2024:BHC-OS:1575-DB

Shephali

REPORTABLE

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION (L) NO. 9792 OF 2023

KUNAL KAMRA,
Indian inhabitant, aged 34 years,
Residing at C-33, Kataria Colony, Cadell Road, Mahim, Mumbai 400 016. ...PETITIONER

~ VERSUS ~

UNION OF INDIA,
Represented by the Secretary,
Ministry of Electronics and Information Technology, having its office at Electronics Niketan, 6 CGO Complex, Pragati Vihar Lodhi Road, New Delhi 110 003. ...RESPONDENT

WITH
WRIT PETITION (L) NO. 14955 OF 2023

EDITORS GUILD OF INDIA,
having their registered office at B-62, Gulmohur Park (first floor), New Delhi 110 049. ...PETITIONER

~ VERSUS ~

Union of India,
Ministry of Electronics and Information Technology, having office at Electronics Niketan, 6 CGO Complex, Pragati Vihar Lodhi Road, New Delhi 110 003.

...Respondent

WITH

INTERIM APPLICATION (L) NO. 17704 OF 2023

IN

WRIT PETITION (L) NO. 14955 OF 2023

1. **News Broadcasters & Digital Association,**
   Through its Secretary General, Mrs Annie Joseph, Age – 67 years, Registered Office at: FF-42, Omaxe Sqaure, Commercial Centre, Jasola, New Delhi 110 025.
2. **Bennett, Coleman & Company Limited,**
   Through its Authorized Signatory Mr Sanjay K Agarwal, Age – 54 years, Having Office at Trade House, Ground Floor, Kamala Mills Compound, Senapati Bapat Marg, Lower Parel West, Mumbai 400 013.
3. **TV 18 Broadcast Limited,**
   Through its Authorized Signatory Mr Satyajit Sahoo, Age – 39 years, Having Office at Empire Complex, 414, Senapati Bapat Marg, Lower Parel West, Mumbai 400 013.

...Applicants

In The Matter Between

Editors Guild of India,
having their registered office at B-62, Gulmohur Park (first floor), New Delhi 110 049.
...Petitioner

~ versus ~

Union of India,
Ministry of Electronics and Information Technology, having office at Electronics Niketan, 6 CGO Complex, Pragati Vihar Lodhi Road, New Delhi 110 003.
...Respondent

WITH

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 7953 OF 2023

Association of Indian Magazines,
Registered office at E-3 Jhandealan Estate, New Delhi 110 055 Through its President Srinivasan B R/o Gemini House, Old No. 58, New No. 36, 3rd Main Road, Gandhinagar, Adyar, Chennai 600 020.
...Petitioner

~ versus ~

Union of India,
through the Secretary,
Ministry of Electronics and Information Technology, having its office at Electronics Niketan, 6 CGO Complex, Lodhi Road, New Delhi 110 003.
...Respondent

Appearances

for the petitioner in wpl/9792/2023 — Kunal Kamra	**Mr Navroz Seervai, Senior Advocate, and Mr Darius Khambata, Senior Advocate**, *with Arti Raghavan, Vrinda Bhandari, Gayatri Malhotra, Abhinav Sekhri & Tanmay Singh, i/b Meenaz Kakalia.*
for the petitioner in wpl/14955/2023 — Editors' Guild	**Mr Shadan Farasat**, *with Hrishika Jha & Natasha Maheshwari, i/b Bimal Rajsekhar.*
for the applicant in ial/17704/2023 — news broadcasters & digital association	**Mr Arvind Datar, Senior Advocate**, *with Nisha Bhambani, Rahul Unnikrishnan & Bharat Manghani, i/b Gautam Jain.*
for the petitioner in wp/7953/2023 — Association of Indian Magazines	**Mr Gautam Bhatia**, *with Radhika Roy, i/b Aditi Saxena.*
for respondent UoI in all three petitions	**Mr Tushar Mehta, Solicitor General & Mr Devang Vyas, Additional Solicitor General,** *With Rajat Nair, Gaurang Bhushan, Aman Mehta, DP Singh, Savita Ganoo, Anush Amin, Vaishnavi.*
Present for the Respondents	**Bhuvnesh Kumar**, Addl Secretary, **Vikram Sahay**, Director & **Ritesh Kumar Sahu**, Scientist D.

CORAM : G.S.Patel &
Neela Gokhale, JJ.

RESERVED ON : 29th September 2023

PRONOUNCED ON : 31st January 2024

ORAL JUDGMENT (*Per GS Patel J*):-

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A. INTRODUCTION & OVERVIEW

1. These cases seem to me to represent an issue of significant immediacy in our times. On the one hand, the seemingly limitless reach and expansion of modes of communication over the internet, especially through social media. On the other, digital technology — the very one that powers the internet — now also allows, in a manner and to an extent never known before, the *manipulation* of information — text, graphic, videographic — to generate almost indetectable false information; information often revealed after the event to be 'fake'. This is far beyond mere forgery; it is something else altogether: an entire chunk of information is manipulated to produce something wholly false. The voice of a famous politician is replicated with words he never spoke. The face of an actor is superimposed on a body and nobody can tell. This is not parody. This is not a prank. But because these fakes — most especially the 'deep fakes' where entire videos are conjured up — have such verisimilitude and because they, too, are capable of instant global propagation via the internet, their influence is profound. The boundaries between truth and falsehood are blurred. And with that, comes the blurring of the dividing line between the constitutional guarantee of the freedom of speech and expression and state-imposed limits on it. After all, who is to decide what is fake or false and what is authentic?

2. The several Petitioners and the Applicant, different voices from different quarters, are united in their complaint about the Central Government's 2023 amendment to a particular Rule under the Information Technology Act. This amendment, they all say, has

just one purpose: to muzzle criticism and questioning of the Central Government as it goes about its 'business', to stifle dissent from what the Central Government puts out in regard to affairs of the state. Through this amendment, the Central Government has anointed itself as the sole arbiter of what is or what is not 'fake, false or misleading'. It, and it alone, will decide this, including the entirely ambiguous term 'misleading'; and when it does, dare any 'intermediary' allow such information to continue to be hosted on a social media platform, that intermediary immediately risks losing statutory protection. The entire amendment is overbroad, vague and without controlling guidelines. It does not even provide for an opportunity for the propounder of any information to defend its correctness, and the government becomes a judge in its own cause (hence another dimension of violation of principles of natural justice).

3. The impugned Rule is ultra vires the governing parent Act, goes the submission. It purports to do that which the Act itself cannot. No rule by executive action, made under any rule-making power, can either go beyond the statute or do what the statute cannot.

4. Therefore, the amendment in question is, the Petitioners say, violative of constitutional freedoms; specifically, those guaranteed under Article 19(1)(a) of the Constitution of India, the right to free speech. At least one Petitioner has an argument positioned under Article 19(1)(g), saying that the amendment infringes his right to carry on a legitimate profession.

5. For different reasons, the Petitioners claim, the amendment is arbitrary and ultra vires Article 14. To say that the amendment is 'limited' to 'the business of the government' is, the Petitioners say, nothing but smoke and mirrors. Nobody knows where the 'business of government' begins or where it ends. In any case, when it comes to the mainstream press and media, as a submission from Mr Seervai and Mr Farasat would have it, 'the government's business *is* our business'. No government can tell the press to 'mind its own business', for the function of the press is precisely the opposite: at every stage to mind the government as it goes about whatever it believes it is its business.

6. At least one fully government controlled entity, the Press Information Bureau, already has a significant social media presence. It is already active on it. Therefore, there is no need for any other 'fact check unit' to be created. The sinister and insidious facet to the impugned amendment is that this new agency has far more than a loud bark: it has fangs and claws, for its unilateral view of what is or is not the 'truth' is accompanied by a requirement of removal of what it has so determined (to be fake, false or misleading); and an intermediary can refuse it only on pain of losing statutory protector or 'safe harbour'. Taken together, this has what they describe as 'a chilling effect' on the right to free speech and freedom of the press.

7. There is also a submission that no such amendment could be effected by executive action or delegated legislation. Even a statutory amendment by Parliament was impermissible for that would violate not just Article 19(1)(a) but also Article 141 of the Constitution.

8. Not so, says Mr Mehta, learned Solicitor-General for the Union of India. He points to the widely reported perils of allowing fake news and information to proliferate on social media. Doing nothing is not an option. Indeed, it is the very intermediaries who asked for Central Government intervention. What the Central Government has done, he maintains, is walk a tightrope, treading very carefully within the boundaries of Article 19(2), the permissible limitations on Article 19(1)(a). Far from being in the slightest manner 'arbitrary', the amendment strikes an appropriate balance. It is, therefore, neither vulnerable on the principle of *Wednesbury* unreasonableness, nor does it violate the doctrine of proportionality. Worse, the 2023 amendment is nothing but a minor adjustment to a previous amendment to which no one raised the slightest objection. There is, Mr Mehta maintains, a much wider public and social interest that must be served. There is far too much fakery abounding; *someone* has to be charged with the responsibility of detecting and identifying it. That task is not one to be lightly undertaken: fakery cannot be met with or set against fakery. It is a responsibility of the highest order. The government is possibly if not *in loco parentis* at least *parens patriae*, an authority regarded and accepted as the legal protector of citizens otherwise unable to protect themselves. This is not condescension, Mr Mehta is quick to clarify; it is by no means an assertion that the citizens of this country are irresponsible or weak or any such thing. It is simply that the power of internet dissemination, social media and technology have blurred the boundaries between truth and falsehood in a manner never before known to mankind. What the amendment seeks to do, therefore, is to establish an agency as objective as possible, in whom trust can be reposed because it is backed by legal authority, to detect — not 'decide', not 'arbiter', but

detect — that which is fake, false and misleading. The amendment further circumscribes even this authority by limiting it only to the 'business of government'; not the statements or public assertions of individuals, whether politicians or bureaucrats, but only the *business* of government. He maintains that what constitutes 'the business of government' is well-defined and well-known to all. At no time has the government proposed to arrogate to itself the sole power to detect *everything* that is or may be 'fake, false or misleading'. Lastly, even if some information about the business of government is found to be 'fake, false or misleading' by the fact-check unit, the intermediary is only required to take reasonable efforts not to host it. Even if it does not, there is no immediate consequence. It only loses immediate and instant immunity, akin to losing an indemnity. It may then have to face a lawsuit; but in that lawsuit, all its defences are open to it, including inviting a judicial pronouncement that would have the effect of restoring that immunity, of returning the intermediary to safe harbour. In any case, he concludes, this is a question of interpretation of a statute. This court would be well within its remit to limit the ambit of any clause or word if that would save the amendment, for the first effort of any writ court vested with the power to decide on the validity of a statute must be, it is well settled, to find a way to uphold it. Striking it down is the exception, not the rule.

9. I have attempted the preceding summary of the contesting position in the broadest terms to more accurately focus on the issues before us. For, too often, the central issue is occluded by a direct plunge into the deep end of the pool. Does the 2023 amendment violate the right to free speech? Is it unconstitutional as being

manifestly arbitrary? Is its framing beyond executive authority? These are the questions we are to decide.

10. We heard Mr Seervai, Mr Khambata, Mr Datar, Mr Farasat and Mr Bhatia for the Petitioners, and Mr Mehta for the Union of India at great length. Much learning and authority was cited before us, including from American jurisprudence. Mr Mehta was at pains to highlight startling instances of fake information and deep fakes.

11. Having considered all this material and weighed the rival submissions carefully, I am not persuaded that I can accept Mr Mehta's formulation or submissions. In my view, Rule would have to be made absolute. I would strike down the 2023 amendment. My reasons follow.

B. THE PETITIONERS, THEIR CONCERNS & THE PRAYERS

12. A description of the parties is not usually necessary, except to identify their concerns or the issues they raise. But in this case, the concerns of all the Petitioners and the Applicant are one. The issue they raise is one. Yet they come to this from disparate quarters. In itself, that lends some colour to the canvas.

13. Kunal Kamra is the lone individual in this group of case. He is by profession a stand-up 'comedian', but that word is not to be read in any disparaging sense. It is what he does. He makes jokes abouts

things and people, highlights and parodies the absurdities in daily life. This is known as *observational comedy*. His entire oeuvre is rooted in some facet or the other of life, politics, art and more. Of course there is parody and exaggeration — that is the whole point, after all — and he does not pretend to be a replicator, narrator or a conveyor of unvarnished 'truth' or 'facts'. In more colloquial terms, he 'puts his spin' on things. Of him, more than others, there may well be substance to the adage *in joco veritas*: in jest, there is truth. Conceptually, this is not very different from the print cartoons we see in our daily press each day. How is he affected by this amendment? He says that essential to his work (it is the only thing he does) and is therefore not only a matter of free speech but also one of his fundamental right to carry on his chosen profession.

14. The Editors Guild and the Association of Indian Magazines are joined by the News Broadcasters and Digital Association. All are coalitions constituted in varying degrees of formality, but joined in their challenge. They all say that whether their publications, channels or media are in print, television or purely internet-based, every one of them relies for greater reach and readership on social media platforms. They all have internet-based versions or editions and these may take different forms. But the publications, and individual reporters or journalists who work for them, all have social media accounts. The impugned amendment affects them directly if their work is going to be subjected to such 'fact-checking' by an agency entirely controlled by the very government on which they report and about which they publish.

15. The News Broadcasters and Digital Association was a late entrant. We did not formally permit the intervention. Doing so would have disrupted an already tight schedule. But we did allow Mr Datar for the News Broadcasters to address us on the distinct legal issue he raised.

16. The prayers in Kamra's petition are enough for my purposes. They read:

> "(a) that this Hon'ble Court be pleased to declare that **Rules 3(i)(II)(A) and (C) to the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Amendment Rules, 2023 – that amend Rule 3(1)(b)(v) of the IT Rules, 2021 – unconstitutional being ultra vires Article 14, Article 19(1)(a) and 19(1)(g), S. 79 & S. 87(2)(z) and (z)(g) of the IT Act** is void *ab initio;*
>
> (b) That this Hon'ble Court be pleased to issue a writ of mandamus or a writ in the nature of mandamus or any other writ, order or direction against the Respondent **restraining the Respondent by itself, its servants, agents, officers and subordinates or any other persons acting by, through or under them from in any manner whatsoever acting upon or implementing or enforcing Rules 3(i)(II)(A) and (C)** to the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Amendment Rules, 2023 (that amend Rule 3(1)(b)(v) of the It Rules, 2021);"
>
> (*Emphasis added*)

17. Since the Petitioners' submissions ranged over many issues, from the beginning we required that they divide these between themselves. Mr Seervai and Mr Khambata addressed us on the questions under Article 19(1)(a), the question of discrimination under

Article 14 and the case on violation of the rules of natural justice. Mr Farasat, very capably standing in for Mr Sibal, addressed us on the questions raised under Article 19(1)(g) and the matter of 'manifest arbitrariness'. Mr Bhatia's submissions centred around the questions of the impugned amendment being ultra vires. Mr Datar's submissions were related to the illegitimacy of exercising a rule-making power for such an amendment.

C. GENERAL PRINCIPLES ON FUNDAMENTAL RIGHTS AND ARBITRARINESS

18. Some of the arguments by the Petitioners drew heavily on American jurisprudence in relation to the right to free speech. I do not believe it is necessary, or even prudent, to examine those dimensions in any detail. Our jurisprudence in India regarding Part III and especially the remit of Article 19 and Article 14 is now firmly established. My summary of the rival submissions attempted to show what these cases are about. But it is equally important to understand what these cases are *not* about. We are not tasked with expanding or enlarging (nor shrinking or limiting) the ambit of Articles 19 or 14 per se. We are asked to assess whether the impugned rule can be fairly said to be correctly positioned within the existing jurisprudence. Is it within the guardrails or does it fall outside them?

19. For instance, Mr Seervai in particular took us through American law to suggest that the right to free speech includes a known falsehood. That is to say, the fundamental right to free speech

includes the right to knowingly lie, but this is subject only to such civil remedies as might otherwise exist. Mr Mehta was quite considerably exercised by the breadth of this submission and, from his perspective, perhaps understandably so.

20. But I need not venture into that territory. The reason seems to me plain. It is best explained by the rival first amendments to the two Constitutions, the American and the Indian. The First Amendment to the US Constitution did not limit the right to free speech. It went the other way. It constrained the power of Congress to curtail that right.[1]

21. Our First Amendment did the opposite (and there is a historical and jurisprudential context possibly best left for discussion elsewhere): it expanded the state's powers to curtail fundamental rights. Article 19(2) was substantially amended. Originally, it said:

> (2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to, libel, slander, defamation, contempt of court or any matter which offends against decency or morality or which undermines the security of, or tends to overthrow, the State.

The First Amendment substituted Article 19(2) to read:

> (2) Nothing in sub clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from

1 "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

> making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub clause *in 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*.
>
> (*The italics show the new introductions*)

22. The effect of this amendment need not detain us, for it has fallen for interpretation many times. The general principles governing Article 19(1)(a) and 19(2) are firmly established. Indeed, Mr Mehta has no quarrel with the generality of the propositions regarding the scope and ambit of Articles 19(1)(a) and 19(2) at all.

23. Consequently, the scope of the discourse is automatically narrowed. As I said, I must see if the impugned amendment is within the boundaries of Article 19(2).[2]

24. With that in mind, I proceed to set out the broadest principles that emerge from the discussions before us.

(i) Articles 19(1)(a) and 19(1)(g) are expansive. They have no specified limits. The restrictions on those rights come under Articles 19(2) and 19(6). It is Articles 19(2) and 19(6) that are strictly confined, i.e., it is the power of curtailment of fundamental rights that is restricted.

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2 This is on the assumption that it is a permissible exercise of a rule-making power to begin with. Mr Datar's submission that there is no such power at all stands apart, and we have dealt with it separately.

(ii) Consequently, any curtailment of a fundamental right guaranteed under Article 19(1)(a) or 19(1)(g) must be demonstrated to fall within the permissible limits of Article 19(2) and Article 19(6).

(iii) The curtailment power Articles 19(2) and 19(6) are not expansive or expandable. The fundamental rights are (for instance, the constant expansion of Article 21).[3]

(iv) Any law must survive the test of Article 14, and, specifically, both parts of it: equality before the law and equal protection of law. Settled jurisprudence tells us that this means there cannot be—

(i) invidious discrimination;

(ii) impermissible must be permissible (even a class of one is permissible),

(iii) the classification must bear a rational nexus to the object sought to be achieved;

(iv) a violation of principles of natural justice;

(v) a conferment of unbridled and uncanalised discretionary power;

(vi) uneven and arbitrary or pick-and-choose dealing.

(v) The *mere* possibility of misuse or abuse of a statute is not a reason to strike it down. The direct potential for wanton abuse may have different implications.

---

3 *Romesh Thapar v State of Madras*, 1950 SCR 594.

(vi) The lack or want of an underlying determining principle constitutes manifest arbitrariness sufficient to invalidate a statute; but that lack of a principle must be manifest, self-evident, apparent and facial. If there is no determining principle, the statute is 'manifestly arbitrary'.

25. Petitioners' counsel would have it that the impugned amendment fails every single one of these well-established tests. Mr Mehta maintains the contrary, and it is his submission that every single Petition points only to the mere possibility of misuse or abuse.

26. With this, I turn to the impugned amendment and the relevant statutory provisions.

D. THE IMPUGNED AMENDMENT & STATUTORY PROVISIONS

I Social Media: Users and Intermediaries

27. "Social media" is what lawyers like to call a 'term of art', which is to say it has no definition in statute, and its everyday meaning is accepted. It refers to various internet-based services such as Facebook, X (the social media service formerly known as Twitter), YouTube and many others. These are *digital platforms*. At least in theory, they provide no content themselves, unlike the websites of, say, news organizations or broadcasters, which have their in-house

bespoke content hosted on their websites. Social media services also have their websites, but the content here is (at least supposedly) entirely user-driven. Individual users accept the terms of service, sign up, create online social media accounts, and then with their chosen online names (which may have no relation at all to their true identities), 'share' content. Where users get their content is uncontrolled and often unknown. Some of it may be self-developed (for instance, if Kamra has a video made of one of his performances), but this is not a requirement. Users control access to their content. An entirely open access user account allows everyone to access all content of that user. A user may choose to restrict his or her content to the extent the social media allows it. Nobody blocks all user access; that would be pointless, rather like talking to oneself.

28. The entity that owns, operates and manages the social media service is, in our law, the 'intermediary'. It hosts *the service*. The service lets users share content. The intermediary does not upload or share content. Intermediaries have in-house rules of conduct. Transgressions can result in suspension or even cancellation of the user account.

29. But because the content is uploaded to, accessible on and from and therefore resides on the social media service provider's computer networks and systems, the intermediary assumes limited responsibility for this content; typically, a 'best efforts' provision not to permit content that violates its terms of service or law (include intellectual property infringement). As long as an intermediary does

this, it enjoys 'safe harbour': it cannot be held responsible in law for the content itself.

