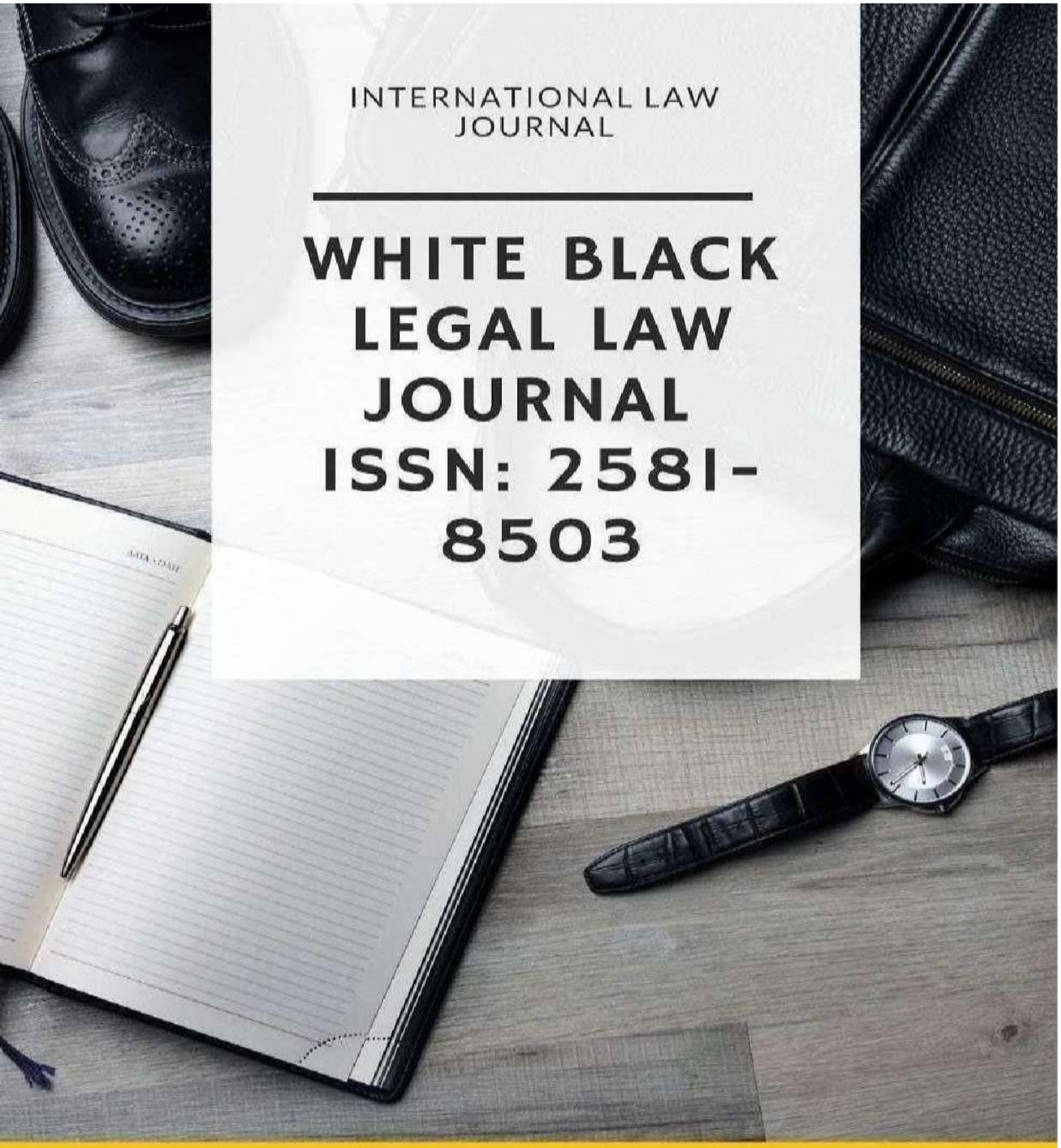

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THE STATE AS ARBITER OF TRUTH: THE CHILLING EFFECT OF THE FACT CHECK UNIT ON INTERMEDIARY LIABILITY AND FREE SPEECH

