definition of a user of a platform should be defined more narrowly and minor secondary actions should either be excluded or defined separately and accorded far less responsibility for content.

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[9] Regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31/EC, COM(2020) 825 final, 15 December 2020, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52020PC0825&from=en.

[10] Defined as enterprises which employ "fewer than 50 persons and whose annual turnover and/or annual balance sheet total does not exceed EUR 10 million". Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises, Annex, Article 2(2), https://service.betterregulation.com/document/175768.

Independence

A key principle governing regulation of the media and online intermediaries in international law is that bodies which exercise regulatory powers over them need to be independent of the government and protected against both political and commercial interference. For example, the 2019 *Declaration of Principles on Freedom of Expression and Access to Information in Africa* (African Declaration) states very clearly, at Principle 17(1):

> A public regulatory authority that exercises powers in the areas of broadcast, telecommunications or internet infrastructure shall be independent and adequately protected against interference of a political, commercial or other nature.[11]

The UNESCO Guidelines place a great deal of emphasis on the idea of independent regulation. Thus, paragraph 28(m), setting out the specifics of "States' duties to respect, protect and fulfil human rights" states, in part, that States should:

> Ensure that any regulatory authority that deals with digital platforms content management, regardless of the thematic, is structured as independent, shielded from political and economic interests, and has external review systems in place.

Paragraphs 68-73 set out the specific characteristics of independent regulation, with paragraph 68 indicating:

> In statutory regulation, official regulatory authorities, though constituting part of the executive state apparatus, should be wholly independent of the government and be primarily accountable to legislatures for fulfilment of their mandates.

There is not the slightest attempt in the draft Act to allocate regulatory powers to an independent body. Instead, the key regulator is the "Department", defined in section 2(f) as "the government department responsible for information technology under the Government of Nepal". The Department is responsible for licensing and enforcement of licensing rules (see section 3 and following), for imposing fines on platforms which do not follow the rules (see, for example, section 12(2)), for enquiring into complaints and ordering platforms to remove content (section 13) and even for imposing fines on users (section 16(3)). The Department is also responsible for creating a Rapid Response Team (section 36), with extensive powers, including to order any platform, individual or entity to remove content immediately (section 36(3)). Even appeals from decisions by the Department to revoke or cancel a licence go to the Ministry (defined in section 2(e) as the "Ministry of Communications

[11] Adopted by the African Commission on Human and People's Rights at its 65th Session, 21 October to 10 November 2019.

and Information Technology of Nepal"), with the rules stating that the decision of the Secretary of the Ministry on an appeal "shall be final" (section 8(4)). The Ministry also has the power to "issue necessary directives to the Department regarding the regulation and management of the operation and use of social media" (section 38).

It is immediately clear that vesting these sorts of highly sensitive regulatory powers in the Department and Ministry is the opposite of allocating them to an independent body. These bodies are integral parts of the government of Nepal, responsible to a minister who is part of the political wing of government.

While it is always important to vest regulatory powers over the media and online intermediaries in independent bodies, this is particularly important when those regulatory powers extend to direct powers to regulate content, as is manifestly the case under the draft Act.

Recommendations

- The draft Act should be fundamentally revised to create an independent, administrative oversight body, along the lines of a telecommunications or digital regulator, and to vest all regulatory powers in that body rather than in the Department or Ministry.
- Among other systems to protect the independence and accountability of the regulatory body, appeals from its decisions should go to the courts and not to a government body such as the Ministry.