30. Because social media is so easily accessible — on any internet-enabled device — it has a reach beyond any form of communication previously known to humankind. All one needs is a connection to the internet. The sheer power this represents can be frightening, and few are more alarmed by it than those whose power over individuals is threatened by its inherent subversiveness. Recent history in the 20th and 21st century tells us enough about the power of social media.

31. The contestation before us is, therefore, not about social media generally or the technology. It is a battle for control — or some level of control — over digital *content*.

II The Information Technology Act 2000

32. The Information Technology Act 2000 ("**the IT Act**") is the parent statute. We need to look at some of its definitions and the provisions regarding intermediaries.

33. I begin with the definition of 'intermediary' in Section 2(w), added by the 2009 amendment:

> (w) "intermediary", with respect to any particular electronic records, means any person **who on behalf of another person receives, stores or transmits that record or provides any service with respect to that record** and includes telecom service providers, network service providers, internet service providers, web-hosting service

> providers, search engines, online payment sites, online-auction sites, online-market places and cyber cafes;
>
> (*Emphasis added*)

34. Other definitions in Section 2 of the IT Act are more than somewhat confusing and intertwined:

> (o) "data" **means a representation of information**, knowledge, facts, concepts or instructions which are being prepared or have been prepared in a formalised manner, and is intended to be processed, is being processed or has been processed in a computer system or computer network, and may be in any form (including computer printouts magnetic or optical storage media, punched cards, punched tapes) or stored internally in the memory of the computer;
>
> (t) "electronic record" **means data**, record or data generated, image or sound stored, received or sent in an electronic form or micro film or computer generated micro fiche;
>
> (v) "information" **includes data**, message, text, images, sound, voice, codes, computer programmes, software and data bases or micro film or computer generated micro fiche;
>
> (*Emphasis added*)

35. The definition of 'information' is sufficient for my purposes.

36. Intermediaries are the subject of Chapter XII of the IT Act, added by the 2009 amendment. The Chapter has a single section:

CHAPTER XII

INTERMEDIARIES NOT TO BE LIABLE IN CERTAIN CASES

79. Exemption from liability of intermediary in certain cases.—

(1) **Notwithstanding anything contained in any law for the time being in force but subject to the provisions of sub-sections (2) and (3), an intermediary shall not be liable for any third party information, data, or communication link made available or hosted by him.**

(2) The provisions of sub-section (1) shall apply if—

(a) the function of the intermediary is limited to providing access to a communication system over which information made available by third parties is transmitted or temporarily stored or hosted; or

(b) the intermediary does not—

(i) initiate the transmission,

(ii) select the receiver of the transmission, and

(iii) select or modify the information contained in the transmission;

(c) **the intermediary observes due diligence while discharging his duties under this Act and also observes such other guidelines as the Central Government may prescribe in this behalf.**

(3) **The provisions of sub-section (1) shall not apply if—**

(a) the intermediary has conspired or abetted or aided or induced, whether by threats or promise or otherwise in the commission of the unlawful act;

(b) upon receiving actual knowledge, **or on being notified by the appropriate Government or its**

> **agency that any information, data or communication link residing in or connected to a computer resource controlled by the intermediary is being used to commit the unlawful act, the intermediary fails to expeditiously remove or disable access to that material on that resource without vitiating the evidence in any manner.**
>
> *Explanation.*—For the purposes of this section, the expression "third party information" means any information dealt with by an intermediary in his capacity as an intermediary.
>
> (*Emphasis added*)

37. Section 79(1) is the *safe harbour* provision. It provides immunity. It is subject to Section 79(2) and, for my purposes, in particular Section 79(2)(c), the duty to 'observe due diligence'.

38. Section 87 confers rule-making power. We are concerned with Sections 87(1)(z) and 87(1)(zg), the latter also added by the 2009 amendment:

> **87. Power of Central Government to make rules.—**
>
> **(1) The Central Government may, by notification in the Official Gazette and in the Electronic Gazette, make rules to carry out the provisions of this Act.**
>
> **(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:—**
>
> … …
>
> (z) **the procedures and safeguards for blocking for access by the public under sub-section (3) of section 69A;**

(zg) **the guidelines to be observed by the intermediaries under sub-section (2) of section 79**;

(*Emphasis added*)

39. One further provision needs to be noticed. This is the Section 69A, the so-called 'takedown' provision:

> **69A. Power to issue directions for blocking for public access of any information through any computer resource.—**
>
> (1) Where the Central Government or any of its officers specially authorised by it in this behalf is satisfied that it is necessary or expedient so to do, in the interest of sovereignty and integrity of India, defence of India, security of the State, friendly relations with foreign States or public order or for preventing incitement to the commission of any cognizable offence relating to above, it may subject to the provisions of sub-section (2), for reasons to be recorded in writing, by order, direct any agency of the Government or intermediary to block for access by the public or cause to be blocked for access by the public any information generated, transmitted, received, stored or hosted in any computer resource.
>
> (2) The procedure and safeguards subject to which such blocking for access by the public may be carried out, shall be such as may be prescribed.
>
> (3) The intermediary who fails to comply with the direction issued under sub-section (1) shall be punished with an imprisonment for a term which may extend to seven years and also be liable to fine.

40. In the celebrated Supreme Court decision in *Shreya Singhal v Union of India*,[4] the Supreme Court upheld the validity of Sections 69A and 79. It struck down another provision, Section 66-A, and it did so on the ground that it was ultra vires Article 19(1)(a) and 19(2) of the Constitution. Section 66-A provided for punishment for sending offensive messages through communication service, etc. I quote this section as it stood before *Shreya Singhal*, for it is the case of the Petitioners that many of the considerations that weighed with the Supreme Court in holding Section 66A to be unconstitutional apply proprio vigore to the impugned amendment. These include, importantly, the concepts of statutory overbreadth and vagueness. The Petitioners also argue that the endeavour by the Union of India today is virtually to reopen and reagitate issues that were closed against it in *Shreya Singhal*. Section 66-A read:

> **66A. Punishment for sending offensive messages through communication service, etc.—**
>
> Any person who sends, by means of a computer resource or a communication device,—
>
> (a) any information that is grossly offensive or has menacing character; or
>
> (b) any information which he knows to be false, but for the purpose of causing annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred or ill will, persistently by making use of such computer resource or a communication device;
>
> (c) any electronic mail or electronic mail message for the purpose of causing annoyance or inconvenience or to

4 (2015) 5 SCC 1.

deceive or to mislead the addressee or recipient about the origin of such messages,

shall be punishable with imprisonment for a term which may extend to three years and with fine.

Explanation.—For the purposes of this section, terms "electronic mail" and "electronic mail message" means a message or information created or transmitted or received on a computer, computer system, computer resource or communication device including attachments in text, image, audio, video and any other electronic record, which may be transmitted with the message.

III *The Impugned 2023 Amendment*

41. On 25th February 2021, the Union of India notified the *Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021* ("**the Intermediary Rules**"; "**the Rules**"). These were expressly stated to be made under Section 87(1)(z) and (zg) of the IT Act.

42. Some definitions from Rule 2(1):

(i) 'digital media' means digitized content that can be transmitted over the internet or computer networks and includes content received, stored, transmitted, edited or processed by—

(i) an intermediary; or

(ii) a publisher of news and current affairs content or a publisher of online curated content;

(j) 'grievance' includes any complaint, whether regarding any content, any duties of an intermediary or publisher under the Act, or other matters pertaining to the

computer resource of an intermediary or publisher, as the case may be;

(k) 'Grievance Officer' means an officer appointed by the intermediary or the online gaming self-regulatory body or the publisher, as the case may be, for the purposes of these rules;

(ka) 'Grievance Appellate Committee' means a grievance appellate committee constituted under rule 3A;

(m) 'news and current affairs content' includes newly received or noteworthy content, including analysis, especially about recent events primarily of socio-political, economic or cultural nature, made available over the internet or computer networks, and any digital media shall be news and current affairs content where the context, substance, purpose, import and meaning of such information is in the nature of news and current affairs content.

(n) 'newspaper' means a periodical of loosely folded sheets usually printed on newsprint and brought out daily or at least once in a week, containing information on current events, public news or comments on public news;

(o) 'news aggregator' means an entity who, performing a significant role in determining the news and current affairs content being made available, makes available to users a computer resource that enable such users to access the news and current affairs content which is aggregated, curated and presented by such entity.

(q) 'online curated content' means any curated catalogue of audio-visual content, other than news and current affairs content, which is owned by, licensed to or contracted to be transmitted by a publisher of online curated content, and made available on demand, including but not limited through subscription, over the internet or computer networks, and includes films, audio visual programmes, documentaries,

television programmes, serials, podcasts and other such content;

(s) 'publisher' means a publisher of news and current affairs content or a publisher of online curated content;

(t) 'publisher of news and current affairs content' means an online paper, news portal, news aggregator, news agency and such other entity called by whatever name, which is functionally similar to publishers of news and current affairs content but shall not include newspapers, replica e-papers of the newspaper and any individual or user who is not transmitting content in the course of systematic business, professional or commercial activity;

(u) 'publisher of online curated content' means a publisher who, performing a significant role in determining the online curated content being made available, makes available to users a computer resource that enables such users to access online curated content over the internet or computer networks, and such other entity called by whatever name, which is functionally similar to publishers of online curated content but does not include any individual or user who is not transmitting online curated content in the course of systematic business, professional or commercial activity;

(v) 'significant social media intermediary' means a social media intermediary having number of registered users in India above such threshold as notified by the Central Government;

(w) 'social media intermediary' means an intermediary which primarily or solely enables online interaction between two or more users and allows them to create, upload, share, disseminate, modify or access information using its services;

(x) 'user' means any person who accesses or avails any computer resource of an intermediary or a publisher for the purpose of hosting, publishing, sharing, transacting,

> viewing, displaying, downloading or uploading information and includes other persons jointly participating in using such computer resource and addressee and originator;
>
> (y) 'user account' means the account registration of a user with an intermediary or publisher and includes profiles, accounts, pages, handles and other similar presences by means of which a user is able to access the services offered by the intermediary or publisher.

43. Part II of the Intermediary Rules deal with (a) due diligence by intermediaries, linking to Section 79; and (b) Grievance Redressal Mechanism. It contains Rules 3 to 7.

44. Rule 3 is the contentious rule. Parts of it were amended in 2022 and then again in 2023 (which is challenged before us). There is no challenge to the 2022 amendment. The opening part of Rule 3(1), though amended, is not controversial:

> 3.(1) **Due diligence by an intermediary**: An intermediary, including a social media intermediary, a significant social media intermediary and an online gaming intermediary, shall observe the following due diligence while discharging its duties, namely:— …

45. Clauses (a) and (b) that follow were substituted by a 2022 amendment with effect from 28th October 2022. Before substitution, they read:

> "(a) the intermediary shall prominently publish on its website, mobile based application or both, as the case may be, the rules and regulations, privacy policy and user agreement for access or usage of its computer resource by any person;

(b) the rules and regulations, privacy policy or user agreement of the intermediary shall inform the user of its computer resource not to host, display, upload, modify, publish, transmit, store, update or share any information that,—

(i) belongs to another person and to which the user does not have any right;

(ii) is defamatory, obscene, pornographic, paedophilic, invasive of another's privacy, including bodily privacy, insulting or harassing on the basis of gender, libellous, racially or ethnically objectionable, relating or encouraging money laundering or gambling, or otherwise inconsistent with or contrary to the laws in force;

(iii) is harmful to child;

(iv) infringes any patent, trademark, copyright or other proprietary rights;

(v) violates any law for the time being in force;

(vi) **deceives or misleads the addressee about the origin of the message or knowingly and intentionally communicates any information which is patently false or misleading in nature but may reasonably be perceived as a fact;**

(vii) impersonates another person;

(viii) threatens the unity, integrity, defence, security or sovereignty of India, friendly relations with foreign States, or public order, or causes incitement to the commission of any cognisable offence or prevents investigation of any offence or is insulting other nation;

> (ix) contains software virus or any other computer code, file or program designed to interrupt, destroy or limit the functionality of any computer resource;
>
> (x) **is patently false and untrue, and is written or published in any form, with the intent to mislead or harass a person, entity or agency for financial gain or to cause any injury to any person**;".
>
> (*Emphasis added*)

46. Then came the 2022 amendment with effect from 28th October 2022 and the 2023 amendment of 6th April 2023. In the extract below of Rule 3(1)(b), I have shown the relevant amendment in 2022 in italics, and the 2023 amendment in bold.[5] Underlining shows the portions in controversy.

> **3(1) Due diligence by an intermediary**: An intermediary, including a social media intermediary, a significant social media intermediary and an online gaming intermediary, shall observe the following due diligence while discharging its duties, namely:—
>
> (a) the intermediary shall prominently publish on its website, mobile based application or both, as the case may be, the rules and regulations, privacy policy and user agreement in English or any language specified in the Eighth Schedule to the Constitution for access or usage of its computer resource by any person in the language of his choice and ensure compliance of the same;

---

5 And, in the soft copy, since we are concerned with *malleability* of digital data, in blue for the 2022 amendment and red for the 2023 amendment.

(b) *the intermediary shall inform its rules and regulations, privacy policy and user agreement to the user in English or any language specified in the Eighth Schedule to the Constitution in the language of his choice and shall make reasonable efforts* **by itself, and to cause the users of its computer resource to not host**, *display, upload, modify, publish, transmit, store, update or share any information that*,—

(i) belongs to another person and to which the user does not have any right;

(ii) is obscene, pornographic, paedophilic, invasive of another's privacy including bodily privacy, insulting or harassing on the basis of gender, racially or ethnically objectionable, relating or encouraging money laundering or gambling, or an online game that causes user harm, or promoting enmity between different groups on the grounds of religion or caste with the intent to incite violence;

(iii) is harmful to child;

(iv) infringes any patent, trademark, copyright or other proprietary rights;

(v) *deceives or misleads the addressee about the origin of the message or knowingly and intentionally communicates any misinformation or information which is patently false and untrue or misleading in nature* **or, in respect of any business of the Central Government, is identified as fake or false or misleading by such fact check unit of the Central Government as the Ministry may, by**

notification published in the Official Gazette, specify;

(vi) impersonates another person;

(vii) threatens the unity, integrity, defence, security or sovereignty of India, friendly relations with foreign States, or public order, or causes incitement to the commission of any cognisable offence, or prevents investigation of any offence, or is insulting other nation;

(viii) contains software virus or any other computer code, file or program designed to interrupt, destroy or limit the functionality of any computer resource;

(ix) is in the nature of an online game that is not verified as a permissible online game;

(x) is in the nature of advertisement or surrogate advertisement or promotion of an online game that is not a permissible online game, or of any online gaming intermediary offering such an online game;

(xi) violates any law for the time being in force;

Explanation.—In this clause, "user harm" and "harm" mean any effect which is detrimental to a user or child, as the case may be;

(c) an intermediary shall periodically inform its users, at least once every year, that in case of non-compliance with rules and regulations, privacy policy or user agreement for access or usage of the computer

resource of such intermediary, it has the right to terminate the access or usage rights of the users to the computer resource immediately or remove non-compliant information or both, as the case may be;

(d) an intermediary, on whose computer resource the information is stored, hosted or published, upon receiving actual knowledge in the form of an order by a court of competent jurisdiction or on being notified by the Appropriate Government or its agency under clause (b) of sub-section (3) of section 79 of the Act, shall not host, store or publish any unlawful information, which is prohibited under any law for the time being in force in relation to the interest of the sovereignty and integrity of India; security of the State; friendly relations with foreign States; public order; decency or morality; in relation to contempt of court; defamation; incitement to an offence relating to the above, or any information which is prohibited under any law for the time being in force:

Provided that any notification made by the Appropriate Government or its agency in relation to any information which is prohibited under any law for the time being in force shall be issued by an authorised agency, as may be notified by the Appropriate Government:

Provided further that if any such information is hosted, stored or published, the intermediary shall remove or disable access to that information, as early as possible, but in no case later than thirty-six hours from the receipt of the court order or on being notified by the Appropriate Government or its agency, as the case may be:

Provided also that the removal or disabling of access to any information, data or communication link

within the categories of information specified under this clause, under clause (b) on a voluntary basis, or on the basis of grievances received under sub-rule (2) by such intermediary, shall not amount to a violation of the conditions of clauses (a) or (b) of sub-section (2) of section 79 of the Act;

(e) the temporary or transient or intermediate storage of information automatically by an intermediary in a computer resource within its control as an intrinsic feature of that computer resource, involving no exercise of any human, automated or algorithmic editorial control for onward transmission or communication to another computer resource shall not amount to hosting, storing or publishing any information referred to under clause (d);

(f) the intermediary shall periodically, and at least once in a year, inform its users in English or any language specified in the Eighth Schedule to the Constitution in the language of his choice of its rules and regulations, privacy policy or user agreement or any change in the rules and regulations, privacy policy or user agreement, as the case may be:

Provided that an online gaming intermediary who enables the users to access any permissible online real money game shall inform its users of such change as soon as possible, but not later than twenty-four hours after the change is effected;

(g) where upon receiving actual knowledge under clause (d), on a voluntary basis on violation of clause (b), or on the basis of grievances received under sub-rule (2), any information has been removed or access to which has been disabled, the intermediary shall, without vitiating the evidence in any manner,

preserve such information and associated records for one hundred and eighty days for investigation purposes, or for such longer period as may be required by the court or by Government agencies who are lawfully authorised;

(h) where an intermediary collects information from a user for registration on the computer resource, it shall retain his information for a period of one hundred and eighty days after any cancellation or withdrawal of his registration, as the case may be;

(i) the intermediary shall take all reasonable measures to secure its computer resource and information contained therein following the reasonable security practices and procedures as prescribed in the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Information) Rules, 2011;

(j) the intermediary shall, as soon as possible, but not later than seventy two hours and in case of an online gaming intermediary who enables the users to access any permissible online real money game not later than twenty-four hours of the receipt of an order, provide information under its control or possession, or assistance to the Government agency which is lawfully authorised for investigative or protective or cyber security activities, for the purposes of verification of identity, or for the prevention, detection, investigation, or prosecution, of offences under any law for the time being in force, or for cyber security incidents:

Provided that any such order shall be in writing stating clearly the purpose of seeking information or assistance, as the case may be;

> (k) the intermediary shall not knowingly deploy or install or modify technical configuration of computer resource or become party to any act that may change or has the potential to change the normal course of operation of the computer resource than what it is supposed to perform thereby circumventing any law for the time being in force:
>
> *Provided that* the intermediary may develop, produce, distribute or employ technological means for the purpose of performing the acts of securing the computer resource and information contained therein;
>
> (l) the intermediary shall report cyber security incidents and share related information with the Indian Computer Emergency Response Team in accordance with the policies and procedures as mentioned in the Information Technology (The Indian Computer Emergency Response Team and Manner of Performing Functions and Duties) Rules, 2013.
>
> (m) the intermediary shall take all reasonable measures to ensure accessibility of its services to users along with reasonable expectation of due diligence, privacy and transparency;
>
> (n) the intermediary shall respect all the rights accorded to the citizens under the Constitution, including in the articles 14, 19 and 21.
>
> (*Emphasis added as noted above*)

47. Rule 3(2) provides for a grievance redressal mechanism of the intermediary. Rule 3(3A), added in 2023, establishes a Grievance Appellate Committee.

(2) Grievance redressal mechanism of intermediary:

(a) The intermediary shall prominently publish on its website, mobile based application or both, as the case may be, the name of the Grievance Officer and his contact details as well as mechanism by which a user or a victim may make complaint against violation of the provisions of this rule or sub-rules (11) to (13) of rule 4, or in respect of any other matters pertaining to the computer resources made available by it, and the Grievance Officer shall-

(i) acknowledge the complaint within twenty-four hours and resolve such complaint within a period of fifteen days from the date of its receipt:

Provided that the complaint in the nature of request for removal of information or communication link relating to clause (b) of sub-rule (1) of rule 3, except sub-clauses (i), (iv) and (xi), shall be acted upon as expeditiously as possible and shall be resolved within seventy-two hours of such reporting;

Provided further that appropriate safeguards may be developed by the intermediary to avoid any misuse by users;

(ii) receive and acknowledge any order, notice or direction issued by the Appropriate Government, any competent authority or a court of competent jurisdiction.

Explanation.—In this rule, "prominently publish" shall mean publishing in a clearly visible manner on the home page of the website or the home screen of the mobile based application, or both, as the case may be, or on a web page or an app screen directly accessible from the home page or home screen.

(b) The intermediary shall, within twenty-four hours from the receipt of a complaint made by an individual or any

person on his behalf under this sub-rule, in relation to any content which is prima facie in the nature of any material which exposes the private area of such individual, shows such individual in full or partial nudity or shows or depicts such individual in any sexual act or conduct, or is in the nature of impersonation in an electronic form, including artificially morphed images of such individual, take all reasonable and practicable measures to remove or disable access to such content which is hosted, stored, published or transmitted by it:

(c) The intermediary shall implement a mechanism for the receipt of complaints under clause (b) of this sub-rule which may enable the individual or person to provide details, as may be necessary, in relation to such content or communication link.