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I. Introduction

The internet was constructed on the assumption of the marketplace of ideas- a place where truth is created by the collision of the various viewpoints instead of being dictated by an authority. This digital common in India is regulated by the Information Technology Act, 2000 ("IT Act"), which also tended to perceive social media platforms (intermediaries) as passive media channels. Nevertheless, the announcement of the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Amendment Rules, 2023 ("2023 Amendment") was a clear break with this passive model. The 2023 Amendment added a new rule, 3(1)(b)(v) which required the intermediaries to make reasonable efforts to prevent the user from displaying any information that deceives or misleads the addressee of the origin of the message or knowingly expresses any information which is patently false and untrue or otherwise misleading in regard to any business of the Central Government as determined by a Fact Check Unit (FCU) of the Central Government. Although the mentioned purpose of restricting viral misinformation is valid, the method used is constitutionally questionable. The intermediary would also loose the safe harbour protection given under section 79 if they fail to do so[1].

The FCU in effect is the Central Government since it is the sole judge of the truth of its own affairs. When FCU marks some content, the mediator will either be obliged to remove it or be deprived of its Safe Harbour immunity (immunity against legal prosecution)[2]. In this paper, it is argued that this mechanism constitutes an unconstitutional Chilling Effect on freedom of speech. It does not simply penalize false speech; it establishes an incentive structure making platforms to conceal any speech that the government disputes. Through the example of Shreya Singhal to the recent split and tie-breaker decisions in Kunal Kamra, as well as the comparison

[1] Amit Sindhwani & Rajendra Kumar, *The Evolving Legal Landscape of Intermediary Liability in India: A Deep Dive*, 17 International In-House Counsel Journal 9297 (2024)
[2] *R. Rajagopal v. State of Tamil Nadu*, (1994) 6 SCC 632.

of Shreya Singhal jurisprudential experience with the standards of procedure in X Corp v. Union of India, this paper confirms that the FCU regime contravenes the provisions of Article 19(1) (a) and the concept of natural justice.

II. Erosion of Safe Harbour: The Shifting of the "Actual Knowledge" to the "Executive Opinion".

A. The Shreya Singhal Standard:

Section 79 gives an immunity to third-party content to the intermediaries, as long as they exercise due diligence. The case of Shreya Singhal v. UOI[3], on its part, interpreted the words of the Section 79(3)(b) as Union of India (2015) to indicate the extent of this due diligence. The Court believed that an intermediary would not lose its immunity unless it could do nothing about it being provided with actual knowledge. Of the utmost importance, the Court did not consider the complaint of a user or a governmental mention as the actual knowledge, but a court order[4].

The reasoning behind it was obvious that the judicial capability of the private platform such as Facebook or Twitter (since changed to X) to determine the legality of the speech was lacking. Compelling them to make decisions on content due to unclear complaints by users would result in colossal over-censorship.

B. The Shift: The 2021 Rules and the 2023 Amendment

The IT Rules, 2021, have started eroding this standard with the introduction of significant social media intermediaries (SSMIs) and increased due diligence requirements. But the 2023 Amendment has created a qualitative change. In Rule 3(1)(b)(v), the condition of a court order is entirely avoided when it comes to content pertaining to the business of the Central Government. The notification by the FCU- an executive body has replaced the actual knowledge[5].

- The Trigger: The FCU declares a post as fake or misleading.

[3] *Shreya Singhal v Union of India* (2015) 5 SCC 1
[4] Chinmayi Arun, 'Gatekeeper Liability and Article 19(1)(a) of the Constitution of India' (2016) 9 NUJS Law Review 453
[5] Indranath Gupta and L Srinivasan, 'Evolving Scope of Intermediary Liability in India' (2023) 37 International Review of Law, Computers & Technology

- The Consequence: The Consequence is that the intermediary is confronted with a binary decision to leave the content on and risk criminal/civil liability in connection to the post of the user or to remove the content and keep immunity.
- The Liability Shift: In reality, no risk-averse company[6] will opt to litigate instead of destroying. It is an illusion to be able to maintain content. This changes the intermediary into a surrogate of the State[7]. The platform is no longer administering the law but it is administering the Executive conception of the truth.

