

FACT-CHECK UNITS: AN UNCHECKED FACT CHECKER – PART II

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The Bombay High Court has recently struck down the 2023 amendment (the “**2023 Amendment**”) to the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 (the “**Intermediary Rules**”), which amended Rule 3(1)(b)(v) (*pertaining to due diligence by an intermediary*) (the “**Impugned Rule**”) of the Intermediary Rules. The judgment was delivered by Justice Atul Chandurkar, who acted as the third-referral judge, after the division bench of the Bombay High Court delivered a split decision on January 31, 2024 (please find [here](#) a detailed analysis of the split decision).

This update discusses the judgment and analyses its implications.

Background

On January 31, 2024, the division bench of Justice GS Patel and Justice Neela Gokhale delivered a split decision in the case of *Kunal Kamra v. Union of India*. The primary issue before the division bench was the validity of the 2023 Amendment, which took away the immunity (“**Safe Harbour**”) granted to intermediaries from liability for third-party content uploaded on their platforms, if the intermediary failed to remove content flagged by the Central Government’s fact-check unit (“**FCU**”) as fake, false or misleading with respect to any business of the Central Government. Justice Patel struck down the 2023 Amendment on the grounds of vagueness, lack of proportionality, and inadequate procedural safeguards. He held that Safe Harbour protection is granted to intermediaries to safeguard free speech and ensure that users can freely post content on their platforms without being restricted by intermediaries seeking to avoid legal risks. Further, Justice Patel held that the 2023 Amendment: (i) introduces restrictions that are not covered under Article 19(2) (*restrictions on freedom of speech*) of the Indian Constitution; (ii) creates an impermissible division within the freedom of profession; (iii) creates a class legislation; and (iv) jeopardises the commercial interests of the intermediaries. *Per contra*, Justice Gokhale upheld the 2023 Amendment on the grounds that the Impugned Rule has no bearing on free speech and falls within the ambit of reasonable restrictions provided under Article 19(2) of the Indian Constitution.

Following the split decision, the matter was referred to a third judge, Justice Chandurkar. On March 11, 2024, Justice Chandurkar ruled on the interim applications and allowed the Central Government to notify the FCU, observing that constitution of the FCU will not result in grave and irreparable loss. Following this decision, the Ministry of Electronics and Information Technology (MeitY) notified the FCU on March 20, 2024. However, the very next day, India’s Supreme Court stayed the notification, with the stay to remain in effect until the Bombay High Court delivered its final verdict.

The Ruling

Justice Chandurkar upheld the judgment of Justice Patel on all points and struck down the 2023 Amendment for being violative of Article 14 (*equality before law*), Article 19(1)(a) (*protection of freedom of speech and expression*), and Article 19(1)(g) (*right to practice any profession, etc.*) of the Indian Constitution, and for exceeding the scope of the Information Technology Act, 2000 (the “IT Act”). Justice Chandurkar’s judgment has been discussed below.

- (i) Scope of opinion: Justice Chandurkar noted that according to Clause 36 of the Letters Patent of the Bombay High Court, the third judge can only deliver his opinion on the points of disagreement in a split verdict. Therefore, the points that were not disagreed upon were not considered.
- (ii) Reasonable restrictions: Justice Chandurkar concurred with Justice Patel’s reasoning and ruled that the 2023 Amendment should be invalidated as it imposes restrictions on free speech that go beyond the scope of Article 19(2) of the Indian Constitution. He observed that while free speech on the internet is protected as a fundamental right, it is not subject to an additional “right to the truth.” Accordingly, ensuring that citizens receive only “true” and “accurate” information online, as defined by the Central Government, is neither a right of the citizens nor a valid restriction under Article 19(2).
- (iii) Right to practice any profession: Justice Chandurkar supported Justice Patel’s view that conducting an exercise to determine whether information on digital media is fake, false, or misleading, and not conducting a similar exercise for information published in the print media, directly infringes Article 19(1)(g) of the Indian Constitution.
- (iv) Judge in its own cause: Justice Chandurkar held that by granting the FCU constituted by the Central Government the power to determine whether information related to the Central Government’s business is fake, false, or misleading, the FCU is effectively acting as a judge in its own cause, which is in violation of Article 14 of the Indian Constitution.
- (v) Knowledge and intention: Agreeing with Justice Patel, Justice Chandurkar observed that it was unconstitutional to divide the Impugned Rule into the following two (2) categories: (i) in matters related to the Central Government’s business, the intermediary loses its Safe Harbour protection, irrespective of the user’s knowledge or intent; and (ii) in matters unrelated to the Central Government’s business, the intermediary’s Safe Harbour protection is revoked only after considering the user’s knowledge or intent.
- (vi) Scope and applicability of expression: Justice Chandurkar concurred with Justice Patel’s view that, in the absence of clear guidelines on the scope and applicability of the expression “fake or false or misleading,” the FCU will enjoy “unguided discretion” in determining the truthfulness of any online content. Therefore, the

Impugned Rule can be regarded as vague and overbroad, which will result in a chilling effect on free speech.

- (vii) Beyond the scope of IT Act: As the 2023 Amendment was not implemented by following the procedure under Section 87(3) (*requirement to lay amendment before both the houses of the Parliament*) of the IT Act, and as it is not connected to anything permissible under Section 69A (*authority to block content*) or Section 79 (*Safe Harbour*) of the IT Act, the Impugned Rule is *ultra vires* the IT Act.
- (viii) Need for reading down: Justice Chandurkar sided with Justice Patel and stated that ignoring the expression “misleading” from the phrase “fake or false or misleading” would not amount to reading down the expression but would instead result in reading out of the expression, which has been held to be impermissible in *Shreya Singhal v. Union of India*. Similarly, he held that the term “information” cannot be interpreted in a manner such that the impact of the Impugned Rule will be limited and will have no effect on political views, satire, opinions, etc.
- (ix) The proportionality test: With respect to the proportionality test, Justice Chandurkar agreed with Justice Patel and held that this test is not satisfied as the Impugned Rule infringes Article 19(1)(a) and Article 19(1)(g) of the Indian Constitution. As the Impugned Rule cannot be read down (as explained above), the Impugned Rule is not sustainable on the cornerstone of proportionality.

Our comments

Justice Chandurkar’s recent ruling may have brought the case to an end before the Bombay High Court, but the Central Government may still challenge this decision in the Supreme Court. The ruling can also influence legal challenges to FCUs set up by various state governments in India, although these state FCUs have been constituted independently of the 2023 Amendment and may not be directly affected. For example, the Madras High Court had adjourned a case against Tamil Nadu’s FCU which was formed under a government order, pending the Bombay High Court decision. Meanwhile, the Karnataka government is proceeding with its own FCU, despite the recent Bombay High Court verdict. There are slight differences in the central FCU and the state FCUs. Unlike the central FCU, which can compel intermediaries to remove content, state FCUs do not directly ask intermediaries to take down content but instead refer cases of misinformation to legal and police authorities. This difference may protect state FCUs from similar legal challenges. Needless to say, the Bombay High Court judgment will likely shape future decisions on how misinformation and online content are handled in India.