3A. Appeal to Grievance Appellate Committee(s).—

(1) The Central Government shall, by notification, establish one or more Grievance Appellate Committees within three months from the date of commencement of the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Amendment Rules, 2022.

(2) Each Grievance Appellate Committee shall consist of a chairperson and two whole time members appointed by the Central Government, of which one shall be a member ex-officio and two shall be independent members.

(3) Any person who is aggrieved by a decision of the Grievance Officer or whose grievance is not resolved within the period specified for resolution in sub-clause (i) of clause (a) of sub-rule (2) of rule 3 or clause (b) of sub-rule (2) of rule 3 or sub-rule (11) of rule 4A, as the case may be, may prefer an appeal to the Grievance Appellate Committee within a period of thirty days from the date of receipt of communication from the Grievance Officer.

(4) The Grievance Appellate Committee shall deal with such appeal expeditiously and shall make an endeavour to resolve the appeal finally within thirty calendar days from the date of receipt of the appeal.

(5) While dealing with the appeal if the Grievance Appellate Committee feels necessary, it may seek assistance from any person having requisite qualification, experience and expertise in the subject matter.

(6) The Grievance Appellate Committee shall adopt an online dispute resolution mechanism wherein the entire appeal process, from filing of appeal to the decision thereof, shall be conducted through digital mode.

48. We are not concerned with the rest of Rule 3 or with Rules 4A to 4C. Then come Rules 5 and 6 and, importantly, Rule 7.

5. Additional due diligence to be observed by an intermediary in relation to news and current affairs content.—

In addition to adherence to rules 3 and 4, as may be applicable, an intermediary shall publish, on an appropriate place on its website, mobile based application or both, as the case may be, a clear and concise statement informing publishers of news and current affairs content that in addition to the common terms of service for all users, such publishers shall furnish the details of their user accounts on the services of such intermediary to the Ministry as may be required under rule 18:

Provided that an intermediary may provide such publishers who have provided information under rule 18 with a demonstrable and visible mark of verification as being publishers, which shall be visible to all users of the service.

Explanation.—This rule relates only to news and current affairs content and shall be administered by the Ministry of Information and Broadcasting.

6. Notification of other intermediary.—

(1) The Ministry may by order, for reasons to be recorded in writing, require any intermediary, which is not a significant social media intermediary, to comply with all or any of the obligations mentioned under rule 4, if the services of that intermediary permits the publication or transmission of information in a manner that may create a material risk of harm to the sovereignty and integrity of India, security of the State, friendly relations with foreign States or public order.

(2) The assessment of material risk of harm referred to in sub-rule (1) shall be made having regard to the nature of services of such intermediary, and if those services permit,—

(a) interaction between users, notwithstanding, whether it is the primary purpose of that intermediary; and

(b) the publication or transmission of information to a significant number of other users as would be likely to result in widespread dissemination of such information.

(3) An order under this rule may be issued in relation to a specific part of the computer resources of any website, mobile based application or both, as the case may be, if such specific part is in the nature of an intermediary:

Provided that where such order is issued, an entity may be required to comply with all or any of the obligations mentions under rule 4, in relation to the specific part of its computer resource which is in the nature of an intermediary.

7. Non-observance of Rules.—Where an intermediary fails to observe these rules, the provisions

> **of sub-section (1) of section 79 of the Act shall not be applicable to such intermediary and the intermediary shall be liable for punishment under any law for the time being in force including the provisions of the Act and the Indian Penal Code**.
>
> (*Emphasis added*)

E. RIVAL SUBMISSIONS

I *Generally*

49. This is the flow of the Petitioners' arguments: the Petitioners are all users. Not one of them is an intermediary. No intermediary is before us. None protests. These users are, therefore, they say under the constant threat, as regards the undefined 'business of the Central Government', that their user-content will be unilaterally identified by some government-controlled 'fact-check unit' as 'fake or false or misleading'. The intermediary's 'due diligence' obligation is not to host, publish, store, etc. It covers every possible thing that can be done to and with digital content. Therefore, the moment this fact check unit or, as we got used to calling it in Court, the FCU on its own decides that something some user has put out is *fake* or *false* or *misleading*, the intermediary is *bound* to take it down. This operates entirely outside the control of Section 69A, the takedown provision. For, if the intermediary does *not* do this, Rule 7 operates eo instante: the intermediary loses safe harbour *and* is liable to prosecution. No intermediary will ever risk this. Therefore, the 2023 amendment to Rule 3(1)(b)(v) does indirectly what cannot be done directly. It

switches focus from the user, who or which generates content, to the intermediary, the service provider, and makes the service provider liable for user content. This is squarely the 'chilling effect', and a frontal assault on the 'marketplace of ideas'. It is not just Rule 3(1)(b)(v) that is to be read in isolation; it is Rule 3(1)(b)(v) read with the consequences in Rule 7.

50. Mr Mehta disagrees. The controlling portion of Rule 3(1)(b) only speaks of 'reasonable efforts'. There is no compulsion. It is the *not making of a reasonable effort at all* that attracts Rule 7. As to the 2023 amendment, he asks how is that no user complained of a fundamental right of free speech being violated when substantially the same provision existed in 2022 with the words "*patently false or untrue or misleading*", and how it comes to pass that the objection arises for the first time only when a dedicated provision is sought to be made for "*the business of the Central Government*". Surely it cannot be suggested that fake, false or misleading information is legitimate for the business of the Central Government but not for other matters. All that the government is doing is identifying a specific authority, the FCU (which may or may not be the PIB) to identify *only* that information that pertains to the business of the government and which is *also* fake, false or misleading. Nobody knows the business of the government better than the government which does that business to begin with; and fakery, falsehood and misleading information about the business of the government abound without limit. The business of the government is not merely the concern of a stand up comedian or this or that newspaper. The government encourages debate and dissent and it has no problem at all with parody. But the business of the government is the concern of every single citizen and, arguably,

given the reach of the medium, everyone everywhere. Why should the government not be allowed to set the record straight if something is found by an independent agency to be fake, false or misleading? he asks. In what legal or moral universe should this be permitted? Besides, he submits, there is now the provision for a grievance redressal mechanism; even an appeal is provided under Rule 3(3A). Further, Rule 7 only operates when an intermediary 'fails to observe these Rules', i.e., it makes no effort at all.

51. If only matters were that simple, that straightforward, the Petitioners say. They maintain that these answers to their case are all over simplistic, even facile. After all, the government already has a public information agency, the PIB, one of considerable heft and standing even on social media. It puts out its corrective or clarificatory content periodically on diverse social media — and indeed users themselves cite the PIB. What is at play here, the Petitioners say, is something else entirely. It begins with the entirely untenable assumption that in every single matter or regarding every single thing — including the business of the government — there is an absolute truth; and everything else is fake, false or misleading. In the 2022 amendment, there was scope for debate whether a particular chunk of digital data or user content was patently false and untrue or misleading. The 2023 amendment takes away all room for debate. In regard to the business of the government — and nobody really knows what that is or tomorrow could be — the government has unilaterally arrogated to itself the power to decide an absolutism: absolute truth or absolute falsehood, with no scope *before the FCU for defending user content*. Mr Seervai said it could not get worse as an egregious instance of a blatant violation of every concept of natural justice: a

user need not even be given a chance to defend himself or herself. "Rome has spoken; and the cause is lost."

II A Closer Look at the Impugned Amendment & Its Interpretation

52. I have extracted out Rule 3(1)(b)(v) earlier. But it is a lengthy clause, with many subordinate clauses. The challenge before us is specific: the 2022 amendment is challenged elsewhere, and is not in issue before us. But the scope of the challenge is apt to be misunderstood, and therefore I take the liberty now of, as it were, 'zooming in' on the precise challenge. Here is the Rule again, but now with only the relevant portions.

> **3(1) Due diligence by an intermediary**: An intermediary, including a social media intermediary, a significant social media intermediary and an online gaming intermediary, **shall observe** the following due diligence while discharging its duties, namely:—
>
> (a) …
>
> (b) *the intermediary … shall make reasonable efforts* **by itself, and to cause the users of its computer resource to not host**, *display, upload, modify, publish, transmit, store, update or share any information that*,—
>
> (i) …
>
> (ii) …
>
> (iii) …
>
> (iv) …
>
> (v) *deceives or misleads the addressee about the origin of the message or knowingly and intentionally communicates any misinformation or information which is*

> *patently false and untrue or misleading in nature* **or, in respect of any business of the Central Government, is identified as fake or false or misleading by such fact check unit of the Central Government as the Ministry may, by notification published in the Official Gazette, specify**;

53. The colour coding follows the earlier extract: blue italics for the 2022 amendment and bold red for the 2023 amendment. "Shall observe" in the opening portion has my emphasis.

54. Do the words (in blue italics) *or knowingly and intentionally communicates* from the 2022 amendment qualify or colour the 2023 amendment? In the Union's reply of 6th June 2023, there is an assertion that the impugned Rule is restricted to those cases where the FCU has, in relation the business of the Central Government, identified information as fake, false or misleading but this is *knowingly or intentionally communicated*.[6] In Rejoinder, Kamra argues that the impugned Rule is unqualified by intent, knowledge or even degree ('patently').[7] This assertion is also found in the first notes of arguments on behalf of Kamra.[8]

55. But the submissions on behalf of the Central Government would suggest otherwise (and I believe advisedly so), i.e., that intent

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6 Paragraphs 6(v)–(vi) at *pp.* 198–199 and paragraphs 6(xiv)–(xv) at *pp.* 205–206.

7 Rejoinder dated 28th June 2023, paragraph 12.

8 Paragraph 12.

is immaterial in the application of the impugned Rule to information relating to the business of the Central Government that the FCU identifies as fake, false or misleading. This is evident from paragraph 34 of the written submissions dated 23rd September 2023, which says:

> 34. That, as per the PIB Fact Check Unit website (https://pib.gov.in/aboutfactchecke.aspx), fact-checked content is categorised clearly into the following three categories:
>
> **Fake** — any factually incorrect news, content, or, piece of information/content related to the Central Government of India, ***spread intentionally or unintentionally***, that can deceive or manipulate the audience, with or without the intention to cause potential harm, can be flagged as Fake;
>
> **Misleading** — any information/content presented, either partially true or with the selective presentation of facts or figures or with distortion of facts or figures and to deceive or mislead the Recipient of the information/content.
>
> **True** — any information/content that is found to be factually correct after investigation.
>
> (*Emphasis added*)

56. This is interesting because throughout the arguments on behalf of the Union, the emphasis was 'fake' and 'false'; and paragraph 34 clearly says that intention is immaterial when it comes to what is decided is 'fake'. The assertion on behalf of the Union that knowledge and intent restrict or control the operation of the impugned Rule is

not supported by the dictionary definitions on which it so heavily relies,[9] nor the assertion later in paragraph 125:

> 125. Further, the impugned rules do not enter the domain of information which does not relate to the business of the Government. *Where any information relates to the business of the Government, Government will be in a position to provide the facts in this regard.* **What the FCU envisaged under the impugned rules will do is confirm the information being made available over the Internet with the evidence on the same matter as on record with the Government and thereafter determine whether such information is factually correct or false/misleading.** There is nothing more the FCU will do.
>
> (*Emphasis added*)

57. Therefore, it follows that knowledge and intention are outside the operating sphere of the impugned Rule.

58. I choose to address this immediately since, apart from anything else, it appears to be the contrary view.

59. Independently of the written submissions and affidavits, on a plain reading, I believe it to be incorrect to say that *knowledge* and *intent* qualify the 2023 amendment. These words, *or knowingly and intentionally communicates* apply to and qualify only the immediately following clause *any misinformation or information which is patently*

9 Written Submissions, paragraph 115.

false and untrue or misleading in nature. They cannot control or qualify the 2023 addition in bold red, **or, in respect of any business of the Central Government, is identified as fake or false or misleading by such fact check unit of the Central Government as the Ministry may, by notification published in the Official Gazette, specify**. For the disjunctive "**or**", to my mind, makes all the difference. It introduces another independent clause unrelated to whether or not content is knowingly and intentionally communicated. Further, the "knowing and intentional" communication can never be by an intermediary — because it is a communication, i.e., user-content. An intermediary is only a host. The 2023 amendment's prohibition is independent of any user knowledge or intent.

60. This is why the 2023 amendment actually creates another *class* of content (and a class of user, the Central Government), viz., information which (*i*) relates to the 'business of the Central Government'; (*ii*) is 'found' to be fake, false or misleading by (*iii*) a notified FCU. It is also this class separation that is directly the matter of at least one facet of the Article 14 challenge before us.

61. Any other interpretation would result simultaneously in an absurdity and a redundancy. On absurdity, the contrary view propounded by the Union, that knowledge and intention restrict the impugned Rule, would mean that the FCU identifies some content relating to the business of the Central Government that is fake, false or misleading, but it continues to be 'hosted, published, displayed, transmitted, etc' because this 'hosting, publishing, display, transmission, etc' is *not* a knowing or intentional communication by

the user. In turn, that would mean that no intermediary would *ever* be required not to host, publish, display etc this FCU-identified Central Government business-related content that is identified as fake, false or misleading for every user would simply claim that there was neither knowledge nor intent — and no one could ever say otherwise, at least not without the greatest difficulty.

62. If '*knowingly and intentionally communicates*' qualifies or restrict the 2023 amendment, then the clause would read like this:

> (b) *the intermediary … shall make reasonable efforts by itself, and to cause the users of its computer resource* **to not host** *any information that*,—
>
> (v) … ~~*deceives or misleads the addressee about the origin of the message or*~~ **knowingly and intentionally communicates any misinformation or information** *which* ***(i)*** *is patently false and untrue or misleading in nature* **OR,** ***(ii)*** **in respect of any business of the Central Government, is identified as fake or false or misleading by such fact check unit of the Central Government as the Ministry may, by notification published in the Official Gazette, specify**;

63. If the clause is to be read like this, then the second portion (the 2023 amendment, the portion following *(ii)* in red above) is wholly unnecessary because it is entirely subsumed in *(i)*. The first part deals with *all* information. It is classless. The second portion is a subset of the first. Everything that applies to the first would then apply to the second — specifically, knowledge and intention. But this would contrary to the Union's own arguments that: (i) the Court should read in (as a matter of 'reading down') a 'disclaimer' by the intermediary — for no such 'disclaimer' would ever be necessary if

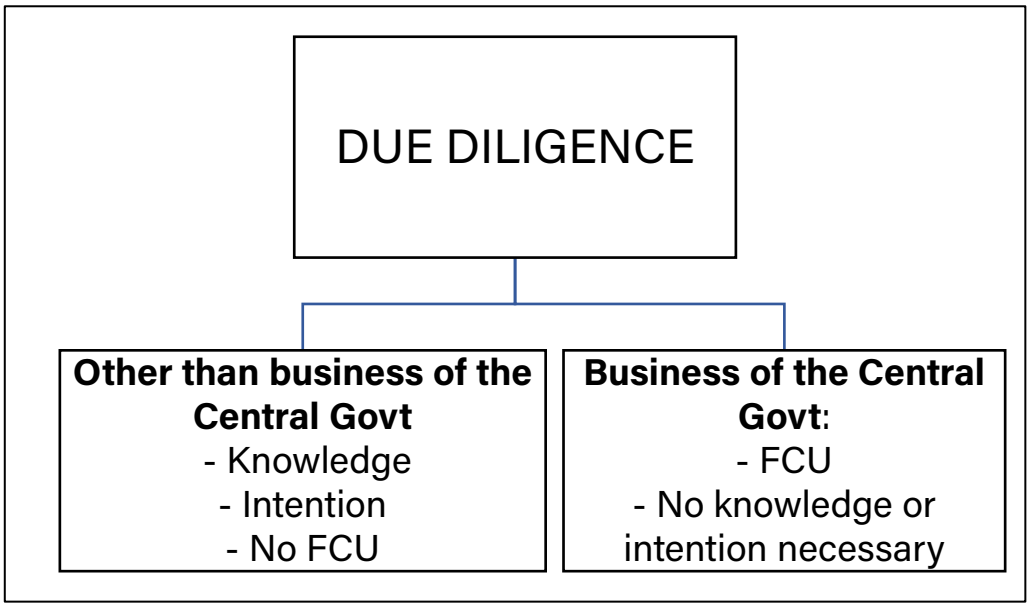
knowledge and *intent* were essential ingredients (there would simply be nothing to disclaim); and (ii) that the FCU is not the 'final arbiter' of truth, and while there is loss of safe harbour and exposure to prosecution, it is a court that will decide truth or falsity, a submission made on affidavit. That interpretation would render the 2023 amendment wholly otiose, redundant, and unnecessary.

64. I do not believe it is open to a court to adopt an interpretation that results in either an absurdity or a redundancy.

65. Correctly read, in my view, the 2023 amendment operates independently of any user knowledge or user intention. Correctly read, therefore, what is being assailed is this:

> **3(1) Due diligence by an intermediary**: An intermediary, including a social media intermediary, a significant social media intermediary and an online gaming intermediary, **shall observe** the following due diligence while discharging its duties, namely:—
>
> (a) …
>
> (b) *the intermediary … shall make reasonable efforts* **by itself, and to cause the users of its computer resource to not host**, *display, upload, modify, publish, transmit, store, update or share* ***any information*** *that*,—
>
> (v) … **in respect of any business of the Central Government, is identified as fake or false or misleading by such fact check unit of the Central Government as the Ministry may, by notification published in the Official Gazette, specify**;

66. The divergence (or classification) may be illustrated thus:



67. The loss of safe harbour and the liability to prosecution under Rule 7 evidently triggers differently depending on whether or not the content is about "the business of the Central Government". If it is *not* about the business of the Central Government, there is no loss of safe harbour or liability to prosecution *unless* knowledge and intent is established. *This is not a requirement for the second class of content, viz., that which relates to the "business of the Central Government."* There, no question of 'knowledge' ("knowingly") or 'intent' ("intentionally") arises.

68. The justification or reason for this is plain. For non-Central Government-business-related content there is no FCU. There is no arbiter of what is "patently false or untrue or misleading". The requirement is that it is the *user* who must be aware that the content is "patently false or untrue or misleading" and must, with that awareness, "knowingly *and* intentionally" publish it. Therefore: (i)

awareness of patent falsity, untruth or misleading nature; (ii) knowledge; *and* (iii) intent.

69. This is markedly different from the other class, content said to relate to 'the business of the Central Government'. For this content, there *is* an arbiter: the FCU. It is the FCU that decides what is fake, false or misleading. Once it does so decide, and if the content continues to be hosted by the intermediary, irrespective of knowledge or intent of the user, there is an automatic loss of safe harbour and a liability to prosecution.

70. Thus, in the first category, the focus is on the user's *awareness* of falsity, untruth or misleading nature. In the second, the focus is on the intermediary permitting the continuance of what the FCU has determined to be fake, false or misleading.

71. Mr Seervai argues that the Affidavit in Reply proceeds from an unsubstantiated assumption or premise through a faulty reasoning to an incorrect conclusion. Paragraph 6 of the Affidavit in Reply from page 198 has several lengthy sub-paragraphs that put up an affirmative case. He took us through these at length. Not all need be quoted verbatim. I summarize the stand of the Union of India on affidavit, quoting only where necessary.

(a) The 'medium', though capable of great public good, has the serious potential of creating devastating public mischief, creating law and order/public order/national security situations, spreading chaos in the country etc.

Of this, Mr Seervai argues, there is no material at all. It is just hyperbole.

(b) Paragraphs 6(v) and (vi) appear to be the heart of the response. They read like this:

> (v) **Just like knowingly and intentionally communicating patently false, untrue and misleading information/content is an anathema to the free speech right. Knowingly and intentionally "passing off" patently false, untrue and misleading information/content as true information/ content through deceptive and delusory means is the biggest abuse of free speech right. The same cannot in any manner be said to be constitutionally protected. In contrast, the public at large and the citizenry of the country have a constitutional right to know and receive true and correct information/content and to be protected against deceptive , untrue, patently false and misleading information/content**.
>
> (vi) Just like right to know is implicit under Article 19(1)(a) of the Constitution, **right to know accurate and true information is also a fundamental right implicit under Article 19(1)(a) of the Constitution. The State is under a constitutional obligation to ensure that through regulatory mechanism the citizens of this country get information/content which is true and correct and are protected from receiving**

> **deceptive and intentionally propagated and peddled information/content which is patently false , untrue and misleading, "passed off' under a camouflage of it being true and correct information/content.**
>
> (*Emphasis added*)

It is to this formulation that Mr Seervai takes the most strenuous objection. The right to free speech is not limited only to speaking some unknowable, ineffable, absolute 'truth' — let alone a 'truth' solely determined by the government of the day. The right to free speech cannot, thus, be abrogated by inveigling into some subordinate legislation a mechanism of ascertaining what the government believes is 'the truth', *and preventing any counter narrative or alternative*.