III. The Constitutional Infirmity: Analyzing the *Kunal Kamra* Verdict

The Bombay HC ruled in favor of Kunal Kamra[8], in a constitutional challenge of the FCU led by political satirist in Kunal Kamra and others v Union of India.

A. The Split Verdict (January 2024)

The Division Bench of the Bombay High Court delivered a split verdict in January 2024, highlighting the deep ideological divide on the issue.

1. Justice G.S. Patel (Striking Down the Rule) Justice Patel's opinion was a robust defense of free speech. He argued that the State cannot arrogate to itself the power to decide truth.

- **Vagueness:** He considered words such as fake, false, and misleading to be too dangerous as they were vague. Is a government press release that is contradicted by an investigative reporting project fake?
- **Chilling Effect:** He believed that the elimination of Safe Harbour will have a Chilling Effect, compelling platforms to filter legitimate speech to escape liability.
- **Article 19(2):** He observed that falsity is not a basis of censorship over speech in Article 19(2). The State has the right to suppress speech only based on certain causes (public order, defamation, etc.), but not based on the fact that it is wrong.

2. Justice Neela Gokhale (Upholding the Rule)- Justice Gokhale applied the strict interpretation of the text, believing the government when it assured her that the FCU would not flag opinions, but simply patently false facts. She opined that there is no right to lie in the first place and that the FCU was only a device to warn intermediaries but not a tool of censorship. She considered the loss of Safe Harbour as an inevitable result of deliberately meaningfully

[6] Owen Fiss, *The Irony of Free Speech* (Harvard University Press, 1996).
[7] Esha Aggarwal, *Analysis of India's Internet Censorship Measures in Light of American Constitutionalism*, 8(2) Comparative Constitutional Law and Administrative Law Journal 70 (2023)
[8] *Kunal Kamra v Union of India* (2024) SCC OnLine Bom 221

hosting fake or false information.

B. The Tie-Breaker: Justice A.S. Chandurkar

Since the decision was a split decision, it was transferred to a third judge by the name Justice A.S Chandurkar. Justice Chandurkar agreed with Justice Patel in his overruling opinion issued in September of 2024, declaring the amendment unconstitutional. His argument builds a number of important principles of law:

- Article 14 (Equality): The rule established invidious discrimination by providing the Central Government with a safeguard (against fake news) afforded to individuals or other entities. The nexus lacks rationality to propose that the false news about the government is more harmful than the false news about the private citizens or opposition parties.
- Vagueness and Overbreadth: Justice Chandurkar concurred that the absence of definition of fake or misleading gave the Executive the carte blanche and contravened the doctrine of vague laws set in Shreya Singhal.
- Subjectivity of Truth: The opinion acknowledged that in a democratic system, the business of government was a disputed area. Unemployment data or COVID-19 death statistics or economic performance is usually subject to interpretation. When the government is given the authority to accredit its own version of such facts as the absolute truth, it paralyzes the democratic opposition.

The Tie-Breaker verdict affirms the fact that the FCU is not a fact-checking mechanism but a censorship mechanism which does not pass the constitutionality test.

IV. The Doctrine of "Chilling Effect" and Prior Restraint

One of the points that a critical analysis made concerning the synopsis of this paper was the use of the word coerced speech. The FCU does not oblige Twitter to declare This is fake (as is the case with tobacco warnings). Rather, it compels Twitter to censor other people. The right doctrine I could ascertained after the comments is the Chilling Effect.

