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FACT-CHECKING OR CENSORSHIP? BOMBAY HIGH COURT FINDS FACT CHECK UNIT UNCONSTITUTIONAL

25 September 2024 **INTRODUCTION**

On 20 September 2024, the Bombay High Court (BHC) struck down Rule 3(i) (II)(A) and (C) of the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Amendment Rules 2023 (Challenged Rule) which amended Rule 3(1)(b)(v) of the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules 2021 (IT Rules) (see *Kunal Kamra v Union of India and Others*, 2024 SCC OnLine Bom 360 ([Justice Neela Kedar Gokhale](#) and [Justice Gautam Patel](#)) and [2024 SCC OnLine Bom 778](#)).

The Challenged Rule conferred authority upon the Ministry of Electronics and Information Technology (MEITY) to designate a fact check unit (FCU), tasked with identifying false or misleading information in relation to the government being hosted across any intermediary platform. The Challenged Rule empowered the FCU to require intermediaries to takedown such fake or misleading content and failure to do so could lead to loss of safe harbour protection under Section 79 of the Information Technology Act 2000 (IT Act). On 20 March 2024, the Central Government notified a FCU, previously constituted by the Press Information Bureau, as the designated FCU under the IT Rules. However, the Supreme Court imposed a stay on the operation of the FCU until all petitions challenging the constitutional validity of the Challenged Rule were settled.

The primary basis of the challenge to the validity of the Challenged Rule was that it violates the fundamental rights of free speech, the right to carry on a legitimate profession, the right to equality, and guarantees against arbitrariness under the Constitution of India (Constitution).

The BHC verdict follows an earlier split verdict by the BHC on 31 January 2024. While Justice Gautam Patel had struck down the Challenged Rule as being unconstitutional, Justice Neela Kedar Gokhale disagreed, upholding the Challenged Rule. The matter was therefore referred to Justice AS Chandurkar of the BHC to render his tie-breaking opinion.

KEY TAKEAWAYS FROM THE JUDGEMENT

FCU's power | Impermissible restraint on free speech

- Article 19(2) of the Constitution provides that only reasonable restrictions can be imposed on the fundamental right to freedom of speech and expression, where necessary in the interest 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.
- The Majority concluded that the Constitution does not guarantee the 'right to the truth' and it is not the responsibility of the state to ensure that citizens are entitled only to information that is not fake or misleading as identified by the FCU. Therefore,

the restrictions on free speech, imposed by the amended Rule 3(1)(b)(v), go beyond the reasonable restrictions prescribed under Article 19 (2). The Majority also found that the Challenged Rule has the potential to have a chilling effect on free speech, resulting in self-censorship.

Arbitrary determination | What is 'fake, false, or misleading'?

- The Majority held that the Challenged Rule does not provide any clarity on what constitutes fake, false, and misleading information and does not prescribe a methodology for such determination by the FCU.
- Therefore, the Challenged Rule makes FCU the sole arbiter for determination of 'fake, false or misleading' information, on inherently subjective analyses.
- To such extent, the powers conferred on the FCU under the Challenged Rule, are overbroad, vague, and an excessive delegation of the legislature's powers, violating the guarantee against arbitrary state action under Article 14 of the Constitution.

Violation of Article 14 | Equal treatment under law:

The Challenged Rule creates the following classifications for its applicability:

- Digital media v Other media such as print or broadcast
- Information relating to business of the Central Government v Other information

While Article 14 permits reasonable classification, the differentiation must be intelligible, distinguishing for some discernible reason those within the class from those left out. The Majority held that there is no particular reason the abovementioned classes should be created, and therefore, the Challenged Rule falls foul of Article 14 of the Constitution.

Loss of safe harbour | Burden of compliance on platforms

- The Majority held that the Challenged Rule effectively censors user content, by shifting responsibility for content accuracy from the creator/ originator of the content to the intermediary service provider, which has no control over the content.
- The Majority acknowledged that even in a situation where the FCU classifies content as fake, false or misleading, the absolute removal of such content is not a certain possibility, given that content by its very nature is proliferated and repeated. Therefore, despite 'reasonable efforts' the intermediary runs the risk of losing safe harbour protection.

Possibility of reading down the provision | Disclaimers by platforms

- The Central Government urged that the BHC should read down the Challenged Rule to save it from being struck down. The Central Government submitted that the Challenged Rule be read such that intermediaries are required to add a disclaimer in respect of information classified as fake.
- The BHC held that it could not read down the Challenged Rule as proposed by the Central Government since (a) requiring only 'fake' content to be disclaimed would mean reading out the term 'misleading' and not merely reading down; and (b) the Challenged Rule requires the intermediary "not to host" content flagged by the FCU. Therefore, the BHC had no option but to strike down the impugned rule.

Challenged Rule | Goes beyond the IT Act

- The Majority further held that the Challenged Rule creates substantive law going beyond its parent legislation and has not been promulgated after following the procedure under the IT Act.

CONCLUSION

The IT Rules have remained the subject of considerable debate since their enactment, with several challenges to their constitutional validity presently pending before various High Courts across the country, even prior to the latest amendment. On 23 March 2024, the Supreme Court transferred all remaining challenges, including those to provisions of the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Amendment

Rules 2023 (2023 Amendment), to the Delhi High Court (DHC), before whom these are now pending adjudication.

A common concern across these petitions is the potential misuse of the IT Rules. The BHC's ruling, therefore will be of considerable persuasive value for DHC in resolving this deadlock, considering the BHC's findings regarding procedural infirmities around the issuance of the Challenged Rule under the 2023 Amendment. Further, given the several broad challenges to the IT Rules pending before the DHC, intermediary regulation in India continues to be an evolving space.

The challenges to the IT Rules underscore a need for a comprehensive legislation that balances the freedom of speech with regulation of unlawful information and content.

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