(c) Misinformation leads to misinformed decisions by citizens and this 'perpetrates' chaos in society. As a result, individual actions founded on falsehoods or that which is patently false, misleading or untrue, has a deleterious effect on society. The *Government* has an obligation, it is alleged to balance these 'competing interests' of freedom of speech (on the internet) with the 'fundamental freedom of those who receive information/content'.

(d) Paragraph (xv) posits certain 'examples' of 'false information'. This is less than helpful. Anyone can

conjure up something that is demonstrably not a fact — that the moon is a ball of cheese, for instance, or that the earth is flat. This is the fallacy of the false premise: an incorrect proposition forming the basis of an argument or a syllogism. If the premise is incorrect, the conclusion may be in error, though it may be *logically* valid. The classic example is of course this:

> — If the streets are wet, it has rained recently (*premise*);
>
> — The streets are wet (*premise*);
>
> — Therefore, it has rained recently (*conclusion*).

The argument is logically valid, but demonstrably incorrect — there may be many reasons for the streets to be wet (flooding or a burst pipeline). Simple logic will not reveal the error, since that accepts the correctness of each premise. The conclusion may or may not be true; but it is impossible to say that it is always true. This is the classic epistemological problem of causality.

In the present case, the syllogism runs like this:

> — Some information on social media is fake, false or misleading (*premise*);
>
> — This particular information is on social media (*premise*);
>
> — Therefore, this particular information must be fake, false or misleading (*conclusion*).

Conceivably, there is simultaneously another logical fallacy in play here, that of the undistributed middle. I

am only highlighting this to point out that taking random hypothetical examples that lie at the polarities do not assist in a matter such as this.

(e) As regards the 'business of the Central Government', the Affidavit in Reply says in paragraph 85—

> that there is a significant likelihood of speculation, misconception and spread of incomplete or one-sided information in social media, with members of the general public acting on the same even in the absence of any announcement by the Central Government. In such matters, the relevant facts are authentically and readily available to the Central Government itself: equipping the Central Government to check the veracity of any information/content related to its activities. Therefore, keeping in view the rapid propagation of false or misleading information/content on social media and the potential of such information/content going viral with attendant harm to members of the general public, it was felt that the best interest of the general public would be subserved if the veracity of such information/content is expeditiously checked and publicly disseminated after fact checking by a Central Government agency so that the potential harm to the public at large may be contained.

(f) Paragraph 86 accepts that a Fact Check Unit in the Central Government already exists in the PIB, which has

fact-checking information relating to the Central Government and disseminating such fact-checking for the benefit of the public. Paragraph 89 seeks to split fact-checked content into categories: fake, misleading or true. *Fake*, we are told, is that which can deceive or manipulate the audience. The intention is immaterial. *Misleading* is selective or *partially true*.

(g) But paragraphs 6(xiii) and (xiv) tells us the approach of the Union of India:

> (xiii) It is most important to note that irrespective of whether or not the intermediary chooses to have such a system or not and whether or not even after finding out through such system [if created by the intermediary] that something knowingly and intentionally displayed, uploaded, published, transmitted , stored or shared on its platform is either misleading or factually and patently false and untrue, **the intermediary is under no obligation to take it down or block access to it**.
>
> **The only change the impugned rule makes is to make the intermediary primarily responsible to check [due diligence] what is stated hereinabove, without any obligation to either take it down or block the information/content**.
>
> **The only statutory change which is made is lifting of the legal immunity [safe harbor protection] conferred upon the intermediary under section 79 of the IT Act**

in such circumstances. In other words, if a Creator or Sender knowingly and intentionally displays, uploads, publishes, transmits, stores or shares any information/content which is misleading or is patently false and untrue, the Recipient who is misled by it or defamed by it or harmed by it in any manner, can take recourse to the-

(i) Grievance redressal mechanism of the intermediary as contemplated in Rule 3(2) of the IT Rules, in the first instance;

(ii) Appellate provision, i.e., appeal to Grievance Appellate Committee(s) as contemplated in Rule 3A of the IT Rules.

Failing in the above two statutory remedies, any Recipient of the information/content who is misled by or defamed by or harmed by the information/content of the Creator or Sender would have to be free to avail all the remedies available before a court of law by initiating statutory / legal proceedings and in said circumstances it would be only the court of law which will be the final arbiter as to whether the information/content of the Creator or Sender is patently false and untrue or misleading and whether the same was communicated knowingly or intentionally.

Thus, the new mechanism merely allows, permits and thereby protects the fundamental right of the Recipient to approach

the competent authority and the court establishing the harm caused to him / her due to some intentionally misleading and patently false or untrue information/content and when the Recipient approaches the competent court, both the intermediary and the Creator or Sender will be able to defend themselves on all available grounds and it will be only the competent com1 which will decide whether:-

(a) The information/content so displayed, uploaded, published, transmitted, stored or shared was misleading or patently false and untrue and was communicated knowingly or intentionally; and

(b) Such information has caused any harm to the Recipient.

The only change will be that the intermediary would not be permitted to get away by using the protective shield of Section 79 despite not having exercised due diligence and continuing with such displaying, uploading, publishing, transmitting, storing or sharing of the information/content.

(xiv) **It is clear that the Government is not supposed to be the final arbiter or decision maker as to whether any information/content is patently untrue, false or misleading.** The obligation under Rule 3(1) of the IT Rules is **on the intermediary, at the first instance, to exercise due diligence and to come to a**

> **conclusion as to whether any information/content is patently untrue, false or misleading basis the identification of the Fact Check Unit.** Failing this, the only final arbiter is the court of law, which will adjudicate as to whether any information/content is patently untrue, false or misleading and has been knowingly and intentionally communicated, and the only consequence of non-compliance of Rule 3 will be adjudication by the competent court without the protective shield of Section 79.
>
> (*Emphasis added*)

72. I am unable to accept this interpretation of the rule in question. I have already analysed it earlier. As we have seen, the *moment* any content (pertaining to the business of the Central Government) is identified by the FCU as a fake, false or misleading, the intermediary has no choice: it *must* not permit it to be hosted, published, etc., either itself *or by any user*. If it does not, Rule 7 operates immediately and takes away safe harbour *and* exposes the intermediary to prosecution. There is little point in saying that it is the court that will ultimately determine it. That is over-stating the obvious. More and more, it is always courts that always determine everything. But the point is what does the *Rule* command?

73. The correct question is this: if the FCU identifies some chunk of data about the business of the Central Government as fake, false or misleading, can the intermediary 'interpret' that content and come to the opposite conclusion? That it is *not* fake, false or misleading? Nothing in the impugned Rule even remotely suggest that the

intermediary has any such authority. The disjunctive 'or' puts FCU-identified content (that which pertains to the business of the Central Government and is FCU-certified as fake, false or misleading) in a separate category or class. Loss of safe harbour is immediate if this content is not removed. This is what Mr Seervai calls the *illusion of choice*.

74. Thus, this is not merely the classification challenge, but the *entirety* of the challenge: Article 19(1)(a), Article 19(1)(g), Article 14, and natural justice. Who is the Central Government FCU to unilaterally decide truth or falsity about *anything*? *How* does it decide? By what *process* (procedural due process), and on what *basis* and with what *guidelines* (uncanalised discretionary power, vagueness, overbreadth) does it do so? If allowed, this is an impermissible expansion of Article 19(2) and Article 19(6) and a wholly unconstitutional curtailment of Articles 19(1)(a) and 19(1)(g); ultra vires Article 14, including for being manifestly arbitrary (there being no underlying principle); and ultra vires Sections 69A and 79 of the IT Act. That, in summary, is the Petitioners' case on this breakdown of the impugned 2023 amendment.

75. To be sure, this formulation is contested root and branch by Mr Mehta, for his argument is that the amendment is: *firstly*, sufficiently narrowly tailored, and is very specific and targeted. *Secondly*, the classification is valid because the two classes are distinct. *Thirdly*, this classification has a direct and rational nexus to the purpose because the business of the Central Government, something well-defined, is of disproportionate impact; therefore, anything fake, false or

misleading about it has an even more pernicious effect. *Fourthly*, There is nothing about the amendment that is vague, for fake and false simply mean that which is not true, and this is being assessed only in the context of the business of the Central Government. Nobody knows better than the Central Government what is or is not true of its own business. *Fifthly*, the clause is capable of being read down if it must be saved, and 'knowingly' and 'intentionally' can as well apply to that content relating to the business of the Central Government which the FCU identifies as fake, false or misleading. *Sixthly*, nobody has ever attempted to shrink any fundamental right, nor to expand the permissible restrictions on the exercise of those fundamental rights. There is, he therefore submits, not the slightest shred of merit in the Petitions.

76. I now proceed to the submissions on the various grounds of challenge.

III *Article 19(1)(a) and Article 19(2): The Fundamental Right to Free Speech*

77. Articles 19(1)(a) and 19(2) say:

> **19. Protection of certain rights regarding freedom of speech, etc.—**
>
> (1) All citizens shall have the **right**—
>
> (a) to freedom of speech and expression;
>
> (b) to assemble peaceably and without arms;
>
> (c) to form associations or unions or co-operative societies;

> (d) to move freely throughout the territory of India;
>
> (e) to reside and settle in any part of the territory of India; and
>
> (f) * * * * *
>
> (g) to practise any profession, or to carry on any occupation, trade or business.
>
> (2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent **the State** from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in 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.
>
> (*Emphasis added*)

78. The emphasis in Article 19(2), Mr Seervai says, and I think correctly, is on *the State*. This is not to be confused or conflated with the dispensation of the day. *The State* survives periodic changes in government. *The State* does not face the electorate; governments do. Throughout the second Affidavit in Reply, he says, and especially in paragraphs 79 to 81, there is precisely such a muddling of these two distinct concepts. Further, what is guaranteed is a *right* under Article 19(1); and in Article 19(1)(a), it is the right to freedom of speech and expression, not some 'right to the truth'.

79. Mr Seervai — all the Petitioners really — accept this: that the State in India does have a legitimate regulatory interest in addressing

various forms of harmful speech. The speed, anonymity and reach of the internet generally and social media especially drives content with real-world implications and the potentiality to do serious harm: sexual offences against children and woman, torture, animal abuse, hate speech, minority targeting, aggravating social, ethnic and religious prejudices, inciting mob violence against identified communities and groups, even genocide. Kamra's lawyers have cited many examples. It makes for sickening reading. But, they say, this case is not about those egregious harms that surely must be addressed. It is about one particular class, affairs or matters that relate to the business of the Central Government.

80. Safe harbour, it is argued, is an important adjunct to free speech *in the context of the power to cause harm* via the internet. It lies at the heart of the exercise of freedom of speech and expression on the internet. It protects not just intermediaries but, through them, their users — precisely those in whom the fundamental right is vested. Intermediaries themselves have no direct interest in any particular user-content. Axiomatically, they cannot. It follows that if content publications carries a commercial risk (including a possible loss of safe harbour), it is inevitable that the risk-avoidance will prevail.[10]

81. Consequently, Mr Seervai argues, confronting intermediaries with the loss of statutory safe harbour is a form of directing or mandating censorship (or self-interested censorship) of identified

10 Dickinson, Gregory M; *The Internet Immunity Escape Hatch*; BYU Law Review, Vol. 47(5), Article 6 (2022) (p. 1437). Relied on by the Petitioners.

online content relating to the business of the Central Government. An intermediary will do anything to retain safe harbour. It will bend the knee to a government directive regarding content. Its business depends on safe harbour and immunity from prosecution for hosted content. Between safe harbour and user's rights regarding content, the intermediary faces a Hobson's choice; and 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 safe-harbour provision is therefore not just intermediary-level insulation from liability. It is an explicit recognition of a free speech right. What safe harbour does is to remove the potentiality of indirect censorship.

82. I agree. It cannot be seen otherwise.

83. Mr Seervai invites us to consider the Supreme Court decision in *Shreya Singhal v Union of India*[11] regarding intermediaries' safe harbour. The Supreme Court said that Section 79 is an exemption provision — that is to say, an exemption from responsibility and liability for user-content. Leaving aside the blocking order statutory mechanism under Section 69A of the IT Act, the Supreme Court read down Section 79(3)(b) to mean that an intermediary would lose safe harbour only if it did not remove or disable access to identified material despite receiving actual knowledge of a court order (under Section 69A) directing such a removal or disabling. The Supreme Court reasoned that that otherwise it would be very difficult for

11 (2015) 5 SCC 1.

intermediaries to act on millions of requests. No intermediary could judge the legitimacy of such requests. If the Section 69A court order of any government notification had to hew strictly to and remain within Article 19(2), then Section 79 obviously could not travel further afield.

84. This is also what the US Court of Appeals for the Fourth Circuit held in *Zeran v America Online*:[12]

> [11] ... **The specter of tort liability in an area of such prolific speech would have an obvious chilling effect. It would be impossible for service providers to screen each of their millions of postings for possible problems. Faced with potential liability for each message republished by their services, interactive computer service providers might choose to severely restrict the number and type of messages posted. Congress considered the weight of the speech interests implicated and chose to immunize service providers to avoid any such restrictive effect**.
>
> [25] **If computer service providers were subject to distributor liability, they would face potential liability each time they receive notice of a potentially defamatory statement from any party, concerning any message.** Each notification would require a careful yet rapid investigation of the circumstances surrounding the posted information, a legal judgement concerning the information's defamatory character, and an on-the-spot editorial decision whether to risk liability by allowing the continued publication of that information. Although this might be feasible for the traditional print publisher, the sheer number of postings on interactive computer services would create an impossible burden in the Internet context. Cf. *Auvil v. CBS 60 Minutes*,

12 129 F.3d 327 : MANU/FEFO/0235/1997. Cited in *Shreya Singhal*.

> 800 F. Supp. 928, 931 (E.D. Wash. 1992) (recognizing that it is unrealistic for network affiliates to "monitor incoming transmissions and exercise on-the-spot discretionary calls"). Because service providers would be subject to liability only for the publication of information, and not for its removal, they would have a natural incentive simply to remove messages upon notification, whether the contents were defamatory or not. See *Philadelphia Newspapers, Inc. v. Hepps*, MANU/USSC/0091/1986 : 475 U.S. 767, 777 (1986) (recognizing that fears of unjustified liability produce a chilling effect antithetical to First Amendment's protection of speech). **Thus, like strict liability, liability upon notice has a chilling effect on the freedom of Internet speech.**
>
> [26] Similarly, notice-based liability would deter service providers from regulating the dissemination of offensive material over their own services. **Any efforts by a service provider to investigate and screen material posted on its service would only lead to notice of potentially defamatory material more frequently and thereby create a stronger basis for liability. Instead of subjecting themselves to further possible lawsuits, service providers would likely eschew any attempts at self-regulation**.
>
> (*Emphasis added*)

85. Yet, Mr Seervai says, this is precisely what the impugned Rule does. It strips the intermediary of all choice — and no amount of statement-making on affidavit can change the cold reading of a statute — when, in regard to the business of the Central Government, the FCU identifies some content as fake, false or misleading.[13]

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13 *Mohinder Singh Gill v Chief Election Commissioner*, (1978) 1 SCC 405.

86. Mr Seervai's next port of call is the Supreme Court decision in *Anuradha Bhasin v Union of India & Ors.*[14] In the backdrop of the internet shutdown in Jammu & Kashmir, the Supreme Court was squarely confronted with the free speech on the internet issue. Anuradha Bhasin has a comprehensive review on the interplay between Article 19(1)(a), Article 19(2), the applicability of several doctrines, all in the context of internet-based free speech. Freedom of speech and expression, the Supreme Court said, includes the right to disseminate information to as wide a section of the population as is possible. The breadth of reach is not a reason to restrict or deny the right. The wider range of circulation of information or its greater impact cannot restrict the content of the right nor can it justify its denial.[15] This has been long established in the case of print media:[16] Free speech on the internet is an integral part of Article 19(1)(a). Any restriction on it must conform to Article 19(2). The restriction must be 'reasonable'. It is controlled by the parameters or factors set out in Article 19(2).[17] While a restriction may be a prohibition, it cannot be excessive. It must be justified by the censor. Whether or not a 'restriction' is a 'prohibition' is a question of fact:[18] *State of Gujarat v Mirzapur Moti Kureshi Kassab Jamat.*[19] Importantly, a court before which a restriction is challenged must see if the imposed restriction/prohibition was the least intrusive: *Om Kumar v Union of*

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14 (2020) 3 SCC 637.

15 *Anuradha Bhasin*, *supra* ¶ 32; *Ministry of Information & Broadcasting v Cricket Association of Bengal*, (1995) 2 SCC 161; *Shreya Singhal*, *supra*.

16 *Anuradha Bhasin*, *supra* ¶ 33.

17 *Anuradha Bhasin*, *supra* ¶ 38.

18 *Anuradha Bhasin*, *supra* ¶ 41.

19 (2005) 8 SCC 534.

India.[20] This introduces the doctrine of proportionality, and, implicit in it the question of testing if the right balance has been struck. It is not permissible to use a "sledgehammer to crack a nut"; "where a paring knife suffices, a battle axe is precluded."[21] Courts applying the balancing approach when deciding questions of fundamental rights is settled jurisprudence: *Minerva Mills Ltd & Ors v Union of India*;[22] *Sanjeev Coke Mfg Co v Bharat Coking Coal Ltd*.[23] Thus, the 'restriction' cannot be arbitrary, excessive or beyond what is required: *Chintaman Rao v State of MP*;[24] *State of Madras v VG Row*;[25] *Mohd Faruk v State of MP*.[26]

87. Then, in paragraphs 74 and 75 of Anuradha Bhasin, there is a reference to the opinions of Dr Sikri J and Dr DY Chandrachud J (as he then was) in *KS Puttaswamy (Aadhaar-5 J) v Union of India*.[27] Dr Sikri J approved of the four-pronged test propounded in *Modern Dental College & Research Centre v State of MP*[28] and followed in *KS Puttaswamy (Privacy-9 J) v Union of India*.[29] These are important for my purposes today. I quote from *Anuradha Bhasin*, citing Dr Sikri J in

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20 (2001) 2 SCC 386. *Anuradha Bhasin*, *supra* ¶ 61.

21 *Coimbatore District Central Cooperative Bank v Coimbatore District Central Cooperative Bank Employees Association & Anr*, (2007) 4 SCC 669.

22 (1980) 2 SCC 591.

23 (1983) 1 SCC 147.

24 1950 SCC 695 : AIR 1951 SC 118.

25 (1952) 1 SCC 410 : AIR 1952 SC 196.

26 (1969) 1 SCC 853.

27 (2019) 1 SCC 1.

28 (2016) 7 SCC 353.

29 (2017) 10 SCC 1.

Puttaswamy (Aadhaar), itself citing *Modern Dental College* and *Puttaswamy (Privacy)*:

> (a) A measure restricting a right must have a legitimate goal (legitimate goal stage).
>
> (b) It must be a suitable means of furthering this goal (suitability or rational connection stage).
>
> (c) There must not be any less restrictive but equally effective alternative (necessity stage).
>
> (d) The measure must not have a disproportionate impact on the right-holder (balancing stage).

88. Paragraph 75 of *Anuradha Bhasin* cites the opinion of Dr Chandrachud J (as he then was) in *Puttaswamy (Aadhaar)*, where the test of proportionality was discussed in the context of privacy violations (considered in *Puttaswamy (Privacy)*). The test of proportionality was applied in *Anuradha Bhasin*: proportionality must ensure a rational nexus between the objects and the means adopted to achieve them. Is a legislative measure is disproportionate in its interference with the fundamental right? Again, a court will see whether a less intrusive measure could have been adopted consistent with the object of the law and whether the impact of the encroachment on a fundamental right is disproportionate to the benefit claimed. The proportionality standard is a demand on both procedural and substantive law. Five principles emerged from this discussion, and they were accepted in *Anuradha Bhasin*:[30]

> 1324.1. **A law interfering with fundamental rights must be in pursuance of a legitimate State aim**;

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30 *Anuradha Bhasin*, ¶ 76. Paragraphs 1324.1 through 1324.5 of *Puttaswamy (Aadhaar)*. Original numbering retained.

1324.2. **The justification for rights-infringing measures that interfere with or limit the exercise of fundamental rights and liberties must be based on the existence of a rational connection between those measures, the situation in fact and the object sought to be achieved**;

1324.3. **The measures must be necessary to achieve the object and must not infringe rights to an extent greater than is necessary to fulfil the aim**;

1324.4. Restrictions must not only serve legitimate purposes; they must also be necessary to protect them; and

1324.5. The State must provide sufficient safeguards relating to the storing and protection of centrally stored data. In order to prevent arbitrary or abusive interference with privacy, the State must guarantee that the collection and use of personal information is based on the consent of the individual; that it is authorised by law and that sufficient safeguards exist to ensure that the data is only used for the purpose specified at the time of collection. Ownership of the data must at all times vest in the individual whose data is collected. The individual must have a right of access to the data collected and the discretion to opt out."

