

## A case of nothing but patent censorship



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The Bombay High Court ruling on the amendment made to the IT (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 is a verdict in defence of the right to

free speech

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On September 20, 2024, Justice A.S. Chandurkar of the Bombay High Court broke a tie that emanated out of a previously split verdict and delivered a ruling in defence of the right to free speech. He declared unconstitutional an amendment made to the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 (IT Rules).

This law, had it been allowed to stand, would have given the Union government an Orwellian carte blanche to decide for us how any news about its operations ought to be carried on the Internet.

The provision in question, Rule 3(1)(b)(v), casts an onerous obligation on intermediaries — companies that facilitate the use of the Internet, ranging from our service providers to social media platforms. If the Union government's "Fact Check Unit" (FCU), which had been created under the amendment, identified any reporting on the government's business as fake, false, or misleading, intermediaries were required to make reasonable efforts not to host, display, upload, or publish such information. Should they choose to ignore a directive they stood to lose their "safe harbour" —an immunity from liability which is integral to the design of the Information Technology (IT) Act, 2000 and the protections it offers both to businesses and to the larger public's right to free expression.

There can be little doubt that fake and misleading information on the Internet is a problem. Its proliferation, given the medium's influence, ought to be a matter of serious public concern. To that end, the state has a legitimate interest in ensuring that it finds solutions towards its tackling. But any measure that it takes has to be found within the Constitution's boundaries.

## Petition and response

The petitioners in the Bombay High Court argued that the introduction of Rule 3(1)(b)(v) indubitably breached those walls of protection. The state, through the amendment, effectively appropriated the power to determine what information was fake or misleading. It did so in a manner that maintained no fidelity to the slew of restrictions that the Constitution otherwise permits on free speech. What is more, the state, they added, had failed to so much as acknowledge that there existed other, less intrusive measures that could have been adopted to counter the problem.

In response, the Union government made two primary arguments. First, it argued that the law was anything but coercive, and that an intermediary was by no means compelled to act on the FCU's instructions. To the contrary, intermediaries were always at liberty to contest a loss of safe harbour in appropriate proceedings. Second, no person enjoyed a licence to spread fake or misleading information and there was no constitutional protection that could be accorded to untrue speech. Therefore, according to the state, the Rule fell well within the government's powers to regulate online expression.

The judges on a Division Bench of the High Court had come to differing conclusions on the Rule's validity in January. Justice G.S. Patel found the provision *ultra vires*. In his reading, the Rule was vague and overbroad; was disproportionate to its avowed objective; and imposed on intermediaries a chilling effect that had a direct bearing on a citizen's right to equal treatment and free speech. Justice Neela Gokhale disagreed. She concluded that the intermediary's loss of safe harbour provided no direct threat to a citizen's right to freedom of expression.

The tie-breaking opinion rejected the Union government's defence of the Rule. In doing so, it deferred to Justice Patel's opinion on the importance of safe harbour and the chilling effect that the Rule was likely to have on intermediaries.

## Intermediaries and safe harbour

Section 79 of the IT Act, right from its inception, contained an exemption, releasing intermediaries from liability for any third party information hosted by them so long as they discharged due diligence in observing their duties under the law. This safe harbour would, however, be lost if the intermediary had "actual knowledge", or received any communication, among others, from a government agency, that their resource was being used to commit an unlawful act.

The logic here was simple enough: to allow entities such as Facebook, X, and WhatsApp to act free from the responsibilities vested in traditional publishers. After all, these platforms merely hosted and transmitted material and did not by themselves act as writers or producers of that content. Therefore, if they were to face liability for what others posted on their sites, the threat of prosecution would be so severe as to effectively incapacitate the Internet's very working.

This basic foundational reason for safe harbour immunity also worked parallelly in promoting free speech on the Internet. Often, the intermediaries themselves do not have any direct interest in the information disseminated by users on their platform. But should they cede to external pressure, it is the users' right to free expression that is at stake.

In the case of Rule 3(1)(b)(v), were the FCU to write to an intermediary pointing out that some information about the central government on its portal was fake, the company's choice would have been limited. It could have either taken down the information flagged, or it could have stood up for the user's right to free speech, sacrificing, in the process, its own safe harbour.

Here, as Justice Patel wrote, the intermediary faced a Hobson's choice. "No intermediary is quixotic enough to take up cudgels for free speech. Compromising one particular chunk of content is a small price to pay; better the user content is thrown under the bus than having the bus run over the entire business."

The government's second argument was easier to dismiss. No doubt, the traditional idea that the right to free speech ought to be built on a notion of a marketplace of ideas — where one believes that an open clash of views would lead to the correct, truthful opinion coming out — has its limitations. Free speech, properly understood, depends on a number of attendant requirements. Its exercise can be hampered, among other things, by a person's access to resources, economic and social conditions, and varying equations of power and authority.

## Free speech and restrictions

But insofar as our jurisprudence on free speech has been built on any doctrine it is this: it is not up to anyone, least of all the state, to determine what kinds of expression ought to be tolerated. The only restrictions available are those explicitly contained in Article 19(2) of the Constitution, which includes matters such as defamation, public order, friendly relations with foreign states and the security and integrity of India.

Our guarantee of free speech, contained in Article 19(1)(a), can be traced to both instrumental and intrinsic values. The first, for example, because an uninhibited discussion of ideas, is likely to lead to better politics. The second because free speech matters not only for the results it produces but also for the recognition it accords to citizens as equal moral beings. That is, that our dignity and our autonomy as human beings depends on our ability to exercise a right to free conscience and free thought.

Neither of these justifications advocate absolutism. There are legitimate grounds on which free speech can be reasonably constrained. Those grounds, in our case, are contained in Article 19(2).

There is here no clause sanctioning a limitation on speech that is false, misleading, or untrue. Yet, through the Rule, the government seized a power to act as the ultimate arbiter on what manner of information about its own actions ought to be seen as constituting the truth. In doing so, it failed to locate itself within any of the permissible categories expressly stipulated under the Constitution. Therefore, the law, as the Bombay High Court has correctly recognised, is nothing but patent censorship. Condoning it would undermine principles that are ingrained in the cornerstone of our democracy.