Regulatory Measures

The draft Act imposes a number of both restrictions and positive obligations on platforms. A major restriction is that anyone who wishes to operate a platform must first obtain a licence from the Department (section 3). It is illegitimate to impose a general licensing requirement on actors which provide online services, other than where such requirements apply based on the specific sort of service being provided, such as a licence to provide telecommunications services. There is no scarcity or other justification for such licensing which, as a restriction on freedom of expression, needs to be justified as "necessary" under international standards for restrictions on freedom of expression. The lack of any necessity for such licensing is clear from the fact that the vast majority of all States and especially democracies do not impose such requirements and yet no detriment can be said to flow from this. The problems with

imposing a licensing requirement on platforms are seriously exacerbated by the vast breadth of actors which would need to obtain such a licence, based on the definition of a platform. This would, for example, require many actors which are already licensed or at least registered as commercial enterprises (companies) to obtain an addition licence. This is formally recognised in the draft Act for entities which are already registered with the Ministry, in sections 4(2) and (3), but not for entities which are formally registered in other ways (such as private companies or civil society organisations). As noted, it would essentially impose a licensing requirement on any entity which enabled user comments on its website. Of course the standard against licensing them does not mean that States cannot impose obligations on platforms, which does not depend on licensing them.

Beyond its general lack of legitimacy, the specific licensing system in the draft Act has a number of problems. The list of documents which must be filed to obtain a licence pursuant to section 4 is already very extensive and the draft Act allocates an apparently unfettered power to the Department to add additional documents (section 4(1)(n)). According to section 5(2), when assessing licence applications, the Department may consider a range of undefined issues, including the platform's "security system, risk status, and other technical aspects". While these are to be "as prescribed", it is not clear how these would justify any refusal to issue a licence. Section 6(1) then indicates that a licence will be issued, within three months, if "the applicant meets all the requirements", although it is not clear exactly what those requirements are, since they are nowhere spelt out in the draft Act. Section 6(3) allows for a licence to be refused on a long list of very vague grounds, namely where the platform "may disrupt national peace and security, sovereignty, territorial integrity, national security, national unity, independence, dignity, or is deemed contrary to national interests". This effectively grants the Department almost unlimited discretion to refuse to issue a licence to an applicant. This is extremely problematical, especially given that licensing would cover most media outlets, since most allow for user-generated content on their websites. Section 6(2) then grants the Department an apparently unfettered power to impose "necessary conditions" on licensees, again a very significant and problematical power.

Section 7(1) limits licences to a very short two-year period, meaning that the broad discretionary powers of the Department to refuse to renew a licence are engaged frequently, leaving a constant threat hanging over every entity which qualifies as a platform. An application for renewal involves the provision of a number of vague categories of information, such as "the security measures implemented for social media usage", "activities conducted under corporate social responsibility (CSR)" and "details of the major activities carried out during the operation of the social media platform" (section 7(3)). The Department

is then given broad discretion to renew (or not), if the renewal "is deemed appropriate" (section 7(4)). Failure to renew in time results in automatic cancellation of the licence and a ban on conducting any activities (sections 7(5) and (6)).

Section 8 sets out the rules regarding the revocation of a licence, including on the broad and vague grounds that the platform has disseminated content which "disrupts national peace and security, law and order, sovereignty, territorial integrity, national security, national unity, independence, dignity, or is deemed contrary to national interests" (section 8(1)). The licensee does have an opportunity to submit a justification but, if the Department deems this to be "inadequate", it shall cancel the licence (sections 8(2) and (3)). And the Department can restrict the operations of a platform while the revocation process is being considered (section 9(2)). As noted above, appeals from such a decision go to the Secretary of the Ministry (section 8(4)). Once again, the system vests very broad discretion in a government body, the Department, to undertake the very dramatic and intrusive measure of revoking a licence.

Beyond licensing, section 10 of the draft Act requires the Department to monitor the content being disseminated on platforms, to issue directives to remove any content which is deemed to be illegal, and to take appropriate legal action against such content (sections 10 (b), (c) and (d)), as well as to establish a complaints mechanism (section 10(e)). These are, once again, very broad and intrusive powers, especially as exercised by a government body like the Department.

A number of provisions in the draft Act also impose positive requirements on platforms. For example, in addition to imposing a number of rules relating to content (see below), section 12 requires platforms to allow users access only after verifying their real identity (section 12(1)(h)), to ensure that all financial transactions are processed through the banking system (section 12(1)(i)) and to provide user details to the authorities for the purpose of investigations (section 12(1)(j)). A failure to respect these rules may lead to a fine of between NPR 2,500,000 and 10,000,000 (approximately USD 17,500 to 70,000).