(*Emphasis added*)

89. Then, in paragraph 78 of *Anuradha Bhasin*, the Supreme Court said:

78. In view of the aforesaid discussion, we may summarise the requirements of the doctrine of proportionality which must be followed by the authorities before passing any order intending on restricting fundamental rights of individuals. In the first stage itself, the possible goal of such a measure intended at imposing restrictions must be determined. It ought to be noted that

> such goal must be legitimate. **However, before settling on the aforesaid measure, the authorities must assess the existence of any alternative mechanism in furtherance of the aforesaid goal**. The appropriateness of such a measure depends on its implication upon the fundamental rights and the necessity of such measure. **It is undeniable from the aforesaid holding that only the least restrictive measure can be resorted to by the State, taking into consideration the facts and circumstances. Lastly, since the order has serious implications on the fundamental rights of the affected parties, the same should be supported by sufficient material and should be amenable to judicial review**.
>
> (*Emphasis added*)

90. Mr Seervai maintains that the impugned Rule wholly fails the proportionality test, one that goes back to *Chintaman Rao* in 1950.

91. Mr Seervai cited more law, particularly the dissent of Justice Oliver Wendell Holmes Jr (in which he was joined by Justice Brandeis) in *Abrams et al v United States*,[31] but a further discussion in that direction is unnecessary.[32] I have already said that we are not

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31 250 US 616 (1919).

32 For which reason, I do not think it appropriate to consider the submission on whether a knowing falsehood is protected, which Mr Seervai advocates based on *United States v Alvarez*, 567 US 709 (2012). The Stolen Valor Act criminalized 'false statements' about having a military medal. A 6:3 majority of the US Supreme Court held the law to be unconstitutional and violative of the right to free speech protected under the First Amendment. There does not appear to be a common rationale: four of the justices concluded that a falsehood, even a knowingly made one, is not in itself sufficient to exclude First Amendment protection. Two other justices held that false speech was entitled to *some* protection, but the statute was invalid because it could have achieved its objective (preventing a falsehood) in a less restrictive manner. The latter proposition is

tasked with discovering new frontiers of the right to freedom of speech and expression. We are only to see if the impugned Rule can fairly be said to lie within the narrowly — and strictly — defined limits of Article 19(2), the 'reasonable restrictions' on the exercise of that fundamental right. For this, the decisions of our Supreme Court, discussed earlier, are surely sufficient. I need not, therefore, consider at any great length authority from other jurisdictions. In particular, and as I have also already noticed, the First Amendment to the US Constitution is in critical ways different from the amendment to Article 19(2) of our Constitution. For this reason, a more elaborate discussion of *New York Times v Sullivan*,[33] on which Mr Seervai also relies, is not really necessary though it is undoubtedly a landmark. *NYT v Sullivan* was in the context of libel and defamation. I need only note my agreement with the general principle that any rule that compels a critic or a commentator (in our case a social media intermediary's user) to *guarantee* the truth of all factual assertions, and to do so on pain of — *Sullivan* said libel — having that assertion totally suppressed does lead to a form of self-interest censorship by the intermediary in question.

92. If there was any doubt about the general applicability of the underlying principle, it is surely put to rest by the decision of our own Supreme Court in *R Rajgopal v State of TN*[34] (in the context of a 'take down' directive in print media). The Supreme Court referenced *Sullivan* and then law from the UK, in particular *Derbyshire County*

already part of our own jurisprudence. *See*: *Amish Devgan v Union of India & Ors*, (2021) 1 SCC 1, paragraph 86.

33 376 US 254 (1964) : 11 L.Ed. 686 : 1964 SCC OnLine US SC 43.

34 (1994) 6 SCC 632.

Council v Times Newspapers Ltd,[35] where the *Sullivan* principle was applied, saying that these were no less valid in the UK. Then in paragraphs 21 and 22, the *Rajgopal* court held:

> **21.** The question is how far the principles emerging from the United States and English decisions are relevant under our constitutional system. So far as the freedom of press is concerned, it flows from the freedom of speech and expression guaranteed by Article 19(1)(a). But the said right is subject to reasonable restrictions placed thereon by an existing law or a law made after the commencement of the Constitution in the interests of or in relation to the several matters set out therein. Decency and defamation are two of the grounds mentioned in clause (2). Law of torts providing for damages for invasion of the right to privacy and defamation and Sections 499/500 IPC are the existing laws saved under clause (2). **But what is called for today — in the present times — is a proper balancing of the freedom of press and said laws consistent with the democratic way of life ordained by the Constitution. Over the last few decades, press and electronic media have emerged as major factors in our nation's life. They are still expanding — and in the process becoming more inquisitive. Our system of Government demands — as do the systems of Government of the United States of America and United Kingdom — constant vigilance over exercise of governmental power by the press and the media among others. It is essential for a good Government. At the same time, we must remember that our society may not share the degree of public awareness obtaining in United Kingdom or United States. The sweep of the First Amendment to the United States Constitution and the freedom of speech and expression**

35 (1993) 2 WLR 449 : (1993) 1 All ER 1011, HL.

under our Constitution is not identical though similar in their major premises. All this may call for some modification of the principles emerging from the English and United States decisions in their application to our legal system. The broad principles set out hereinafter are evolved keeping in mind the above considerations. But before we set out those principles, a few more aspects need to be dealt with.

22. We may now consider whether the State or its officials have the authority in law to impose a prior restraint upon publication of material defamatory of the State or of the officials, as the case may be? We think not. No law empowering them to do so is brought to our notice. As observed in *New York Times v. United States* [(1971) 403 US 713 : 29 L Ed 2d 822 (1971)], popularly known as the Pentagon papers case, **"any system of prior restraints of (freedom of) expression comes to this Court bearing a heavy presumption against its constitutional validity"** and that in such cases, **the Government "carries a heavy burden of showing justification for the imposition of such a restraint"**. We must accordingly hold that **no such prior restraint or prohibition of publication can be imposed by the respondents** upon the proposed publication of the alleged autobiography of "Auto Shankar" by the petitioners. **This cannot be done either by the State or by its officials. In other words, neither the Government nor the officials who apprehend that they may be defamed, have the right to impose a prior restraint upon the publication of the alleged autobiography of Auto Shankar. The remedy of public officials/public figures, if any, will arise only after the publication and will be governed by the principles indicated herein**.

(*Emphasis added*)

93. Two further authorities need to be noticed at this stage. The first is the Supreme Court decision in *S Rangarajan v P Jagjivan Ram & Ors.*[36] The case was of film certification or, as we are wont to still call it in India, the censor certificate. The Supreme Court cited the famous passage from *Sakal Papers (P) Ltd v Union of India*[37] by Mudholkar J:

> "… The courts must be ever vigilant in guarding perhaps the most precious of all the freedoms guaranteed by our Constitution. The reason for this is obvious. **The freedom of speech and expression of opinion is of paramount importance under a democratic Constitution which envisages changes in the composition of legislatures and Governments and must be preserved.**"
>
> (*Emphasis added*)

94. *Sakal Papers* was applied in *Shreya Singhal*, relied on and followed in *Kaushal Kishor v State of UP*,[38] and considered in *Anuradha Bhasin*.

95. In *S Rangarajan*, the Supreme Court also said:

> **42.** Alexander Meiklejohn perhaps the foremost American philosopher of freedom of expression, in his wise little study neatly explains:
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> > "**When men govern themselves, it is they — and no one else — who must pass judgment upon unwisdom and unfairness and danger. And that means that unwise ideas must have**

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36 (1989) 2 SCC 574.

37 (1962) 3 SCR 842 : AIR 1962 SC 305.

38 (2023) 4 SCC 1.

> **a hearing as well as wise ones unfair as well as fair, dangerous as well as safe, unAmerican as well … American. …** If then, on any occasion in the United States it is allowable, in that situation, to say that the Constitution is a good document it is equally allowable, in that situation, to say that the Constitution is a bad document. If a public building may be used in which to say, in time of war, that the war is justified, then the same building may be used in which to say that it is not justified. If it be publicly argued that conscription for armed service is moral and necessary, it may likewise be publicly argued that it is immoral and unnecessary. If it may be said that American political institutions are superior to those of England or Russia or Germany, it may with equal freedom, be said that those of England or Russia or Germany are superior to ours. **These conflicting views may be expressed, must be expressed, not because they are valid, but because they are relevant. … To be afraid of ideas, any idea, is to be unfit for self-Government.**" [Political Freedom (1960) at 27].

He argued, if we may say so correctly, that the guarantees of freedom of speech and of the press are measures adopted by the people as the ultimate rulers in order to retain control over the Government, the people's legislative and executive agents.

44. What Archibald Cox said in his article though on "First Amendment" is equally relevant here:

> "**Some propositions seem true or false beyond rational debate. Some false and**

> **harmful, political and religious doctrine gain wide public acceptance. Adolf Hitler's brutal theory of a 'master race' is sufficient example. We tolerate such foolish and sometimes dangerous appeals not because they may prove true but because freedom of speech is indivisible. The liberty cannot be denied to some ideas and saved for others. The reason is plain enough: no man, no committee, and surely no Government, has the infinite wisdom and disinterestedness accurately and unselfishly to separate what is true from what is debatable, and both from what is false.** To license one to impose his truth upon dissenters is to give the same licence to all others who have, but fear to lose, power. **The judgment that the risks of suppression are greater than the harm done by bad ideas rests upon faith in the ultimate good sense and decency of free people"**. [Society Vol. 24, p. 8, No. 1 November/December 1986]

45. The problem of defining the area of freedom of expression when it appears to conflict with the various social interests enumerated under Article 19(2) may briefly be touched upon here. There does indeed have to be a compromise between the interest of freedom of expression and special interests. But we cannot simply balance the two interests as if they are of equal weight. Our commitment of freedom of expression demands that it cannot be suppressed unless the situations created by allowing the freedom are pressing and the community interest is endangered. The anticipated danger should not be remote, conjectural or far-fetched. It should have proximate and direct nexus with the expression. The

> **expression of thought should be intrinsically dangerous to the public interest. In other words, the expression should be inseparably locked up with the action contemplated like the equivalent of a "spark in a power keg".**
>
> (*Emphasis added*)

96. Closer home, a learned single Judge of this Court (AP Shah J, as he then was), considering a case of refusal to telecast a film on Doordarshan, had this to say in *Anand Patwardhan v Union of India*:[39]

> **1.** John Stuart Mill, a great thinker of 19th Century in his famous treatise "Utilitarianism, Liberty and Representative Government" neatly explained the importance of free speech and expression in these words:
>
> > "**But the peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth; if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error**."
>
> **Indeed, freedom of speech and expression has now been accepted as a natural right which a human being acquires on birth. It is therefore, regarded as a basic human right.** The words "freedom of speech and expression" appearing in Article 19(1)(a) of the Constitution has been construed by

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39 1996 SCC OnLine Bom 306 : (1996) 2 Mah LJ 685 : (1997) 1 Bom CR 90 : AIR 1997 Bom 25 : (1996) 98 Bom LR 794.

the Supreme Court to include freedom to circulate one's views by words of mouth or in writing or through audio-visual instrumentalities. Thus every citizen of this free country has the right to air his or her views through the printing and/or the electronic media subject to permissible restrictions imposed under Article 19(2) of the Constitution.

The question arising in this petition whether the refusal of Doordarshan to telecast "In Memory of Friends", a documentary produced by the petitioner, violates his fundamental right of freedom of speech and expression will have to be considered in the light of these established principles.

15. Coming then to the objections raised by the respondents, we have noted that one of the objections is that the documentary tries to propagate leftist view point that only a class consciousness can prevent the religious and communal massacre. One may not agree with the view of the film maker. **But in a democracy it is not necessary that every one should sing the same song. Freedom of expression is the rule and it is generally taken for granted. The film maker may project his own message which the other may not approve of it. But he has a right to 'think Out' and put the counter-appeals to reason. It is a part of a democratic give-and-take to which one could not complain. The State cannot prevent open discussion and open expression, however, hateful to its policies. Everyone has a fundamental right to form his own opinion on any issue or general concern. He can form and inform by any legitimate means.** In this behalf the following observations of Alexander Meiklejohn, an

> American philosopher of freedom of expression, are worth noting:… [40]

97. This approach from our own jurisprudence sits uneasily with Mr Mehta's frequent assertions that the *government* welcomes debate, dissent, satire; and yet maintains that the impugned Rule is necessary. *Firstly*, it is not about this or that government at all. It is about what the State — perennial as the grass — *can* or *cannot* do. What a particular government or dispensation wants, and what the State can permissibly do may be very different things. *Secondly*, on my interpretation of the Rule in question — that is to say the requirement that an intermediary must block or take down any content relating to the business of the Central Government that the FCU has (on its own) determined to be fake, false or misleading, or, in default immediately lose safe harbour — for precisely this targeted content there remains no scope for any debate, dissent or satire *before* the material is excised from the public domain. Pointing to after-the-event grievance redressal mechanisms does not fulfil the purpose. *Thirdly*, Article 19(1)(a), the right to free speech and expression, when read with Article 19(2), clearly means that the government has an expansive right to counter any content, but an extremely restricted entitlement to abridge the fundamental right.

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40 Referenced, as we have seen, in *S Rangarajan*, and already extracted above. Hence, not reproduced here.

IV *'The Chilling Effect' & 'The Marketplace of Ideas'*

98. These two phrases are far too easily bandied about. I narrow their implications for these cases. *The chilling effect* speaks to censorship, but not direct censorship. It connotes a concatenation of factors that tend inevitably and ineluctably to self-censorship; and this self-censorship may itself be direct (by the author) or indirect (by another who has control over the author's content). Knowing that some content will be proscribed, and, if put out, will entail significant adverse consequences, the author refrains — and we have self-censorship. In parallel, where the author is dependent on some other agency on whom is cast the burden of content-control, the knowledge that the other agency will certainly (or even *almost certainly*) act to forbid that content prevents the author from exercising the right to free speech.

99. The *marketplace of ideas* is almost literally that. Ideas, left unexpressed, are not the cause for concern. It is the *expression* of ideas — of varying kinds, degrees and perspectives — that the right to free speech and expression evidently protects and guarantees. The use of the marketplace is not to be confused with commercialization. The marketplace here is a forum for exchange — where ideas, expressed in a certain way — are traded, exchanged, debated, commented on. The marketplace of ideas is a term of art that means space and opportunity for discussion, dissent and debate. Automatically, this has several implications. It means there is no universal or accepted 'version'. Perceptions matter. Opinions count. Dissent, disagreement and debate are of the essence; without them, there is simply no 'right

to freedom of speech and expression'. The marketplace of ideas is not a forum for agreement. It is a forum for *disagreement*. It is not about the comfort of conformity or the tranquillity of the familiar. It is a place for discomfort, discomfiture, unfamiliarity, and it is a demanding and taxing venue, *especially if there is to be a 'conversation' or a 'dialogue'*, for this necessarily demands that every discourse be civil, with possibly an agreement to disagree. As a learned single Judge of this Court (Dr DY Chandrachud J, as he then was) once remarked in the context of our profession, the *discourse of law is a discourse of civility*. Nothing is achieved by name-calling and threats.

100. I begin this part of the discussion with a telling extract from the remarkable 2011 decision of S Muralidhar J (as he then was) in *Srishti School of Art, Design & Technology v Chairperson, Central Board of Film Certification*.[41] The decision is an impassioned defence of free speech. Parts merit quoting at length.

> **S. Muralidhar, J.:— "The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests."** [Justice Harlan in *Cohen v. California*, 403 U.S. 15 (1971)] "I disapprove of what you say, but I will

41 2011 SCC OnLine Del 1234 : 2011 (123) DRJ 1 : (2011) 178 DLT 337.

defend to death your right to say it" [Attributed to Voltaire in S.G. Tallentyr, The Friends of Voltaire (1907)]

1. The Petitioner, which has produced a documentary film "Had Anhad? (Bounded-Boundless), challenges in this petition an order dated 28th May, 2010 passed by the Film Certification Appellate Tribunal ("FCAT") upholding three of the four excisions ordered by the Central Board of Film Certification ("CBFC") by its order dated 5th November, 2009 while granting the film a "V/U" Certificate.

23. **The freedom of the citizen's speech and expression under Article 19(1)(a) of the Constitution may not be absolute, but the restrictions thereon under Article 19(2) have to be narrowly construed. As explained in *Life Insurance Corporation of India v. Prof. Manubhai D. Shah* (supra [(1992) 3 SCC 637]) the burden is on the state to show that the benefit from restricting the freedom is far greater than the perceived harm resulting from the speech or depiction. The State has to ensure that the restrictions do not rule out legitimate speech and that the benefit to the protected interest outweighs the harm to the freedom of expression.** Justice Harlan in Cohen v. California (supra) pertinently asked: "**Surely the State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us?**"

26. In *Israel Film Studios Ltd. v. Gerry*, (1962) Isr SC 15 2407 (at 2416), the Israel Supreme Court was examining the justification of censoring a portion of a short film showing an eviction from the Somail suburb of Tel Aviv. The reason for disallowing the said portion, inter alia, was that it did not present the problem in its entirety. The Supreme Court of Israel reversed the decision of the censors. Speaking for the Court Justice Landau pointed out:

> "**A sovereign arrogating for itself the power to determine what the citizen should know will ultimately determine what the citizen should think; nothing constitutes a greater contradiction of true democracy, which is not "directed from above**". This thought is echoed in an essay titled "Sense and Censoribility" (at http://www. altlawforum org/law-an-media/publications/sense-and-censoribility visited on 25th February, 2011) by legal scholar Lawrence Liang. He points out that the law as interpreted by the Supreme Court "teaches you how you should see the film and a legal theory of spectatorship… it creates a world of reception theory, which plays an important pedagogic role, which is not just about prohibiting a particular view, but also about cultivating a particular view." Recognising the need to acknowledge the rights of both the "citizen viewer" and the "speaking subject" he says: "the task of censorship is to teach the viewer to become a citizen through particular spectatorial practices, and the imagined gaze of the citizen-viewer determines the specific content of censorship laws."

28. The scenes and visuals that constitute the third excision are in one sense a recalling of the memory of an historical event. The recall may be imperfect. It may contradict the collective memory of that historical event. It may revive tensions over the events being recalled. Yet, that by itself does not invite censorial intervention to obliterate the scenes of recall. In *Laor v. Film and Plays Censorship Board*, (1987) Isr SC 41 (1) 421 the censor Board refused to permit the staging of a play 'Ephraim Returns to

the Army" which described events in the occupied territories under Israeli military rule on the ground that it presented a distorted and false image of the military administration. It feared an outburst of "negative feelings against the State" and "severe offense to the feelings of the Jewish public by the implied and explicit comparison between the Israeli regime and the Nazi occupation." Justice Barak speaking for the Court that negatived the ban held: ***"It is none of the Board's business whether the play reflects reality, or distorts it."*** He went on to observe: "**Indeed, the passage in the play may offend the feelings of the Jewish public, and is certainly liable to offend the feelings of those with personal experience of the Holocaust. I myself was a child during the Holocaust, and I crossed fences and borders guarded by the German Army smuggling objects on my body. The parallel between the German soldier arresting a child and the Israeli soldier arresting an Arab youngster breaks my heart. *Nonetheless, we live in a democratic state, in which this heartbreak is the very heart of democracy.***"

29. Later in *Bakri v. Film Censorship Board*, (2003) Isr SC 58 (1) 249, this aspect was revisited. The documentary film which was censored — "Jenin, Jenin" — presented the Palestinian narrative of the battle in the Jenin refugee camp in April 2002 during the "Operation Defensive Wall". The film maker at the outset declared that he had made no attempt to present the Israeli position. The censor Board banned the film since it was "distorted" and was "offensive to public's feelings". The Israel Supreme Court reversed the Board. Justice Procaccia speaking for the Court observed "**the messages of the film *Jenin, Jenin*, as described above, are indeed offensive to wide sections of the public in Israel**" and **still the film could not be banned because "although the injury is deep and real, it does not reach the high threshold required to rescind freedom of speech**

> **…. the offense is not radically shocking to the point of posing a concrete threat to the public order, in a way that might justify restricting freedom of expression and creativity.**" Commenting on this decision, legal scholar Daphne Barak-Erez points out that the Court should perhaps acknowledge the offense to feelings caused by such films but still refuse to uphold the censor Board's decision **"because of the enormous danger of turning the state into the custodian of truth."** (Barak-Erez, Daphne (2007) "The Law of Historical Films: In the Aftermath of "Jenin, Jenin", Southern California Interdisciplinary Law Journal, Vol. 16, 495-522. The English translation of the passages of the above judgements of the Supreme Court of Israel, which in the original are in Hebrew, are hers.)
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> (*Emphasis added*)

101. I will return to the question of 'truth' momentarily. What the discussion so far tells us is the importance of divergence, in perception, perspective and expression. This relates both to the marketplace of ideas, an essential component of the right to free speech and expression (for without such a marketplace the right is a nothingness), and the pernicious 'chilling effect'. To put this in a firm perspective, we need to turn to the 5-judge Supreme Court decision in *Kaushal Kishor v State of Uttar Pradesh & Ors.*[42] The learned Attorney-General for India submitted that—

> **as a matter of constitutional principle, any addition, alteration or change in the norms or criteria for imposition of restrictions on any fundamental right has to come up through a legislative process. The restrictions already enumerated in clauses (2) and (6) of Article 19**

42 (2023) 4 SCC 1. Paragraph numbers are from the SCC Report.

