

Bombay High Court decision on fact-checking rule and its implications

On September 26, 2024, the Bombay High Court (“**Bombay HC**”) delivered a pivotal ruling in *Kunal Kamra vs. Union of India*¹, striking down Rule 3(1)(b)(v) (“**Rule**”) of the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2023 (“**IDMEC Rules**”). This judgment holds significant implications for free speech, online content regulations and intermediary liability in India.

Overview of the Rule and challenge

The Rule, introduced by the Government of India (“**GoI**”) *vide* the 2023 amendments to the IDMEC Rules, empowered GoI to establish a central Fact-Checking Unit (“**FCU**”) which would perform the role of verifying any content online pertaining to the business of the GoI. The Rule also imposed a duty on intermediaries like social media platforms and news websites to take down content flagged by the FCU to be ‘false’, ‘fake’ or ‘misleading’. Any failure to do so would result in intermediaries losing their safe harbour protection under Section 79 of the Information Technology Act, 2000 (“**IT Act**”), exposing them to liability for the third-party content hosted on their platform.

Brief facts

3 (three) separate petitions were filed before the Bombay HC to challenge the Rule by Kunal Kamra, the Editor’s Guild of India, and the Association of India Magazines. The petitions argued that the Rule violated Articles 14 (*equality before law*), 19(1)(a) (*freedom of speech and expression*), and 19(1)(g) (*freedom to practice any profession or carry on any occupation, trade or business*) of the Constitution of India (“**Constitution**”) and sections 79 (*intermediary liability and immunity*) and 87 (*rule-making power of the Central Government*) of the IT Act. They argued *inter alia* that the Rule could lead to censorship, empowering the GoI to act as the sole arbiter of truth regarding its own actions, and that phrases like ‘fake’, ‘false’, or ‘misleading’ were overly vague and broad.

Split verdict and judgment

The petitions were initially heard by a Division Bench of Justice G.S. Patel and Justice Neela Gokhale, resulting in a split verdict. Justice Patel struck down the Rule, holding it unconstitutional for violating Articles 14, 19(1)(a), 19(2), 19(1)(g), and 19(6) of the Constitution and Section 79 of the IT Act, while Justice Gokhale upheld it. The matter was then referred to a third judge, Justice A.S. Chandurkar, who affirmed Justice Patel’s verdict and ruled in favour of striking down the Rule.

¹ Writ petition (L) no. 9792 OF 2023

Justice Chandurkar agreed with Justice Patel's assessment that the Rule violated fundamental rights under Articles 14, 19(1)(a) and 19(1)(g) of the Constitution and that it was *ultra vires* the IT Act. He placed reliance on several landmark judgments such as *Shreya Singhal vs. Union of India*² and *Kaushal Kishor vs. State of Uttar Pradesh*³ to underscore the dangers of vague and overbroad restrictions on free speech. He reiterated that the expressions 'fake', 'false', or 'misleading' were undefined, making the Rule vague and overbroad. Without clear definitions, the Rule created a chilling effect on free speech, as it forced intermediaries to censor content out of fear of liability, while placing unchecked power in the hands of the GoI.

Key observations

Some notable observations in Justice Patel's verdict (affirmed by Justice Chandurkar) include:

1. **Class legislation:** Justice Patel observed that the Rule created an unreasonable distinction between information related to the business of the GoI and other types of content (which related to individuals or news agencies). By offering special protection to the GoI's business through a dedicated fact checking mechanism, it granted the GoI an unfair advantage over content of other private players, such as individuals and business entities.
2. **Burden on intermediaries:** Justice Patel noted that the Rule unfairly shifted the responsibility for content accuracy from the originators (original creator) to intermediaries, entities that have no control over the content posted on their platforms. This placed an unreasonable burden on these platforms, as they would be held liable for failing to remove content flagged by the FCU and penalised with loss of intermediary safe harbour.

Additionally, the court pointed out that the expression 'fake' or 'false' or 'misleading' was overly broad, lacking specific guidelines or definitions. This opened the door for arbitrary interpretation, potentially stifling legitimate criticism or dissent under the guise of curbing misinformation.

Conclusion

The Bombay HC's ruling is a landmark moment for digital rights and free speech in India. By striking down the Rule, Bombay HC reinforced the idea that content regulation must be carefully balanced to avoid governmental overreach. The judgment highlights the importance of keeping checks and balances on the state's power to regulate online content, particularly when it pertains to the freedom of expression.

This ruling also has broader implications for the digital ecosystem, as it prevents the GoI from overburdening intermediaries with policing content. By protecting the safe harbour provision, the court ensures that intermediaries will not be held accountable for third-party content without due cause and process. It also stresses the necessity for transparency and fairness in any fact-checking mechanism, especially when it relates to content about the GoI.

In conclusion, the verdict in *Kunal Kamra vs. Union of India* is a crucial step toward safeguarding free speech in India's rapidly evolving digital landscape, setting a precedent for the protection of fundamental rights in the face of growing state control over online content.

² Writ petition (criminal) No.167 Of 2012

³ Writ petition (criminal) No. 113 OF 2016

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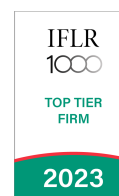


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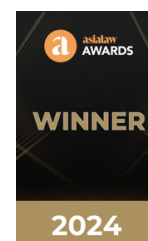
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