A. Defining the Chilling Effect

As explained in the Supreme Court case of Anuradha Bhasin v. Union of India (2020)[9], a "Chilling Effect" is when the act of a state is so ambiguous or punitive that it prevents people

[9] *Anuradha Bhasin v Union of India* (2020) 3 SCC 637

to exercise their fundamental rights because they are afraid of consequences. The Chill works in two levels in the context of the FCU:

- The Intermediary Chill: Platforms are profit maximizing institutions. The price of establishing the truth of a political posting is very high; the price of removing it is zero. In the case where there is a risk of losing Safe Harbour (and in the context of the risk of criminal liability), the economic decision in rationality is to surrender to FCU immediately. This is "censorship by proxy.[10]"
- The User Chill: Understanding that the government will have content removed by the service, journalists and citizens will self-censor their criticism of the government, or risk de-platforming.

B. Prior Restraint by Proxy

The FCU is a very good system of prior restraint. Although the government is not literally preventing the publication, it is managing to make it impossible to publish[11]. The State is able to do what it cannot accomplish without the courts by the intermediary liability, the elimination of speech without judicial decision on whether it was unlawful. This goes against the tenet in K.A. Abbas v. Union of India[12] and subsequently in the case of Brij Bhushan[13], the Court found that prior restraint is a drastic curtailment of free speech which must be accompanied by the utmost level of justification- a level of justification which the undefined mandate of the FCU cannot fulfill.

V. Procedural Unreasonableness: The Contrast to X Corp v. Union of India[14]

As the Bombay High Court was testing the FCU, a case was being tried in the Karnataka High Court on blocking orders in X Corp v. Union of India. The comparison of these two cases shows the opposite approaches to the procedural fairness on the digital level.

A. X Corp Judgment (Karnataka HC).

In X Corp, the platform sought to appeal against a number of blocking orders that the

[10] Sowbaakhya Y. & V. Angelin Subiksha, *Content Moderation in the Digital Age: Striking a Balance between Rights and Responsibilities under the Indian Constitutional Framework*, 4 Legal Lock Journal 175 (2025)
[11] Anshu Gupta, *Recalibrating Free Speech in India's Digital Age: Balancing Expression, National Integrity and the Global Democratic Challenges*, 3 LawFoyer International Journal of Doctrinal Legal Research 703 (2025)
[12] *K.A. Abbas v. Union of India*, (1971) 2 SCC 446.
[13] *Brij Bhushan v State of Delhi* AIR 1950 SC 129
[14] *X Corp v Union of India* (2023) SCC OnLine Kar 45

government had made under section 69A of the IT Act. The HC of Karnataka rejected the petition and held that being a foreign company, X Corp was not entitled to rights under Article 19 (which applied only to citizens).

Nevertheless, the case is interesting in the way it suggests regarding procedure. The Court, even when dismissing the petition, was interacting with the "reasons" of blocking. Only in Section 69A, the government should issue a reasoned order and there is a review committee mechanism (however flawed).

B. The FCU: Procedural Black Hole

The FCU mechanism in Rule 3(1)(b) (v) is a theoretical black hole when compared to Section 69A.

- Nemo Judex In Causa Sua: The most obvious breach of natural justice is that the Central Government is the Judge of its Own Cause. The veracity of news concerning the Executive is determined by the FCU (an executive body). It lacks independent oversight, any judicial review prior to the takedown and any neutral arbiter.
- No Hearing: There is no hearing as there is in Section 69A blocking orders[15] (where the person creating the content likely has a right to be heard), and the FCU guidelines do not offer a way to allow the user to challenge the fake labelling of content before it is taken down.
- Avoiding Shreya Singhal: The FCU enables the government to accomplish takedowns without the takedown protection of the court order that is required under Shreya Singhal. It is an executive circumvention of the judiciary.

The Kunal Kamra tie-breaker ruling was right in finding that such absence of procedural protection makes the limitation unreasonable. Although an individual may agree that the issue of fake news exists, the process of fighting it cannot be random.

VI. Constitutional Analysis: The Proportionality Test

Any limitation to Article 19(1)(a) should pass the four-pronged Proportionality Test established in Justice K.S. Puttaswamy v. Union of India[16] (II) (Aadhaar Judgment). The FCU is guilty at least of three counts[17].