> **have to be taken to be exhaustive. Therefore, the Court cannot, under the guise of invoking any other fundamental right such as the one in Article 21, impose restrictions not found in Article 19(2)**.
>
> (*Emphasis added*)

This is a central theme in the Petitioners' assault on the impugned Rule.

102. The Supreme Court held by majority that the first question before it was in two parts. The first was whether the Article 19(2) reasonable restrictions on the right to free speech under could be said to be exhaustive. The second, possibly following from the first, was whether *additional* restrictions on the right to free speech can be imposed on grounds not found in Article 19(2), *by invoking other fundamental rights*. We are not concerned here with the second part. The Supreme Court said:

> **33.** The restrictions under clause (2) of Article 19 are comprehensive enough to cover all possible attacks on the individual, groups/classes of people, the society, the court, the country and the State. This is why this Court repeatedly held that any restriction which does not fall within the four corners of Article 19(2) will be unconstitutional. …
>
> **34.** That the Executive cannot transgress its limits by imposing an additional restriction in the form of Executive or Departmental instruction was emphasised by this Court in *Bijoe Emmanuel v. State of Kerala* [(1986) 3 SCC 615]. The Court made it clear that the reasonable restrictions sought to be imposed must be through "a law" having statutory force and not a mere Executive or Departmental instruction. **The restraint upon the Executive not to have a back-door intrusion applies equally to courts. While courts may be**

entitled to interpret the law in such a manner that the rights existing in blue print have expansive connotations, the Court cannot impose additional restrictions by using tools of interpretation. What this Court can do and how far it can afford to go, was articulated by B. Sudarshan Reddy, J., in *Ram Jethmalani v. Union of India*, (2011) 8 SCC 1 : (2011) 3 SCC (Cri) 310] as follows:

> "85. An argument can be made that this Court can make exceptions under the peculiar circumstances of this case, wherein the State has acknowledged that it has not acted with the requisite speed and vigour in the case of large volumes of suspected unaccounted for monies of certain individuals. **There is an inherent danger in making exceptions to fundamental principles and rights on the fly. Those exceptions, bit by bit, would then eviscerate the content of the main right itself.** Undesirable lapses in upholding of fundamental rights by the legislature, or the executive, can be rectified by assertion of constitutional principles by this Court. However, a decision by this Court that an exception could be carved out remains permanently as a part of judicial canon, and becomes a part of the constitutional interpretation itself. It can be used in the future in a manner and form that may far exceed what this Court intended or what the constitutional text and values can bear. We are not proposing that Constitutions cannot be interpreted in a manner that allows the nation-State to tackle the problems it faces. The principle is that exceptions cannot be carved out willy-nilly,

and without forethought as to the damage they may cause.

86. **One of the chief dangers of making exceptions to principles that have become a part of constitutional law, through aeons of human experience, is that the logic, and ease of seeing exceptions, would become entrenched as a part of the constitutional order. Such logic would then lead to seeking exceptions, from protective walls of all fundamental rights, on grounds of expediency and claims that there are no solutions to problems that the society is confronting without the evisceration of fundamental rights. That same logic could then be used by the State in demanding exceptions to a slew of other fundamental rights, leading to violation of human rights of citizens on a massive scale.**"

35. Again, in *Ministry of Information & Broadcasting, Union of India v. Cricket Assn. of Bengal*, [(1995) 2 SCC 161], **this Court cautioned that the restrictions on free speech can be imposed only on the basis of Article 19(2).** In *Ramlila Maidan Incident, In re*, (2012) 5 SCC 1 : (2012) 2 SCC (Civ) 820 : (2012) 2 SCC (Cri) 241 : (2012) 1 SCC (L&S) 810] , this Court developed a three-pronged test, namely:

(i) that the restriction can be imposed only by or under the authority of law and not by exercise of the executive power;

(ii) that such restriction must be reasonable; and

> (iii) that the restriction must be related to the purposes mentioned in clause (2) of Article 19.
>
> (*Emphasis added*)

V Vagueness and Overbreadth

103. This brings me back to certain other portions of the encyclopaedic decision in *Shreya Singhal*; specifically the question of 'vagueness'. Vagueness and overbreadth are both linked to the concept of *the chilling effect*. Justice Rohinton Fali Nariman, speaking for the Court, considered these aspects. In paragraph 55, he held that it was settled law that where there were no reasonable standards prescribed to define guilt in a section that creates an offence, and absent clear guidance, such a section would be struck down as arbitrary and unreasonable: *Shreya Singhal*, paragraph 63 (citing *Reno v American Civil Liberties Union*[43]); less restrictive alternatives equally effective in achieving a legitimate purpose are to be preferred (*Shreya Singhal*, paragraph 65); the doctrine of 'vagueness' is *not* alien to our jurisprudence: *Shreya Singhal*, paragraph 68, citing *KA Abbas v Union of India*;[44] *Harakchand Ratanchand Banthia v Union of India*;[45] *State of MP v Baldeo Prasad*;[46] in paragraph 70, citing *AK Roy v Union of India*.[47]

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43 521 US 844 : 138 L.Ed. 2d 874 (1997).

44 (1970) 2 SCC 780

45 (1969) 2 SCC 166.

46 (1961) 1 SCR 970 : AIR 1961 SC 293.

47 (1982) 1 SCC 271.

104. In the context of a fundamental right, therefore, vagueness, overbreadth, impossibility of interpretation to provide the necessary statutory 'leanness' and precision are all reasons to invalidate a legislation.[48]

105. On the question of 'the chilling effect' and overbreadth, *Shreya Singhal* says in paragraph 87:

> **87. Information that may be grossly offensive or which causes annoyance or inconvenience are undefined terms which take into the net a very large amount of protected and innocent speech. A person may discuss or even advocate by means of writing disseminated over the internet information that may be a view or point of view pertaining to governmental, literary, scientific or other matters which may be unpalatable to certain sections of society. It is obvious that an expression of a view on any matter may cause annoyance, inconvenience or may be grossly offensive to some. A few examples will suffice. A certain section of a particular community may be grossly offended or annoyed by communications over the internet by "liberal views"—such as the emancipation of women or the abolition of the caste system or whether certain members of a non-proselytizing religion should be allowed to bring persons within their fold who are otherwise outside the fold. Each one of these things may be grossly offensive, annoying, inconvenient, insulting or**

48 I leave aside the question of the possibility of abuse of a statute, for it seems to me settled that the *mere* possibility that a statute *might* be abused is no reason to invalidate it; see paragraphs 95 and 96 of *Shreya Singhal* itself. But the passages in *Shreya Singhal* citing considerable earlier learning clearly suggest that where *wanton* abuse is inevitable, there may be sufficient reason to hold the statute unconstitutional; and an assurance that it will not be abused is no answer. No such submission is canvassed — at least not in these terms — before us, and therefore I will not enlarge the discussion in that direction.

> **injurious to large sections of particular communities and would fall within the net cast by Section 66-A. In point of fact, Section 66-A is cast so widely that virtually any opinion on any subject would be covered by it, as any serious opinion dissenting with the mores of the day would be caught within its net. Such is the reach of the section and if it is to withstand the test of constitutionality, the chilling effect on free speech would be total**.
>
> (*Emphasis added*)

106. Limiting the impugned Rule to the so-called business of the Central Government does not survive the *Shreya Singhal* test. I will return to a consideration of the submission on overbreadth and vagueness shortly, but I must first detour into this aspect of truth and falsity.

107. The need for precision in definition is not just 'desirable', submits Mr Datar, and I think with considerable justification. It is an essential requirement, especially when the attempt tranches upon the exercise of any fundamental right. In *Government of Tamil Nadu & Ors v R Thamaraiselvam & Ors*,[49] the Supreme Court in terms held that vague definitions and classification and conferment of unguided power (in that case by government order, not legislation) is sufficient for an invalidation.

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49 (2023) 7 SCC 251.

VI Fake, false or misleading: the faux true/false binary

108. In the context of vagueness and overbreadth, there are three distinct components in the impugned Rule that demand greater scrutiny:

(i) The sweep of the expression 'fake, false or misleading';

(ii) The meaning of the 'Business of the Central Government' (discussed later when considering the submissions under Article 14);

(iii) The 'identification' as fake, false or misleading by the FCU (discussed later while considering the submissions under Article 14).

109. Not one of these three words lends itself to any acceptable form of precision. The Affidavit in Rejoinder deals with this extensively from page 574 onwards, but even independently of that, there is an unacceptable level of subjectivity injected into these. Nobody knows on what basis the FCU will make this determination. Is it to be on some objective standard and material? Is that publicly accessible? Is the reference factual material itself tested for 'truth' or 'accuracy'? Some empirical or scientific fact may be taken as true (the distance of Earth from the sun, for instance). But in the real world — perhaps most especially in our world of law — few things are immutably black-or-white, yes or no, true or false. Lawyers and judges typically inhabit a world of well over fifty shades of grey.

110. This is crucial. For if 'fake, false or misleading' does not lend itself to precision and accuracy, then there is the issue of vagueness and overbreadth.

111. I consider this from three perspectives. First, I start with the Evidence Act, 1872. Then I look at two texts that grapple with the concepts of *truth* and *proof*. Finally, I look at instances from popular culture and contemporary writing.

i. Evidence Act

112. The Evidence Act defines "fact" like this in Section 3:

> "Fact" — "Fact" means and includes—
>
> (1) any thing, state of things, or relation of things, capable of being perceived by the senses;
>
> (2) any mental condition of which any person is conscious.
>
> *Illustrations*
>
> (a) That there are certain objects arranged in a certain order in a certain place, is a fact.
>
> (b) That a man heard or saw something, is a fact.
>
> (c) That a man said certain words, is a fact.
>
> (d) That a man holds a certain opinion, has a certain intention, acts in goods faith or fraudulently, or uses a particular word in a particular sense, or is or was at a specified time conscious of a particulars sensation, is a fact.
>
> (e) That a man has a certain reputation, is a fact.

113. Immediately, this highlights the problem: with 'facts' we are concerned with sensory *perception* and conscious mental conditions. Therefore: what a person said — the words — may be a fact, whether those words are *true* or *false* is another matter. Similarly, what a person *heard*, the actual sound or words, is a fact; whether that which was heard was *true* is separate.

114. But let me turn to the primary function of courts operating under the Evidence Act: the matter of *proof*. Proof is always of a fact. The Evidence Act tells us—

> "**Proved**".—A *fact* is said to be proved when, after considering the matters before it, the **Court either *believes* it to exist**, or ***considers* its existence so *probable*** that a ***prudent*** man **ought**, under the **circumstances of the particular case**, to **act upon the *supposition*** that it exists.
>
> "**Disproved**".—A *fact* is said to be disproved when, after considering the matters before it, **the Court either *believes* that it does not exist**, or **considers its *non-existence so probable*** that a ***prudent*** **man ought**, under the circumstances of the particular case, to **act upon the *supposition*** that it does not exist.
>
> "**Not proved**".—**A fact is said not to be proved when it is neither proved nor disproved**.
>
> (*Emphasis added*)

115. 'Belief', 'probability', 'prudence', 'supposition' — everything in this definition in one of our statutes, something almost certainly overlooked in framing the impugned Rule, points to the sheer impossibility of an absolute determinism in all things, even those relating to the business of the Central Government. The most telling

of these is the last: a *fact* may simply be "not proved" — neither proved nor disproved, meaning that there is just not enough for even a belief, a probability, a supposition.

116. The test is always that of a prudent person: a *reasonable* reader, as the Supreme Court said in *Ramesh Chotalal Dalal v Union of India & Ors.*[50]

ii. Scholarly works

117. On this perennial dilemma, it is worth considering the following extracts from John D Caputo of Syracuse University and Villanova University. In his incisive work *Truth: The Search for Wisdom in the Postmodern Age*,[51] he writes:

> **Contemporary life, which is marked by modern transportation systems in which we can travel almost anywhere, and modern information systems, through which almost anything can travel to us, is much more pluralistic than life in the past.**
>
> **This has resulted in ideas about open-ended rainbow cultures rather than monochromic pure ones. But it has also created trouble. On the one hand it has created social strife, arising from an influx of peoples into the wealthier nations in search of a better life, as well as the exploitation of the poorer countries by the wealthier ones on the global market.** Kant, to his credit, saw some of this coming, and addressed it under the name of 'cosmopolitanism', treating visitors as citizens of the

50 (1988) 1 SCC 668.

51 Penguin Books, 2013.

cosmos, of the world, which is an excellent point, especially coming from someone who didn't get around much. **On the other hand, contemporary life has created problems for philosophers, as all this pluralism threatens a veritable vertigo when it comes to truth, and that vertigo is called postmodernism.**

So if you ask postmodernists, 'What is truth?' they are likely to squint and say, 'It depends.' Postmodernists tend to be a bit incredulous that there is just one thing called truth which is always and everywhere the same, and are more inclined to think there are a lot of different truths, depending on who and where you are; they are inclined to play it loose. Herein lies the problem. Playing it too loose with truth is called relativism — a point that we will want to keep in mind throughout. Relativism means there is no Truth, just a lot of competing truths, depending on your language, culture, gender, religion, needs, tastes, etc., and one is as good as another. Who can say what is true? Who has the authority to pronounce on that? So the critics of postmodernism fear the worst: relativism, scepticism, nihilism, flat out anarchy. And, truth to tell, a lot of postmodern philosophers have created this impression because they have spent their time trying to take the air out of Truth. In the late nineteenth century, Nietzsche (one of postmodernism's patron saints) said Truth was an ensemble of fictions and metaphors that we had forgotten are fictions and metaphors. **More recently, the highly influential philosopher Richard Rorty (1931–2007) said truth was merely a compliment we pay ourselves when things are going well with our beliefs.** He was an American, and a pragmatist. But maybe you already guessed that. Classical philosophers, especially Germans, love to capitalize Truth (of course the Germans capitalize all their nouns), while postmodernists generally avoid the upper case.

So the problem we have on our hands — and it's a good one to read about on a long journey — is what 'universal' means in a postmodern world, and what 'truth' means where our first thought is that everyone's truth is entitled to its own fifteen minutes in the sun.

Relativism is the main threat to truth that is posed by the postmodernists, just as absolutism is the main threat posed by modernism. In what follows I hope to dodge both these bullets, each of which I regard as dead ends, I will argue that absolutism is a kind of intellectual blackmail, while relativism, which is widely mistaken to be the postmodern theory of truth, is in fact a failure to come up with a theory. Relativism renders us unable to say that anything is wrong, but absolutism confuses us with God. Unbridled relativism means that anything at all could be taken to be true, and then we're left standing at the station, holding the bag of 'anything goes'. This isn't chaosmic, it's just chaos. If anything goes, how will you ever be able to say anything is false? Why not just say things are different?

How about '2 + 2 = 5'? How would you be able to object to lying and cheating? How about people who swindle the elderly out of their life savings? The list goes on. So, fond as we are of travelling hither and yon, *Anything Goes* is one of those places we don't want to go.

This even entails renouncing the title of my book, *Truth*, and breaking the bad news to readers that there is no such thing. Instead there are truths — many of them, in the plural and lower case. There is no such thing as Reason (as it was understood by the Enlightenment at least), but there are good reasons and bad ones. I want to defend all of this — and this is the challenge — while not ending us all up in the Relativist ditch of '*anything goes*'.

> Lessing offers us some sage advice in terms of reducing our expectations and trimming our sails to the winds of space and time. **He said that if God held out the truth in his right hand and the search for truth in his left hand and asked him to choose, he would select the left hand, on the grounds that the absolute truth itself was for God alone, while his own business was the search for truth.**
>
> But what we today mean by hermeneutics is a more general theory, **that every truth is a function of interpretation**, and **the need for interpretation is a function of being situated in a particular time and place, and therefore of having certain inherited presuppositions**. This is something of which we have been made acutely aware by modern transportation and information systems, by virtue of which we are constantly being barraged by a multiplicity of perspectives. **Whatever truth means for us — in our postmodern situation — is a function of hermeneutics, of learning to adjudicate; of dealing with difference judiciously.**
>
> **Hermeneutics is based on the idea that there are truths big and small, some crucially important, others not so much, truths of different kinds, levels and purposes, all depending on our hermeneutic situation**.
>
> (*Emphasis added*)

118. It is difficult to argue with this theory and approach. But it highlights precisely the problem that lies at the heart of the impugned Rule: that an absolute determination of that which is fake, false or misleading is even possible in all circumstances; and that the sole arbiter of that, in relation at least to the business of the Central Government, is the government itself.

119. To be sure, it cannot be suggested that *nothing* is capable of an absolute determination as the 'truth'. Two plus two always equals four, and the River Thames does run through London. This lies at one end of the spectrum, as Mr Bhatia points out in his written submissions. At the other, lie statements that are neither true nor false: expressions of opinions, hopes, desires. But what the impugned Rule is concerned with is content and information that lies between these polarities: subjective assessments even on objective data, or questioning of the data, especially if that data comes from the government. It is possible, for instance, to query the 'official' government data on any metric — the economy, poverty, health, for instance — or to question and look askance at contemporary events and actions — demonetization or what is most likely to have happened during a border skirmish or incursion.

120. Frederick Schauer, the David and Mary Harrison Distinguished Professor of Law at the University of Virginia, has written extensively on free speech, stereotypes and the law. Prof Schauer is also a fellow of the British Academy and the American Academy of Arts and Sciences, and, importantly for my purposes, was the Frank Stanton Professor of the First Amendment at Harvard University for 20 years. In a recent work, *Proof: Uses of Evidence in Law, Politics and Everything Else*,[52] he poses difficult questions and sets them in a contemporary context:

> But evidence is not only about trials and not only about law. It is about science; it is about history; it is about psychology; and it is, above all, about human rationality. **What do we**

52 The Belknap Press of the Harvard University Press, 2022.

know, and how do we know it? More specifically, what do we know about the facts of the world, and how do we know them?

… **All too frequently, for example, commentators on a variety of issues conflate the lack of evidence with falsity — taking the absence of evidence as being equivalent to evidence that the statement is false. Those looseness needs to be inspected. Similarly, public discourse often couples the idea of evidence with any of numerous qualifying and annoyingly confusing adjectives. Phrases such as "hard evidence", "direct evidence", "concrete evidence", "conclusive proof" and many others all suggest, misleadingly, that the lack of overwhelming proof beyond a reasonable doubt for some conclusion is sufficient to reject a conclusion for which there is at least some evidence.** … In response to current events, **we often see officials and others display a dangerous lack of respect for the evidentiary conclusions of genuine experts, but these events also sometimes endow professionals, experts and expert institutions with an authority that extends well beyond the scope of their expertise**.

… This book is based on the premise that controversies about facts are important in their own right, but even more so because they provide the foundations for questions of personal choice and public policy.

Evidence is the pre-requisite for judgments of truth (and falsity). … what psychologists call "motivated reasoning" is a large part of the evidentiary terrain. Unfortunately, how people perceive the facts of the world is often substantially influenced by their normative preferences about how they would like the world to be.

… Even more fundamentally, however, evidence matters only to those for whom truth matters. **And it is not clear**

that truth matters to everyone, in the same contexts, and to the same degree. If we think of truth as something that can be preferred (or not), we can then understand a preference for truth as competing with preferences for happiness, affection, friendship, ambition, wealth, health, lack of stress and a myriad of other emotions and conditions that may at times conflict with and be more important to some people than the truth.

… it is hardly obvious … that more truth (or more knowledge) is equally important for all people (or institutions) at all times and for all subjects. And it is equally not obvious that evidence, the basis for our knowledge and the basis for our judgments of truth and falsity, is equally important for all people at all times and for all subjects.

As recent controversies have prominently and often tragically demonstrated, expertise matters. It is sometimes said that we live in an "age of experts". We live also, however, in an age of dueling experts, in which the conclusions of experts are marshaled on multiple sides, and in which the notion of "expert opinion", as a collective consensus judgment of multiple experts is elusive.

Still, there are a few themes that run erratically through what is to follow. **First is that probabilities matter. A lot. The very idea of evidence is about inductive reasoning and thus about probability, even if not necessarily with numbers attached, the probabilistic nature of evidence will be a recurring focus. Second, evidence comes in degrees. Sometimes, and seemingly more often recently than in the past, people reach conclusions and make statements for which there is, literally, no evidence. But although "no evidence" really is no evidence, weak evidence is still evidence. And weak evidence often has its uses. Repeatedly, the question of how much evidence**

> **there is will be as important as the question whether there is any evidence at all. The third running theme follows from the second. Whether what evidence we have, or how much evidence we have, is good enough depends on what we are to do with it, and on the consequences of the evidence we have being sufficient or insufficient to support some conclusion**. …
>
> (*Emphasis added*)

121. In *Deepfakes and the epistemic apocalypse*,[53] the philosopher Joshua Habgood-Coote of the University of Leeds takes a closer look at deepfakes and the narrative that these will precipitate an unprecedented epistemic apocalypse. The published paper's abstract reads:

> It is widely thought that deepfake videos are a significant and unprecedented threat to our epistemic practices. In some writing about deepfakes, manipulated videos appear as the harbingers of an unprecedented *epistemic apocalypse*. In this paper I want to take a critical look at some of the more catastrophic predictions about deepfake videos. **I will argue for three claims: (1) that once we recognise the role of social norms in the epistemology of recordings, deepfakes are much less concerning, (2) that the history of photographic manipulation reveals some important precedents, correcting claims about the novelty of deepfakes, and (3) that proposed solutions to deepfakes have been overly focused on technological interventions.** My overall goal is not so much to argue that deepfakes are not a problem, but to argue that behind concerns around

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53 Habgood-Coote, J. Deepfakes and the epistemic apocalypse. Synthese 201, 103 (2023). https://doi.org/10.1007/s11229-023-04097-3; shareable: https://rdcu.be/dw37o. Accessed on 13th January 2024.

deepfakes lie a more general class of social problems about the organisation of our epistemic practices.

(*Emphasis added*)

122. Habgood-Coote's paper opens:

> **1 Introduction**
>
> Ours, too, is an age of propaganda. We excel our ancestors only in system and organization: they lied as fluently and as brazenly.
>
> C.L.R James, The Black Jacobins (1938), p5.

Attention: your beliefs are under threat! Any miscreant with access to a laptop can produce of videos of anyone doing anything they want, using advanced and mysterious forms of deep learning. These deep fake videos should spook you out. Here, watch some: Barack Obama saying "Ben Carson is in the sunken place"; Tom Cruise joking about Mikhail Gorbachev and polar bears; Richard Nixon delivering his contingency speech about the destruction of Apollo 11; Elizabeth Windsor delivering an alternative Christmas message. … **Deepfakes mean that we can no longer trust our eyes; at least when we're looking at videos. Even if deepfakes don't become widespread, their mere possibility is enough to undermine the knowledge we gain from recordings.** These videos indicate the start of a new age of epistemic troubles: … We're entering *the Epistemic Apocalypse*. **This is a technological dystopia, and technology itself is the only solution: we urgently need to invest more in deepfake technology to help us detect fakes.**

Although a little hyperbolic, the previous paragraph is a collage of real claims from news coverage and commentary about deepfakes. Let's call the view expressed in this paragraph the Epistemic Apocalypse narrative. This

narrative began to take shape in 2018 with a series of popular articles: …

At the centre of this narrative are three claims:

1. Deepfakes will have terrible effects on our socio-epistemic practices.

2. Deepfakes are historically unprecedented.

3. The solutions to deepfakes are technological.

The goal of this paper is to take a critical look at these claims. **On the first claim, I will argue that the idea that deepfakes mark a significant transformation in the way we gain knowledge from recordings relies on a plausible but incorrect view of the epistemology of recordings. On the second claim, I will show that manipulated recordings have been common throughout history.** On the third claim, I will argue that a combination of technochauvinism (Broussard, 2018), and the post-truth narrative (Habgood-Coote, 2019) has focused attention on technological aspects of the problem posed by deepfakes, to the detriment of the social aspects of this problem.

My goal is not so much to argue that we should be sanguine about the threats of deepfakes, but to point out ways in which the Epistemic Apocalypse narrative has distorted the epistemic problems we actually face. The problem with discourse around deepfakes is that writers are asking the wrong questions, transforming real social problems about enforcing the proper norms of image production and dissemination, and the management of ignorance-producing social practices into hypothetical technological problems about how to detect perfect simulacra. If we focus back on social problems, there remain important reasons to be pessimistic about our epistemic situation, but the primary objects of our

> **concern will be techno-social practices: social practices which are shaped by available technology**.
>
> (*Emphasis added*)

123. Other recent articles in popular journals and magazines have over the past seven years or so echoed these views: Adrian Chen, 2017;[54] Daniel Immerwahr, 2023.[55]

iii. 'The Illusion of Choice'

124. Counsel for the Petitioners all submitted, each in his own way, Mr Seervai perhaps most emphatically, that the impugned Rule gives social media users only the *illusion* of choice over content. In reality, it allows the Central Government to wholly proscribe alternate views on some content — and it is the Central Government alone which decides what content will be subjected to this identification of fake, false or misleading and why.

125. But this argument is predicated on the assumption, which I do not accept, that a social media user can be as thoroughly irresponsible in regard to content as he or she desires. On this, Mr Mehta is undoubtedly correct. Even if it is not a matter of policing, or of State authority, *merely* because the content is on the internet or on social

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54 *The Fake-News Fallacy*; The New Yorker, August 28, 2017. https://www.newyorker.com/magazine/2017/09/04/the-fake-news-fallacy. Accessed on 11th December 2023.

55 *What the Doomsayers Get Wrong About Deepfakes*; The New Yorker, November 13, 2023. https://www.newyorker.com/magazine/2023/11/20/a-history-of-fake-things-on-the-internet-walter-j-scheirer-book-review. Accessed on 11th December 2023.

media does not mean that it is wholly immune from checking and verification. Here Mr Mehta neatly turns the tables: print media, he submits, always has internal fact checking. The major news organizations like the Financial Times, the New York Times, the Economist and other periodicals like the New Yorker and a slew of others are reputed to have very stringent fact checking standards. Submitted material must *first* pass through these filters before it hits print — and, in the case of online editions, even the online versions of the same content. The Petitioners have no grievance with this before-the-event fact-checking, he submits; they do not say it amounts to self-censorship or pre-censorship. Their only objection seems to be to the after-the-event post-facto checking of a certain class of content (relating to the business of the Central Government). This contradiction is never explained, Mr Mehta submits.

126. The rejoinder to this is that pre-censorship of Central Government content would be impermissible. The Union of India's reply dissembles: nobody denies the need for fact-checking of online content (certainly in the context of reportage and news media coverage). But, say the Petitioners, that provides a complete answer: if the news coverage, reportage, opinion piece, op-ed, etc have all already been filtered by the organizations themselves, then they lie in the grey zone between the innocuous absolute 'truths' (2+2=4) and the mere expressions of desires (which are neither true nor false). What is capable of being targeted is the internally fact-checked material that the Central Government unilaterally considers to be fake, false or misleading. This could be an analysis of the government's own data or assertions, or criticism. Almost any counter-narrative could be said to be 'misleading'. Absent any

guidelines, the Rule in question is vague and overbroad. 'Exemplars' in court filings do not substitute for guidelines. Mr Seervai puts it like this: what the government is telling us is that we — individuals on their own or representing news outlets — may put out content, some of it passing through internal filters, but we must do so knowing that if the government decides it is 'fake' or 'false' or 'misleading', our content is liable to be taken down. Every single counter point on government business can conceivably fall within the word 'misleading'. What is left to the user, therefore, he submits, is nothing but an *illusion* of choice; in reality, there is no choice at all; all must, at least in regard to 'the business of the Central Government', conform to the diktat of the FCU.

127. This should not become a debate about a theory of law or freedoms. We are concerned with the interpretation of a particular Rule. The Petitioners' argument is founded on the premise that all users everywhere and in all circumstances have the plenitude of choice. In reality, our choices are constrained by innumerable factors. The argument comes perilously close to saying that no law that even fits within Article 19(2) — itself a constriction of choice — can or should ever be made. A more accurate approach would be, I believe, to simply say that choices (i.e., freedoms) cannot be constrained except in strict accordance with Articles 19(2) to (6). The mere invocation of the 'illusion of choice' is insufficient; and might have perilous consequences — such as a fifth instalment of *The Matrix* movie franchise. Nobody wants that.

iv. Contemporary Culture & Events

128. The contestation between 'fact' and 'truth' has been the focus of much artistic endeavour. Perhaps the most enduring and vivid example is the 1950 Japanese film *Rashomon* by Akira Kurosawa. The film is acclaimed for a plot device and structure by which various characters provide subjective, alternative, conflicting and contradictory versions *of the same incident* — the *alleged* rape of a woman and the murder of her samurai warrior husband. Four contradictory narratives are present. The fourth character claims all three other stories are 'falsehoods'. Which version is the 'truth'?

129. It is worth pausing for a minute to reconsider the position and description of social media intermediaries. The word 'platform' is perhaps too arid given the nature and intensity of activity. A more apposite term might be to liken each one to a *campus*, one where (at least in theory), there should be a free exchange of ideas. But, as we know, free speech is imperilled even on campuses everywhere.

130. In "*Who's Cancelling Whom?*", David Cole, National League Director of the American Civil Liberties Union and Honourable George J Mitchell Professor in Law and Public Policy at the Georgetown University Law Center, addresses recent events on American campuses in the light of the recent conflict at Gaza.[56] He writes:

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56 New York Review of Books, 11th January 2024 web edition, 8th February 2024 print edition. https://www.nybooks.com/articles/2024/02/08/whos-canceling-whom-canceling-of-the-american-mind/, accessed on 12th January 2024.

The sad reality is that intolerant efforts to silence those with whom we disagree have long been a staple of our culture. That's why the First Amendment is so necessary. At various times and in various places during our nation's history, Jeffersonian Republicans, Hamiltonian Federalists, Catholics, Jews, Jehovah's Witnesses, atheists, labor organizers, anarchists, pacifists, socialists, communists, civil rights activists, white supremacists, women's liberation advocates, LGBT rights proponents, and fundamentalist Christians have all been victims of the intolerance of substantial parts of American society, and often of government censorship as well. **And while social media has undoubtedly enabled new modes of cancellation, its ready availability to all has simultaneously provided a megaphone to unpopular speakers, making it more difficult to cancel them effectively.**

With so much cancellation from all sides, free speech is undoubtedly imperilled on college campuses. The academic enterprise demands a commitment to open debate and free inquiry. In the words of a 1974 Yale faculty committee report, written by the historian C. Vann Woodward in response to students shouting down speakers fifty years ago, **"The history of intellectual growth and discovery clearly demonstrates the need for unfettered freedom, the right to think the unthinkable, discuss the unmentionable, and challenge the unchallengeable."**

And the problem is hardly unique to universities; a broader culture in which people often get their news and opinion from outlets that express only one point of view means many have lost the habit of engaging seriously with ideas they find disturbing, wrong, or offensive. We ask a lot of students when we tell them to rise above all that. But as the 1974 Yale committee noted, that is precisely what intellectual growth requires.

> The prevalent notion that hearing something one finds offensive inflicts harm that should be avoided, and concomitant demands for "trigger warnings" and "safe spaces," make open conversation challenging. In response, it's not sufficient to invoke the playground rhyme "Sticks and stones may break my bones, but words will never hurt me." We have all at some point been hurt by someone's words. **Speech is undeniably powerful, and it can be used for good or bad ends. But just as playing soccer inescapably poses the risk of injury, so the free exchange of ideas will inevitably leave some feeling bruised. The costs must be acknowledged but cannot justify suppression if speech—and academic inquiry—are to be free.**
>
> **Committing to free speech means respecting everyone's right to speak, even and especially those we deem most offensive.**
>
> (*Emphasis added*)

131. We should not forget that social media 'users' do not just post content. They also *consume* it. They are readers as much as they are writers (or forwarders, or 'posters', or whatever the term might be). The point that Mr Seervai makes is, I believe, that it is not for any one agency to decide — in the marketplace of ideas — what a reader should or should not consume, or how he or she should make up his mind.

132. In other words, and through the lens of our jurisprudence, anything that travels beyond the boundaries of Article 19(2) to adversely impact Article 19(1)(a) is absolutely forbidden. Censorship,

direct or indirect, falls in this class unless it is shown to fit within the permissible restrictions prescribed and limited by Article 19(2).

133. Other contemporary cultural references are to 'speaking truth to power', and 'calling out' governments, about holding them to account. These also highlight the concerns of the Petitioners as citizens and shows that these concerns are neither trivial nor confined to the rarefied and esoteric world of lawcourts. They are echoed in literature, art, cinema. What, for example, might we make of fiction? The concern there is not about facts, but through the novel — and all great literature teaches us this — about some form of 'truth'.

134. Since we have before us a Petition by Kamra, a professional stand-up comedian, we should listen closely to the words of Rowan Atkinson too, from 2018, on just how fundamental the fundamental right to free speech really is:[57]

> **My starting point when it comes to the consideration of any issue relating to free speech is my passionate belief that the second most precious thing in life is the right to express yourself freely. The most precious thing in life, I think, is food in your mouth, and the third most precious is a roof over your head, but a fixture for me in the number two slot is free expression, just below the need to sustain life itself.** That is because I have enjoyed free expression in this country all my professional life, and fully expect to continue to do so.
>
> (*Emphasis added*)

57 https://www.youtube.com/watch?v=BiqDZlAZygU.

135. Why should we, in law, be so sanguine as to abjure the thoughts, beliefs and feelings of the world around us? Of the way citizens increasingly choose to do business and to communicate? If it is not to be reduced to arcane aridity, if it is to progress through time, the law *must* be informed by and alive to society and culture, changing times, aspirations, hopes, dreams and desires. The argument that the impugned Rule serves the 'public interest' is irreconcilable with its singular focus on business of the Central Government. That is by no means the only public interest — even if public interest was a valid consideration in an Article 19(1)(a) challenge, which it is not.

VII Can the impugned Rule be saved by 'reading it down'?

136. Mr Mehta has tried to persuade us that it is within our remit to 'read down' the Rule to save it, that being our primary objection. That if we can find a way to uphold the Rule, we should is not contentious.[58] But how is this to be achieved? Mr Mehta's submission is really to show that the impugned Rule, correctly read, or sufficiently read down, is not vulnerable on the grounds of vagueness and overbreadth (which I touched upon earlier).

137. I take it as equally not contentious that in the guise of 'reading down', a whole re-writing of the statute is impermissible.[59] Nobody denies this.

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58 *State of Tamil Nadu v P Krishnamurthy*, (2006) 4 SCC 517. There is indeed a presumption in favour of constitutionality, but it is not irrebuttable. The burden lies on he who assails it.

59 *Shreya Singhal*, *supra*, paragraphs 51–52; *Minerva Mills v Union of India*, (1980) 3 SCC 625, paras 61, 64, 74.

138. The submission is in three parts:

(i) What is fake, false or misleading is capable of accurate discernment, even if these terms remain statutorily undefined.

(ii) Mere vagueness with nothing more cannot result in the Rules being struck down.

(iii) Unconstitutionality of a law on the grounds of vagueness is limited to provisions with penal consequences (and hence the *Shreya Singhal* dicta will not apply).

139. I have already discussed the relevant portions of *Shreya Singhal* on overbreadth and vagueness. I will not repeat these. I find nothing in *Shreya Singhal* that overbreadth or vagueness as a ground to hold a statute ultra vires is limited to penal provisions. If anything, it is quite the opposite. I cannot possibly revisit or rethink the Supreme Court dicta in *Shreya Singhal*.

140. I am puzzled how it can be denied that this Rule has no 'penal' consequences. It does. There does not have to be a rule prescribing an offence or a punishment. Rule 7 makes it clear that not only is there loss of safe harbour but there is an immediate liability to prosecution as well, and a loss of prosecution immunity if an intermediary does not cease to host the FCU-identified content.

141. The first point remains. Is there vagueness? Can it be cured by an appropriate 'reading down' (not a rewriting)? What would Mr Mehta have us do? How would he have us read the Rule in question?

142. To begin with, Mr Mehta contends that the Rule is limited to that which is fake or false, and this can never be subjective. I have been at some pains to question the accuracy of even this assertion, so broadly stated. But the submission wholly elides the expression 'misleading' and asks that it be ignored entirely. That I cannot do. I do not say that it will colour the other two terms, but it has to be read in context. When confronted with this, to argue causality — that some information is 'misleading' *because* it is 'fake or false' — proceeds on a false premise of the three words being amorphous and interchangeable or having some sort of undefined interplay. But that in itself is vagueness and overbreadth. The three words *are* disjunctive (the comma and the use of the disjunctive 'or'). One expression cannot glissade over the others. That is not reading down. It is reading out. I cannot do that.

143. *Second*, Mr Mehta says that 'information' in the impugned Rule should be confined to 'facts'. But 'information' is defined in the IT Act. 'Fact' takes its definition from the Evidence Act, as we have seen. What is now suggested is that we should *read in* to fake, false or misleading as an exclusion (or somehow *read out*), any opinion, view, commentary, satire, or criticism. The Rule does not even remotely suggest this. It simply flattens everything that is in its path by referencing *any* information that the FCU has identified as 'fake, false or misleading' in relation to the 'business of the Central Government'. Now the definition of 'information' in the IT Act itself is expansive and inclusive. It has the widest possible import. I do not see how a court can, in the face of that interpretation, narrow the definition by judicial interpretation. That would be most injudicious. The written submissions by Mr Mehta do not really clarify the

position. For instance, it is suggested — and I do not know by what mechanism a statement in written submission or even on affidavit can operate to alter a statute — that 'false information' is that which 'purports' to be true but 'cannot be supported as true under any reasonable interpretation'. Supported by whom? Why? What is or is not a reasonable interpretation is surely not a singularity.

144. I was surprised to hear from Mr Mehta a suggestion that there could be a disclaimer by intermediaries, i.e., that when confronted with a FCU identification of some business of the Central Government being fake, false or misleading, a mere disclaimer would suffice without actual removal of content. But nothing in my analysis of the Rule supports this. The emphasis is on the words "not to host". Continuing to host with a disclaimer attached is not contemplated at all.

145. Further, emphasizing the words 'reasonable efforts' is to no avail. The reason is the virality of the medium. No intermediary can guarantee that every single occurrence, repetition or incident of content is removed. By its very nature, content is proliferated and repeated, endlessly: what we call 'forwards'. This is not a situation of a single chunk of content being in a static or solitary place from which it can be removed. It spreads in every direction — hence, 'reasonable efforts' (as opposed to doing nothing at all). Moreover, digital content is frequently cached and can remain in some digital store for years on end. No one can ensure absolute removal; hence, again, a 'reasonable' or 'best efforts' provision. But this is not the same thing as saying that the intermediary has the choice of *not* removing the

content identified by the FCU as fake, false or misleading. If it does not, it has not made 'reasonable efforts' and the consequences follow.

146. Here Mr Mehta in his further written submissions invites us to venture into the realm of the 'known unknowns', or, as he puts it, the 'elephant test' — impossible to describe, but you know it when you see it.[60] The first authority cited, from the UK, *Aerotel Ltd v Telco Holdings Ltd*,[61] actually *rejected* this submission. But Mr Mehta's canvas is this trifecta: (*i*) it is *not necessary* to define with precision the words fake, false or misleading because (*ii*) they *cannot* be precisely defined; yet (*iii*) one knows them when one comes upon them.

147. But in the same written submissions, the Union of India would have it that the terms are capable of 'mathematical precision', and it provides ten pages of definitions; presumably inviting us to fall back on ordinary lexical meanings.[62] But what not one of these definitions deny, as they cannot, is that though a determination may be possible, it is inherently subjective.

148. We have already seen what the Evidence Act says. But now we are told that far from the FCU 'identifying' (with no stated guidelines, norms or prescriptions as to how this identification is to be done), that the FCU will 'adhere to' to 'legal concepts' such "preponderance of probabilities", "proof beyond reasonable doubt", and "balance of equities" while it identifies what is fake or false. But

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60 Further written submissions, paragraph 104 onwards.

61 2007 (1) All ER 225.

62 Further written submissions, paragraphs 115–126.

I ask the question, to which there is no answer: why should the FCU do so if the Rule does not command it? And even if it does, these standards — all rooted in the Evidence Act — can yield inconsistent and contradictory results. What troubles me is this. If the FCU is to go about its business in this fashion, then it is really arrogating to itself the power of some court, civil or criminal. For the final determination of these matters *on these standards and precepts* is the work of courts. If one strips away these accretions, what remains is the conferment of unguided and uncanalised authority on the FCU to decide what it likes about anything it choose relating to the business of the Central Government.

149. Vagueness and overbreadth may overlap, but they are conceptually distinct. Vagueness is unacceptable fuzziness and lack of clarity. Overbreadth is a statute that tries too much. Notably, dealing with overbreadth, the Shreya Singhal court applied the decision in *Kameshwar Prasad v State of Bihar*,[63] where the Supreme Court struck down on the ground of it being overbroad a rule that proscribed every form of demonstration or strike by a government servant.

150. I cannot accept the submission on behalf of the Union of India that the Petitioners are seeking to canvas a fundamental right to a falsehood. That is not my understanding, and it is a terrible over-simplification. The very fact that Article 19(1)(a) has no boundaries but Article 19(2) has very strict ones tells us one thing plainly: that expressions of ideas can, are, and should be contested; and that truth

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63 1962 Supp (3) SCR 369.

is indeterminate. Courts, as arbiters of neutrality, adjudicate evidence and proof of facts; and they do so on the determinants set out in law. As Lessing said, perhaps only God (at least to a believer) knows what the absolute truth is. The burden of humankind is to forever be in search of it, though it may, like the cup of Tantalus, remain always just out of reach.

151. The point really is this: nobody denies and nobody can deny the Government to counter as strongly as it wishes any particular information, factoid, or content. But it is an altogether different thing for the government to demand that that which it has in its sole discretion 'identified' should be the *only* information, factoid or content about even the business of the Central Government; and any non-conforming information, factoid or content must be excised.

VIII *Does the impugned Rule survive the Article 19(2) test?*

152. Mr Mehta's reliance on *Tata Press Ltd v Mahanagar Telephone Nigam Ltd*[64] is not persuasive. That was in the context of commercial speech, also protected under Article 19(1)(a), and reaffirms that it can only be restricted under Article 19(2).

153. I am not prepared to hold that Article 19(2) can be expanded.

154. This means that the impugned Rule must be shown to fall strictly within the parameters of Article 19(2). Many 'exemplars' are shown to us in a compilation. This is not a matter of protecting speech

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64 (1995) 5 SCC 139.

that is fake, false or misleading at all — an egregious mischaracterization — but how this is to be determined and by whom. Reliance on the dissent in *Kaushal Kishore* to suggest that the law is that only speech with 'social value' is protected is jurisprudentially unsound. We are bound by the majority view. Indeed, this reliance on dissent highlights the very paradox in question. The submission is that all fake, false or misleading information falls into Article 19(2). But this again begs the question. Let us say the Financial Times or the Economist reports with statistics on India's performance under various heads and metrics. The government disagrees. The reportage could not possibly be said to fall within Article 19(2). It would be protected. The submission does not cover this possibility. Or, to take another hypothetical, let us say there is a report from overseas of stock manipulation allegedly done by an Indian company. Newspapers report that there is such a report. The government says the information is 'fake, false or misleading'. I ask, *which* information? That there was such an overseas report? Or what that report alleged? This ambivalence cannot possibly be squashed into Article 19(2).

155. Further, I find repeated references to 'national security', 'the public interest', and 'the national interest'. Those are not to be found in Article 19(2). I have gone through the various 'examples' cited by the Union of India. I have found a single one that fits within one or the other of the parameters set out in Article 19(2). I am unimpressed — and unintimidated — by the repeated use of expressions like 'national security related information', 'public interest', 'elections' and 'havoc'. As Mr Datar points out, free speech cannot be regulated 'in the public interest' because that arena of restriction is not in

Article 19(2). It does appear in Articles 19(5) and 19(6), but has been excluded from Article 19(2).

156. Answering this, I understood Mr Mehta to say that the Supreme Court decision in *Secretary, Ministry of Information & Broadcasting, Government of India & Ors v Cricket Association of Bengal & Ors*,[65] accepted that any speech involving the use of 'airwaves' *could* be regulated 'in the public interest'. But in that very decision, the Supreme Court held that the fundamental right under Article 19(1)(a) cannot be restricted except as permitted by Article 19(2). The *CAB* decision was in the context of a perceived need to regulate not free speech but the issue of licenses to broadcaster. It did not deal with *content*. The impugned Rule is concerned only with *content*.

157. I agree, though, on this: that the *potential implications* of fake news is indeed wide. But that is surely an argument against the government on the question of overbreadth, because it necessarily and axiomatically makes suspect and subject to identification with no reference to cause, effect or Article 19(2)'s constraints, every single digital data chunk that relates to the business of the Central Government. Before anything else is suggested, the primary requirement remains: a demonstration that the impugned Rule falls within, and only within, the straitjacket of Article 19(2).

158. For this reason, too, I reject without hesitation the attempt to curtail Article 19(1)(a) buried in the submission that the fundamental right is to ensure that every citizen receives *only* 'true' and 'accurate'

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65 (1995) 2 SCC 161.

information — as determined by the government. It is not the business of the government to keep citizens from falling into error. It is other way around. For it is very much business and should be the duty of every citizen to prevent the government from falling into error. Governments do not select citizens. Citizens elect governments.

159. Mr Bhatia supports Mr Seervai's arguments. There is much of value in his thoughtful and well-researched note, drawing on jurisprudence from various jurisdictions. Our Constitution does not distinguish between "high-value" and "low-value" speech. The State cannot make this distinction. All forms of expression are presumptively protected under Article 19(1)(a). The only restrictions are in Article 19(2). We have already seen this.

160. He is also correct in saying that the State cannot coercively classify speech as true or false and compel the non-publication of the latter. That is nothing but censorship. The Constitutional guarantee of free speech is a guarantee on *principle*; a recognition of, as Justice AP Shah said in *Anand Patwardhan*, a *natural* right. What is the underlying rationale? It would appear to have overlapping dimensions. *First*, through debate, disagreement, dissent, discourse and dialogue, it is a *mechanism* to truth-determination. *Second*, it is a matter of individual agency and autonomy buried in the promise of 'freedom'. *Third*, it is tied root and branch to the concept of a democratic republic: self-governance under the rule of law, and this ties to the first. The noisiness of all three is not to be abjured. It is devoutly to be welcomed. The opposite, viz., that the State alone will

determine in advance and for all and on what topic it chooses that which can or cannot be said is the complete anti-thesis of the 'freedom'. It knocks it off its pedestal.

161. There is, as I have noted, something of a divide between what is said and how it is said. "Information" and "content" cover the *what*. The *how* is a question of the manner of expression. Separating the two is not a matter of wheat-from-chaff. Indeed, few courts anywhere have achieved unanimity about this.

162. To put it differently: in our constitutional scheme, free speech is always to be under-regulated, and the restrictions on it — attempts at control and abridgement — must be over-regulated, not the other way around. This is not a finding that there is a fundamental right to falsehood or fake news or deepfakes. Quite the contrary. That is not even the question before us. The only issue is whether the State has, in our Constitutional set up, an overriding authority to arrive at an absolutist determination of both *content* and *expression* as 'the truth' and to compel a particular form of content *and* expression? I would have the greatest difficulty in accepting a proposition of this width.

163. I am also not be misunderstood to suggest, let alone hold, that any fundamental right is absolute. That is contrary to law. What comes to us from established learning and the weight of authority is that the restrictions on the right must conform to what the Constitution itself demands. We need not look at judge-made jurisprudence in the American context because, as I have noted, our Constitution took a different path. Our Constitution does not (as US

law might be said to do) distinguish between types of free speech. It simply enumerates in Article 19(2), the *specific* parameters within which that right can be curtailed — and every attempt at statutory curtailment must be demonstrated to fall within, and strictly and only within, the confines of Article 19(2). More importantly, Article 19(2) cannot be expanded by legislation or judicial pronouncement. As Mr Datar points out, that would need a full-fledged *Constitutional* amendment. India is not alone in this interpretation, as Mr Bhatia points out with instances from South African jurisprudence. Thus, even a restriction on fake, false or misleading cannot lie outside Article 19(2). It must remain within, and it must satisfy the tests of being the least restrictive and of meeting the demands of the doctrine of proportionality.

164. Where might a piece of 'fake news' calling for an insurrection or an incitement to communal or other violence fall? Conceivably, this could well be within the Article 19(2) limits of 'public disorder'. But that demands guidelines, and it demands a shrinking or constriction of what can be held to be fake, false or misleading and why. The impugned Rule takes up falsity per se, and restricts content on that ground divorced from, and untraceable to, any specific part of Article 19(2). That would be impermissible.

165. Mr Bhatia's written submissions have an extensive analysis of comparative jurisdictions, but those may not be necessary for my purposes. The general principles are correct; most of all that while some things may be absolutely true (that 2+2 = 4), the question before us is whether the *State* can arrogate to itself the power to determine

what, outside the starkly obvious, *may* be true or false. History has no shortage of examples; the most immediate one may be Galileo. Also, from the evidence act, an opinion is a *fact*. But it is an opinion. It may be neither true nor false (for instance, that such and such a writer deserves the Nobel Prize).

166. My discussion could end here. But there are other submissions to consider, and I now turn to those.

IX Article 19(1)(g) and Article 19(6)

167. Supplementing Mr Seervai's argument, but with a focus of Article 19(1)(g) and Article 19(6), Mr Farasat opens with one incisive point. The test, he submits, and I think with considerable justification, is to see if this Rule could be applied to *print* media as it stands.

168. Mr Farasat is quick to point out that the stereotyped 'vision' of a social media 'user' being only an individual with internet access on some device is far from true. The Editors' Guild, which he represents, is in charge of content in *both* print *and* digital media. There are several commercial bodies that have — and traditionally only had — print editions. These publications now have social media accounts *in the name of their publications*, apart from individual content contributors having their own accounts. In law, this is most visible with, for instance, the online social media accounts of LiveLaw and BarAndBench (neither with a print edition). But other publications like the Times of India, the Hindu, the Hindustan

Times, the Indian Express and so forth all have daily broadsheets in print and, in addition, have social media accounts.

169. The conundrum, he points out, is this: content is not fake, false or misleading *only* because of the medium. The medium does not determine the message. Yet the impugned Rule applies only to online content. If there is an underlying or accompanying print version, it is *not subjected to the same level of scrutiny*. Automatically, this means that the government is unconcerned with an actual, objective determination of what is fake, false or misleading. If the exact same material is in print, it cannot censor. These rules will not apply. But if that very same material is propagated online, it is subjected to the impugned Rule. In other words, the impugned Rule censors social media circulation.

170. As he puts it, free speech and the freedom of the press do not exist in a vacuum. The press, the fourth estate, needs infrastructure to generate and disseminate news. Control over newsprint and unencumbered circulation are protected: *Bennett Coleman & Co & Ors v Union of India & Ors*;[66] reiterated in *Kaushal Kishore*.

171. Article 19(6) says:

> (6) Nothing in sub-clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause, and, in particular, nothing in the said sub-clause shall affect the

66 (1972) 2 SCC 788; paragraphs 66–67.

> operation of any existing law in so far as it relates to, or prevent the State from making any law relating to,—
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> > (i) the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or
> >
> > (ii) the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise.

172. Social media has become the primary news medium for the last half-decade or so. There is some material to show a precipitous decline in hard-copy newspaper readership in India. That in turn means a stagnation or decline in advertising revenue. Social media is thus the primary driver for news dissemination. The impugned Rule targets social media content even for news outlets that have a print media (and about which nothing is or can be proposed). There is, thus, a direct infringement of Article 19(1)(g). The impugned Rule 'pushes out of the news cycle' the digital version of any reportage with which the Central Government disagrees.

173. The press must report all sides. What the impugned Rule does, Mr Farasat argues, is to force news publications to have an entirely one-sided version online. The Press Council of India's norms for Journalistic Conduct clearly say that the government's view is one side. Even so, the impugned Rule literally forces only the government view.

174. At least on this aspect of the matter, I am unable to see any appropriate answer to Mr Farasat's formulation. Any particular 'information' does not *become* fake, false or misleading *only* because it is digital. Examples can be endlessly multiplied. India's economic growth, poverty levels, education, health, drinking water, even internet freedom are all fertile grounds for opposing views and criticism. If this critical material is in print, it cannot be censored — at least not by this Rule. But the very same material *only because it is also in digital form* is liable to be suppressed as fake, false or misleading. What would happen to reports on figures and statistics on fatalities and vaccinations during the COVID-19 pandemic? The government had one set of figures. Others reported differently in print. And they did so online as well. Would the online content be 'fake, false or misleading' but the identical content in hard copy not?

175. The actual extent of internet/social media presence of a publication or journal is immaterial. After all, the fundamental rights are to protect the minority not the other way around. The argument that a news outlet is not a 'citizen' and cannot complain is also without merit, for the social media content, even if it be in the name of a particular journal, is operated by an individual.

176. Mr Datar's submission, though taken as part of the Article 14 challenge, is apposite in this context. Republication on social media of material already in print can be taken down: that which cannot be forbidden in print is proscribed in its digital avatar. This

impermissibly creates a dichotomy *within* Article 19; and that is illegitimate and also fails the Article 14 test.[67]

177. What is particularly galling to his clients, Mr Farasat says, is the underlying approach that the business of the Central Government is not the business of anyone else. "To the contrary," he says: "your business is in every regard my business, and it is my duty to question and query everything you say."

X The challenges under Article 14

178. Various challenges are mounted under Article 14. I consider each in turn.

i. Classification

179. The submission from Mr Seervai is that Article 14 permits classification, not class legislation. Thus, even assuming that the purpose is legitimate — to weed out information relating to the business of the Central Government that is fake, false or misleading — carving out *only* the business of the Central Government is class legislation. More importantly, the second test, that there must be a rational nexus to the objective is not met. This is not a case of under-inclusion, for the government is not a valid class of its own when it comes to digital information. It is, as Mr Datar contends, a case of over-inclusion because it encompasses protected speech (dissent,

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67 *Madhu Limaye v Sub-Divisional Magistrate Monghyr & Ors*, (1970) 3 SCC 746; *Sakal Papers*, *supra*.

criticism, satire) and disregards intent. This runs afoul of Article 14, following the decision of the Supreme Court in *State of Gujarat & Anr v Shri Ambica Mills Ltd & Anr.*[68]

180. What or who is the subject of the impugned Rule? Mr Mehta would have it that the business of the Central Government is well defined and confined to the entries in Lists I and III of the VIIth Schedule and the Government of India (Allocation of Business) Rules, 1961 read with Article 73. That Article says:

> **Article 73: Extent of Executive Power of the Union**
>
> (1) Subject to the provisions of this Constitution, the executive power of the Union shall extend—
>
> (a) to the matters with respect to which Parliament has power to make laws; and
>
> (b) to the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or agreement:
>
> Provided that the executive power referred to in sub-clause (a) shall not, save as expressly provided in this Constitution or in any law made by Parliament, extend in any State to matters with respect to which the Legislature of the State has also power to make laws.
>
> (2) Until otherwise provided by Parliament, a State and any officer or authority of a State may, notwithstanding anything in this article, continue to exercise in matters with respect to which Parliament has power to make laws for that State such executive power or functions as the State or officer or authority thereof could exercise immediately before the commencement of this Constitution.

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68 (1974) 4 SCC 656.

181. Article 73(1)(a) directly invokes Lists I and III of the VIIth Schedule, and hence Mr Mehta's formulation. But Entry 97 in List I has a residuary provision, which makes it expansive; and Article 73 extends the executive power of the Union even to matters on which Parliament has not legislated, though competent to do so. Whether this adds to overbreadth and vagueness is not the question. The point only is that it is virtually impossible — and more akin to the elephant argument — to define what the business of the Central Government actually covers.

182. A look at the 'exemplars' in the Union of India's compilation shows precisely this: the PIB has put out corrections and identifications on a vast range of subjects: police, defence, health and medicine, social media account information, elections, statements attributed to the then Chief Justice of India and so forth. This tells me two things: *first*, the business of the Central Government is not as well-defined or limited as Mr Mehta would have it; and *second*, that the existing — that is to say, the least restrictive — measure of having the PIB put out corrections, clarifications and identifications even in relation to whatever may be the business of the Central Government is sufficient.

183. Thus, information and content relating to the business of the Central Government is a separate class. For this, and this alone, the Central Government's own FCU will determine what is fake, false or misleading. And then the consequences follow.

184. The Government does not ipso facto constitute a class of its own sufficient to justify preferential treatment. The differentiation must be intelligible, clearly distinguishing for discernible reason those within the class from those left out. This distinguishing is called classification. The distinguishment or differentiation must bear a rational nexus to the statutory objective: *State of Rajasthan v Mukan Chand & Ors.*[69]

185. How might one go about testing this? The universe of all social media content is a subset of all internet content (just as there some of us who use the internet but have no social media accounts, there is internet material that is not on social media). Within this subset is a further subset of information relating to the business of the Central Government. But *anything*, i.e., *any content on the internet* in the largest class may be fake, false or misleading — and may have the same ills and perils as every other piece of information. Similarly, any content on social media, not just government content, may be fake, false or misleading. Why is Central Government business-related content a class apart (and why not, while we are about it, State Government content, or content relating to every instrumentality of the State?) In other words, there is no justification why the business of the Central Government stands or should stand on a special footing distinct from other information. Or, as Mr Seervai somewhat waspishly put it, what is so great or so special about the Central Government? To say only that there is a significant likelihood of speculation, misconception and one-sided information is no answer. That is equally true of anything or anyone. The suggestion, too, that

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69 (1964) 6 SCR 903 : AIR 1964 SC 1633.

the Central Government most especially is in a particularly vulnerable position and cannot defend itself is hardly tenable. It has information. It has reach. It can disseminate widely. For the one authority that can literally shut down the internet in a region — pull the plug entirely — to suggest this is hardly credible.

186. Accompanying this is the unanswered question of why the Central Government alone can decide for itself the veracity of all content that concerns it. Nobody else can do this; not even one of the 28 states in the country. Presumably, the Life Insurance Corporation of India would have accurate and up-to-date information about its own business. So too the State Bank of India and hundreds of other entities. They do not have this prerogative. This tells me that Mr Seervai's argument that there is no intelligible differentiation is correct.

187. I see no reason why deepfakes about the Central Government should enjoy any greater protection than deepfakes about film actors or cricket stars.

188. Clearly, this is invidious class legislation not permissible classification.

ii. Natural Justice

189. I am more than somewhat concerned about the structure of this enterprise. There is no safeguard against bias. There are no guidelines, no procedure for hearing, no opportunity to counter the

case that some information is fake, false or misleading. This is not, on the face of it, a matter of subjective satisfaction on objective material. This is entirely subjective satisfaction on *unknown* material.

190. Even more disturbingly, the Rule clearly makes the Central Government a judge in its own cause, the cause being the business of the Central Government (nebulous though that is). That is impermissible: *AK Kraipak & Ors v Union of India & Ors.*[70] Regarding the business of the Central Government, the Central Government's FCU will decide whether content is fake, false or misleading. How, on what material, no one knows. Even we are not told. The lack of a hearing is profoundly disturbing especially when we see that 'cancelling' content has serious civil consequences (including the fundamental rights under Articles 19(1)(a) and (g) of the Constitution). Even in commercial law, this has not been accepted, and a hearing has been required: *State Bank of India v Rajesh Agarwal & Ors.*[71]

191. It goes on: there is no disclosure of material relied on against the user's content that is being so flagged. There is no requirement for a reasoned order. What grievance can legitimately be made in the form of a representation against this? It is not the grievance officer who has the material on which the FCU acted.

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70 (1962) 2 SCC 262.

71 (2023) 6 SCC 1.

iii. Proportionality

192. Mr Datar has submitted that the impugned Rule fails the established proportionality test. In the context of a violation, infringement or abridging of fundamental rights, the five-fold tests were set out by the Supreme Court in *Gujarat Mazdoor Sabha & Anr v State of Gujarat*[72] thus:

(i) A law interfering with fundamental rights must be in pursuit of a legitimate State aim.

(ii) Any law that infringes, abridges or abrogates the exercise of fundamental rights must bear a rational connection between the measure, the factual situation and objective or aim of the statute.

(iii) The measures must be shown to be (a) necessary and (b) not more excessive than needed.

(iv) Such restrictions must be shown to be necessary to protect or advance legitimate purposes; and

(v) The State must provide sufficient safeguards against the abuse of such interference.

193. The fifth of these, he submits, is wholly insufficiently provisioned. The after-the-event grievance redressal mechanism is meaningless for the officer in question simply does not know and cannot know the basis for the identification as fake, false or misleading of any content relating to the business of the Central

72 (2020) 10 SCC 459.

Government. I must agree with this submission, but I would go further and say that the impugned Rule fails all five tests.

iv. Ultra vires (the IT Act)

194. Self-evidently, the impugned Rule cannot operate outside its controlling statute. No Rule can. Section 87 of the IT Act allows the Central Government to make rules by notification to carry out the provisions of the Act. The 2023 Amendment is said to have been in exercise of powers under by Section 87(2)(z) and (zg) of the IT Act; we have already seen that. Section 87(2)(z) contemplates rules that provide for

> the procedure and safeguards for blocking for access by the public under sub-section (3) of Section 69A

Section 87(2)(z) relates to rules that set out guidelines to be observed by intermediaries under Section 79(2) (for safe harbour).

195. The impugned Rule is not made under Section 87(2)(z) of the IT Act. They could not have been. Therefore, the impugned Rule falls under Section 87(2)(zg). That in turn means it must be read with Section 79(2) (the safe harbour provision in the IT Act). