

FACT-CHECK UNITS: UNCHECKED FACT CHECKERS

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Introduction

In the case of *Kunal Kamra v. Union of India*, on January 31, 2024, the petitioners challenged the constitutional validity of the 2023 amendment (the “**2023 Amendment**”) made to Rule 3(1)(b)(v) (*pertaining to due diligence by an intermediary*) (the “**Impugned Rule**”) of the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 (the “**Intermediary Rules**”). This update discusses the judgment and analyses its ramifications.

The Intermediary Rules

The Information Technology Act, 2000 (the “**IT Act**”) defines an “intermediary” as any person that, on behalf of another, receives, stores, transmits, or provides services related to electronic records. This includes telecom service providers, network service providers, internet service providers, web-hosting service providers, search engines, online payment sites, online auction sites, online marketplaces, and cyber cafes.

Following the 2023 Amendment, the Impugned Rule requires intermediaries, including social media intermediaries, significant social media intermediaries, and online gaming intermediaries, to make reasonable efforts by themselves, and to ensure that users of their computer resources do not host, display, upload, modify, publish, transmit, store, update, or share any information that, among other things, knowingly and intentionally communicates misinformation or information that is patently false, untrue, or misleading in nature, or, in respect of any business of the Central Government, is identified as fake or false or misleading by a designated fact-check unit (“**FCU**”) of the Central Government. In other words, the 2023 Amendment grants the government, the authority to institute a FCU tasked with identifying any fake, false, or misleading information concerning its businesses across online platforms.

Further, as per Section 79(1) and (2) (*exemption from liability of intermediary in certain cases*) of the IT Act, read with Rule 7 (*non-observance of Rules*) of the Intermediary Rules, if an intermediary fails to observe the rules, it loses its immunity from liability for any third-party content made available or hosted by the intermediary (“**Safe Harbor**”), and is liable for punishment under any law for the time being in force including the provisions of the IT Act and the Indian Penal Code, 1860.

The ruling

Justice GS Patel’s judgment invalidated the 2023 Amendment, stating that it goes against Article 14 (*equality before law*), Article 19(1)(a) (*protection of freedom of speech*), Article 19(2) (*restrictions on freedom of speech*), Article 19(1)(g) (*right to practice any profession, etc.*), Article 19(6) (*restrictions on right to profession, etc.*) of the Indian Constitution, as well

as Section 79 (*exemption from liability of intermediary in certain cases*) and Section 87(2)(zg) (*power of Central Government to make rules*) of the IT Act. Conversely, Justice Neela Ghokale's judgment upheld the 2023 Amendment.

Both judges presented starkly different interpretations of the Impugned Rule, leading to contrasting perspectives in their judgments. An overview is provided below:

Justice GS Patel's interpretation

- (i) **Requirement of knowledge and intent**: Justice Patel classified the application of the Impugned Rule into two (2) categories based on the type of content. He opined that: (a) there is no loss of Safe Harbor for the intermediary in respect of content not related to the Central Government's business unless the user demonstrates knowledge and intent in communicating any misinformation or information that is patently false and untrue, or misleading; and (b) there is an automatic loss of Safe Harbor for the intermediary in respect of content concerning the Central Government's business if the FCU deems it to be "fake or false or misleading" and it remains hosted by the intermediary.
- (ii) **Vagueness and overbreadth**: According to Justice Patel, the absence of legal definitions for the terms "business of the government" and "fake, false, or misleading" raised issues of vagueness and overbreadth. Further, he stressed that the Impugned Rule could not be narrowly interpreted to only address fake or false "facts" because the term used under the IT Act is "information," which is broad and inclusive. Therefore, the Impugned Rule cannot be interpreted to suggest an exclusion of opinions, views, commentary, or criticism. The judge also observed that the Impugned Rule lacked safeguards against bias. There were no clear guidelines or procedures for hearings, nor any opportunity for users to counter allegations of fake, false, or misleading information. The process followed by the FCU relied entirely on subjective satisfaction with material which was not disclosed to the user. Moreover, there was no requirement for a reasoned order, leaving users with no legitimate means to challenge decisions made by the FCU.
- (iii) **Illusion of choice**: Justice Patel rejected the contention that intermediaries could merely issue a disclaimer for FCU-flagged content to users without removing it. He stressed that the phrase "reasonable efforts" as used in the Impugned Rule did not allow intermediaries to retain flagged content, as failure to remove it forfeited their Safe Harbor protection. Recognizing intermediaries' commercial interests, he highlighted their inclination to prioritize Safe Harbor, often at the expense of user-generated content. Consequently, by targeting intermediaries over users, the Impugned Rule created a regime of indirect, self-interested censorship.
- (iv) **Right to free speech and profession**: Justice Patel stressed that any law restricting the freedom of speech and expression under Article 19(1)(a) of the Indian Constitution must fit within the boundaries set by Article 19(2) (i.e., the interests of the sovereignty and integrity of India, the security of the State, friendly relations

with foreign states, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence), which the 2023 Amendment failed to do. Further, Justice Patel noted that the implication of the 2023 Amendment was that content replicated on social media, despite being previously published in print, could be subject to removal by the FCU. This approach, which prohibited digitally what was allowed in print, created an impermissible division within the freedom of profession under Article 19(1)(g).

- (v) Right to equality: With respect to the right to equality under Article 14 of the Indian Constitution, Justice Patel regarded the 2023 Amendment as class legislation, observing that it exclusively shielded deepfakes concerning the Central Government's business while disregarding the intent behind the speech, thus encompassing protected speech like dissent, criticism, and satire.
- (vi) Beyond parent statute: Justice Patel observed that the Impugned Rule exceeded the scope of the parent statute by mandating intermediaries to remove content based on FCU directives, thus bypassing the protections and procedural safeguards outlined in Section 69A of the IT Act, which governs online blocking orders by the government and contains procedural safeguards.

Above all, Justice Patel questioned whether the state could claim the authority to decide what, beyond the blatantly obvious, constitutes truth or falsehood. He expressed concern that if the FCU operates in this manner, it effectively assumes the role of a court. Justice Patel concluded that the 2023 Amendment designates the FCU as the final arbiter in deciding the authenticity of user-generated content pertaining to the government's business.

Justice Gokhale's interpretation

Contrary to Justice Patel's view, Justice Gokhale upheld the proportionality of the Impugned Rule, stating that citizens' right to participate in democracy requires access to accurate information. Further, she noted that the government is best suited to provide accurate information relating to its "business." Considering this, the vagueness of what may constitute "business" alone is not enough to declare the Impugned Rule *ultra vires*. She also clarified that the qualification of knowledge and intent extends to FCU-flagged content, and political satire, parody, criticism, and opinions are not considered offensive.

Furthermore, she noted that Safe Harbor ceases to apply only if offensive information violates the restrictions under Article 19(2) of the Indian Constitution, and the term "reasonable efforts" used in the Impugned Rule does not compel intermediaries to remove flagged content but allows them the option of issuing disclaimers.

With respect to the recourse mechanism, she noted that the Impugned Rule does not directly penalize intermediaries or users without recourse to a court of law. Further, a grievance redressal officer and an appellate committee form part of the mechanism

provided. In case of bias by the FCU, aggrieved parties can seek recourse through the courts of law.

Justice A. S. Chandurkar's final decision

Due to the split verdict, Justice A. S. Chandurkar was appointed as the third judge to preside over the case and decide on the interim applications. In his order dated March 11, 2024, he noted that the balance of convenience tilts in favour of not granting an interim stay on the notification of FCUs during the challenge's pendency, especially since the government has submitted that political opinions, satire, and comedy are not linked to the business of the Central Government. Furthermore, notifying the FCU would not result in an irreversible situation as any action taken post-notification would always be subject to the validity of the Impugned Rule, which is under challenge. He concluded that grave and irreparable loss is not shown to result if the FCU is notified.

FCU notification and SC stay

Following Justice Chandurkar's order, the Ministry of Electronics and Information Technology ("**MeitY**") notified the FCU on March 20, 2024. However, the notification was stayed by the Supreme Court of India the very next day, with the stay remaining operative until the Bombay High Court delivers its final verdict.

Our comments

The final verdict is poised to be a landmark development that will ultimately shape the relationship among intermediaries, users, and the State, with respect to free speech and censorship. Parallel to FCU demands on the central level, state governments of Karnataka and Tamil Nadu are also setting up their own FCUs. The Madras High Court has also already seen a challenge against Tamil Nadu's FCU and has decided to adjudicate after the Bombay High Court delivers its verdict. However, the recent refusal of the Bombay High Court to grant an interim stay may hint at what is to come.

The unchecked spread of misinformation online poses a formidable threat to the country's social and democratic fabric, and measures need to be undertaken to counter it. Nevertheless, the institution of FCUs without any procedural safeguards may not be the most democratic path to follow. If FCUs are eventually permitted, intermediaries will increasingly rely on filtering tools to remove information *en masse*, which is going to pose an even greater threat to free speech.

Another point to note is the emerging trend of rushing regulations under the IT Act to keep pace with technological development. The Intermediary Rules themselves, from the very start, have been a subject of much litigation for introducing provisions with vague terminology and which exceed the parent statute's scope. This includes introducing a traceability mandate that could compromise end-to-end encryption, and a requirement on digital news media and over-the-top platforms to adhere to a code of ethics. Another

emerging trend involves vague laws being supplemented with clarifications from the MeitY. In many cases, such clarifications do not offer much solace due to their non-binding nature.

Technology may be fast-paced and disruptive, but law needs to be precise, stable, and considerate. Therefore, the need of the hour is a balanced ruling, which upholds constitutional freedoms while providing an equitable mechanism to allow checks and balances.