[15] Sehgal, Divyansha and Grover, Gurshabad, Online Censorship: Perspectives from Content Creators and Comparative Law on Section 69A of the Information Technology Act (March 30, 2023)
[16] *Justice KS Puttaswamy (Retd) v Union of India (II)* (2019) 1 SCC 1.
[17] Gautam Bhatia, *The Transformative Constitution: A Radical Biography in Nine Acts* (HarperCollins India 2019).

1. **Legitimate Goal:** The State claims it is the goal of curbing misinformation. Though valid in theory, the Supreme Court has never deemed that truth in itself is a restriction under the Article 19(2)[18]. The limitations should be subordinate to certain heads such as the public order or the State security. Speech that is not threatening to the order of the people is a constitutional right to lie.
2. **Rational Nexus:** There is no rational nexus between the objective (reducing fake news) and the classification (defending only the Central Government). How come that fake news about the Opposition Leader is not as harmful to the democracy as fake news about the Prime Minister? Such bi-sided protection implies that it is not about truth but about reputation management of the ruling party[19].
3. **Necessity (Least Restrictive Measure):** The Press Information Bureau (PIB) already exists in the government where clarifications are made. It will be able to mark the posts as disputed (a pro speech approach) instead of compelling takedowns (a no speech approach). The FCU mechanism does not justify necessity.[20].
4. **Balancing:** The harm to democratic speech, occasioned by the Chilling Effect, is much greater than the good of eliminating fake news about government business.

The Doctrine of Unconstitutional Conditions:

Lastly, FCU regime contravenes the Doctrine of Unconstitutional Conditions. This principle of the law was first developed in the U.S. Supreme Court ruling in Frost and Frost Trucking Co. v. Railroad Commission[21], which states that a government can never make the granting of a benefit privilege (Safe Harbour immunity, in this case) conditional upon the granting of a constitutional right (Freedom of Speech)[22]. The State is pressuring people to comply by informing intermediaries that, in order to have immunity, they must surrender their right to host critical speech, and it does so in a way that avoids constitutional review.

[18] Aarya Deshmukh, *Accountability in the Digital Realm: Examining Internet Intermediary Liability*, 7 International Journal of Law Management & Humanities 2742 (2024)
[19] Arun, Chinmayi and Singh, Sarvjeet, Online Intermediaries in India (February 18, 2015). NOC Online Intermediaries Case Studies Series
[20] V Devadasan, 'Conceptualising India's Safe Harbour in the Era of Platform Governance' (2024) 19 Indian Journal of Law and Technology 1.
[21] *Frost & Frost Trucking Co v Railroad Commission* 271 US 583 (1926)
[22] Kathleen M Sullivan, 'Unconstitutional Conditions' (1989) 102 Harvard Law Review 1413.

VII. Conclusion:

The "truth" is rarely binary. The facts and opinion and analysis are interwoven in the space of public policy whether it is the effectiveness of a vaccine, the effects of demonetization, or the facts relating to cause of a train crash.

The 2023 Amendment and the creation of the Fact Check Unit is an effort to reduce this complexity into a binary of "True" (State-approved) and "False" (State-disapproved). The Bombay High Court rightly thought when it in the Kunal Kamra tie-breaker said that this kind of power is the bane of a constitutional democracy. The State has established a framework of unconstitutional terms by making the Safe Harbour immunity of the intermediaries contingent upon their subordination to the FCU. It compels the private entities to sell the right to their users to engage in free speech to their survival as a corporate entity.

The decision to strike down the FCU rule in September 2024 is a major win to online rights in India. Nevertheless, the court struggle will probably be transferred to the Supreme Court. It must be restated in the Supreme Court that the adjudicator of the illegality of speech should be a judicial mind and not an executive hand as in the case of Shreya Singhal. With the FCU being left alone, India will be putting itself into a situation where the only truth that the marketplace of ideas allows is the truth that the government allows to exist.