None of these positive obligations are legitimate. The right to operate anonymously online is protected by the right to freedom of expression. As the special international mandates on freedom of expression – the United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information –

stated in their 2015 Joint Declaration on Freedom of Expression and Responses to Conflict Situations:

> Encryption and anonymity online enable the free exercise of the rights to freedom of opinion and expression and, as such, may not be prohibited or obstructed and may only be subject to restriction in strict compliance with the three-part test under human rights law.[12]

It is not entirely clear what "through the banking system" means but it is perfectly legitimate to conduct financial transactions using credit cards (indeed, this is the main way of doing this around the world), which is not directly through the banking system. As for providing user details, this should be required only in very limited circumstances, normally after obtaining judicial authorisation for it. It is certainly not sufficient to require this simply because the authorities are conducting an investigation. There would normally need to be reasonable grounds to suspect that an individual had committed an offence before requiring a platform to provide personal information concerning that individual to the authorities.

Section 14 of the draft Act requires all platforms operating from outside of Nepal to establish a contact representative in Nepal to facilitate communication, including with the Department. This is not in itself an illegitimate requirement. However, as noted above, the draft Act fails to establish any requirement of a connection with Nepal before being defined as a social media platform (and hence being required to meet these conditions). In addition to having a specific link to Nepal, it is also necessary to have some sort of minimum size cut-off for this requirement. Otherwise, the operation of the draft Act will inevitably lead to some actors which qualify as social media platforms according to its terms and which do enjoy some usage within Nepal but which do not have a sufficiently large operation there to cover the costs of hiring a local representative to terminate their local operations (or get blocked from providing them).

Section 15 of the draft Act requires all platforms to establish an "effective complaint management mechanism, which includes a Rapid Response Team (RRT)" to respond to complaints from users. Furthermore, the "complaint-handling team" must operate "round the clock" and include "an authorized officer" who is responsible for handling complaints, along with a monitoring system for purposes of "self-regulation". This is supplemented by section 12(1)(f), which requires platforms to "[e]stablish a mechanism for addressing

[12] Adopted 4 May 2015, para. 8(e), https://www.osce.org/fom/66176?page=1. The special mandates adopt a Joint Declaration on a different freedom of expression theme each year, with the assistance of the Centre for Law and Democracy. All of the Joint Declarations are accessible at https://www.osce.org/fom/66176.

complaints related to social media usage". Like the section 14 requirements, this is not itself illegitimate but it is arguably excessive in some respects – in particular inasmuch as it requires "round the clock" operations and self-regulatory monitoring – and there needs to be recognition that only larger platforms will be able to put in place more developed systems in this area.

Section 37 requires platforms to "conduct educational and awareness programs for the welfare and security of social media users" and lists various means by which such programmes may be delivered, such as through the media, websites and so on. Support is to be provided by various official actors. This is supplemented by section 12(1)(e), which requires platforms to "[c]ontinuously disseminate awareness and educational materials via social media to promote the safety and well-being of social media users". These are generally positive since digital information literacy is a key element of any effective approach to mitigating online harms. However, they are both mandatory requirements, such that a failure to respect them might lead to sanctions, for example a refusal to renew a licence. It would, therefore, be useful to clarify how extensive this obligation is for different platforms or for platforms of different sizes. In addition, section 12(1)(e) is set out in excessively strong terms ("continuously disseminate" this sort of material to users).

Recommendations

- The whole system of licensing for platforms should be removed from the draft Act. If the licensing system is retained, it should at least be fundamentally reworked so as to remove the extremely broad discretion vested in the Department to issue or renew (or not) or to revoke a licence, and to impose additional conditions on licensees, as well as the other problematical attributes of the system, as described above.
- The Department should not have the power to order content to be removed, only to refer cases involving allegedly illegal content to the courts.
- Sections 12(1)(e), (f) and (h)-(j) should be removed from the draft Act.
- In addition to requiring a sufficient connection to Nepal to be defined as a social media platform for purposes of the Act in the first place, there should be a minimum size cut-off for the application of section 14.
- Some of the requirements of section 15 should be reconsidered and, like section 14, there should either be a minimum size cut-off for the application of this section and section 12(1)(f), or graduated responsibilities depending on how large a platform is.

- There should be some indication in the draft Act of the extent of the section 37 and section 12(1)(e) obligations, and consideration should be given to casting 12(1)(e) in more realistic terms.

Content Restrictions

There are, broadly speaking, three types of content restrictions in the draft Act. The first, captured in sections 12 and 13, applies to platforms, the second, a captured in section 16, applies to users and the third, captured in sections 18-26, applies to all "persons". A person is not defined in the draft Act but it would likely cover both individuals and legal persons, including platforms. Most, but not all, of these restrictions are problematical from the perspective of international law. It is beyond the scope of this Note to present a detailed critique of each and every one of these restrictions so, in this section of the Note, we focus on some of the more egregious restrictions.

Section 12(1) sets out a number of content restrictions and obligations relating to these restrictions for platforms. The main content restrictions are in sections 12(1)(a) and (c). The former requires platforms to ensure that content is not disseminated which "harms Nepal's sovereignty, territorial integrity, national security, national unity, independence, dignity, or national interests, or that incites social, cultural, or religious disharmony", while the latter does the same for content which "severely harms an individual's character, contains hate speech, incites violence, or disrupts communal harmony". It is positive that most of these restrictions are linked to a form of harm. However, several are too broad or vague to be justified as specific content restrictions, and others are simply not legitimate. Thus, it is not legitimate to ban speech which "harms" sovereignty, territorial integrity or national security; instead, incitement to violence or other specific illegal acts may be prohibited. It is, for example, perfectly legitimate to host a discussion about dividing up a country, even while it is not legitimate to advocate for the use of violence to achieve this end. The references to "national unity, independence, dignity, or national interests" are all problematical. They are, to start with, too vague to serve as the basis for controlling content but they are also simply not legitimate grounds for doing this. It is unclear how speech which does not incite to violence could undermine independence, we have defamation laws to protect dignity, to the extent that it deserves protection, and the same applies to harm to an individual's character, and national interests could be anything that the Department wanted it to be. When it comes to inciting disharmony or disrupting harmony, these are also just too broad and vague as

grounds for controlling content. It is legitimate to limit intentional advocacy of hatred that incites to hatred, but this is a much narrower notion.

Section 12 also imposes a number of unrealistic, freedom of expression restricting obligations on platforms vis-à-vis restricted content. Thus, section 12(1)(b) requires platforms to develop "technological measures or adopt other necessary steps" to prevent the sharing of content which violates the law. Section 12(1)(d) requires platforms to ensure privacy and protect intellectual property rights. And section 12(1)(g) requires platforms to establish a "system to verify the accuracy of content" disseminated on the platform". It is not technically possible for platforms to do any of these things. Furthermore, any technological measures which aimed at doing these thing would inevitably be significantly over-inclusive, thus banning a range of legitimate speech and failing to meet the necessity requirement for restrictions on freedom of expression.

Failure to meet any of the obligations imposed under section 12(1) may lead to the Department imposing a fine of between NPR 2,500,000 and 10,000,000 (approximately USD 17,500 to 70,000) (section 12(2)). In addition, pursuant to section 13, where the Department receives a complaint about content which violates either the draft Act or another law, it shall investigate and, where the Department deems the complaint to be justified, it shall direct the platform to remove the content. Failure to do so may lead to a fine of between NPR 500,000 and 1,500,000 (approximately USD 3,500 to 10,500) for each instance of non-compliance, and a requirement to pay compensation to any individual who has been harmed or suffered a loss. In other words, all of the content covered by section 12(1) is subject to being taken down, on the order of a government body, the Department, a very severe approach (as opposed to measures such as posting a response, putting up a warning or directing the user to other, repudiating content). This is further exacerbated by section 36(3), which provides for the Rapid Response Team (RRT), operating under the direction of the Department, to order "any platform, individual, or entity" to "[i]mmediately remove any content disseminated on social media". This extends far beyond just ordering platforms to take down content and does not involve any procedural protections (under section 13, platforms at least have the opportunity to make representations about the matter).

The primary provision in the draft Act directed specifically at users is section 16. Section 16(1) prohibits a range of content which goes far beyond what is permitted under international law. This includes, among other things, using derogatory language, engaging in "abusive" speech, spreading "hate speech", defined to include not only inciting hatred but also disrupting social harmony, spreading false or even misleading information, or disseminating

content which "involves activities prohibited by prevailing laws" or which "promotes superstition or negatively impacts public health". Section 16(2) appears to add a requirement of malicious intent to the prohibitions in section 16(1), but this is not entirely clear. According to section 16(3), breach of section 16(2) may lead to the Department imposing a fine of up to NPR 500,000 (approximately USD 3,500).

Each of these content restrictions is illegitimate according to international law. Most of them are far too broad. Thus, a wide range of perfectly legitimate expressions may be deemed to disrupt social harmony, "involve" illegal activities or "promote" superstition (such as writing about them from a social point of view while not inciting others to engage in them) or negatively impact public health (such as questioning the effectiveness of COVID 19 vaccinations). It is very clear that it is not legitimate to prohibit generally the dissemination of false information, let along misleading information, while it is legitimate to prohibit the making of false statements in particular circumstances (such as false and defamatory statements, perjury or fraud). As the special international mandates on freedom of expression stated in their 2017 Joint Declaration:

> General prohibitions on the dissemination of information based on vague and ambiguous ideas, including "false news" or "non-objective information", are incompatible with international standards for restrictions on freedom of expression, as set out in paragraph 1(a), and should be abolished.[13]

The problems with these prohibitions are significantly exacerbated by the fact that fines are imposed directly by the Department rather than a court or at least an independent administrative body.

There are again numerous problems with the content restrictions found in sections 18-26, which apply to any "person". Unlike the previous restrictions, these restrictions all provide for prison sentences ranging from a period of three months to up to five years, as well as fines of between NPR 50,000 and 1,500,000 (approximately USD 350 to 10,500). It is assumed that these are at least applied by the courts and not the Department.

Some of these restrictions are largely legitimate, depending on how, exactly, they are interpreted, such as the prohibitions on hacking in section 21, on phishing and imposter scams in section 22 and on sextortion and extortion in section 23. Others are not. These include, for example, prohibitions on: any act which "adversely affects" matters including

[13] Joint Declaration on Freedom of Expression and "Fake News", Disinformation and Propaganda, 3 March 2017, para. 2(a), https://www.osce.org/fom/66176.

national unity, independence, national interests or “harmonious relations between federal units” (section 18(1); acts which “intimidate, threaten, shame, humiliate, insult, defame, or spread rumors” (“cyberbullying”, section 19(1)); acts which falsely accuse someone or abuse a person, monitoring someone online without consent, or sending “repeated and unnecessary messages” (“cyberstalking”, section 20(1)); sharing “gruesome” images (section 24(1)); disseminating obscene images or “false or misleading information” (section 25(1)); or uploading “deepfake videos” (section 26(1)). The problems with some of these restrictions have already been canvassed above – such as spreading false or misleading information or merely “adversely affecting” national unity, independence or national interests. Others are simply too broad, especially given the quasi-criminal nature of these offences, such as intimidating, shaming or humiliating someone, and sending repeated or gruesome messages.

Section 27(1) prohibits, among other things, the creation or use of “an anonymous or fake identity”, punishable by up to three months’ imprisonment, a fine up of to NPR 50,000 (approximately USD 350) or both. The problems with such a rule are set out above. Section 27(3) prohibits using an anonymous group or “any other type of fake identity” to spread false or misleading information that “disrupts Nepal’s sovereignty, territorial integrity, or national interests” punishable by up to five years’ imprisonment, a fine up of to NPR 1,500,000 (approximately USD 10,500) or both. The problems with prohibiting merely “disrupting” these interests, as opposed to inciting violence to this end, are described above.

Recommendations

- Sections 12(1)(a)-(d) and (g) should be removed from the draft Act.
- Neither the Department nor the Rapid Response Team (RRT) should have the power to order platforms or other actors to take down content.
- The whole of section 16 should be removed from the draft Act.
- The rules in sections 18-26 should be reviewed and, as appropriate, either removed from the draft Act or substantially amended to bring them into line with international standards.
- Article 27 should either be removed entirely from the draft Act or very substantially amended to bring it into line with international standards.

Sanctions

In some cases, the sanctions provided for under the draft Act are reasonable (apart from the fact that the underlying provisions are problematical and that in many cases sanctions are imposed by the Department rather than an independent actor) inasmuch as they only involve fines. However, the sanctions for all of sections 18-27 involve prison sentences, which is excessive in most cases, even if these provisions were substantively legitimate (which most are not, as outlined above). In addition, section 13(2) empowers the Department to order a platform to remove content, while section 36(3) empowers the RRT to order any platform, individual or entity to do this, both of which are, as noted above, very problematical.

However, there are also other problems with the regime of sanctions in the draft Act. Section 28(1) provides that, should a person commit an offence under an existing law using social media, "an additional imprisonment of up to one year shall be added to the punishment" under the existing law. This is profoundly illegitimate. First, it is clear that sanctions should not be increased merely because an offence is committed online. There is simply no warrant for this. A social media post may only be seen by a few people, as compared to the possibility of a media report being seen by 100s of 1000s of people. Under international law, sanctions for speech-related offences must also be proportionate, as part of the necessity part of the test for restrictions. This means that sanctions must be tailored to the actual nature of the offence and the harm caused, rather than randomly being increased simply because the offence happens to be committed via social media. Second, given the breadth of actions covered by the draft Act, including merely liking or commenting on a post, the sanctions should, if anything, be reduced rather than increased. Third, many offences which may be committed using social media do not even provide for imprisonment, in recognition of the fact that imprisonment is not warranted for such offences. Section 28(1)'s crude and blanket rule would automatically convert the sanction for all such offences into imprisonment.

Section 28(2) provides for double the punishment for each repeated offence. This again fails to respect the international law requirement that sanctions be tailored to the actual nature of the offence, so as to respect the requirement of proportionality. It also fails to reflect how social media is used and, in particular, the fact that it is very simple to "repeat" an offence simply by sharing, liking or commenting on something twice.

Section 28(3) provides that if anyone holding a public position or even merely "receiving benefits from the state treasury" commits an offence under the Act, they shall be subject to a sanction which is 50% greater than what is otherwise prescribed. Once again, this fails to respect the need for sanctions to be proportionate (i.e. tailored to the specific nature of the offence). Also, it is highly discriminatory as it specially targets those who receive benefits,

which may, among other people, include persons with disabilities, those suffering from illnesses or the poor.

Section 28(4) provides for "additional imprisonment of up to one year" to be added whenever an offence is committed using children. While it is certainly problematical to involve children in offences, this is again a crude and inflexible rule which fails to respect the rule on proportionality. Among other things, it would multiple by five times the penalty for those offences which otherwise only attract a maximum period of imprisonment of three months.

Section 30 provides that where an offence which is provided for under another law has a greater penalty than is provided for under the draft Act, the offence may be prosecuted under that other law without prejudice to the draft Act. Once again, we see a highly punitive approach being applied, on the wrong assumption that committing offences via social media is automatically more harmful or culpable than doing so in other ways. This is not only offensive to the requirement of proportionality, but it also fails to reflect the fact that in many cases so-called offences using social media involve minimalistic engagement with the offending content, such as merely liking or sharing it. And, as a matter of general legal principle, the specialised rule – i.e. the draft Act – should apply rather than a law of more general application when the subject matter is covered by that specialised law. I.e. the draft Act should apply to the use of social media and not a more general law.

Recommendation

- Sections 28 and 30 should be removed from the draft Act.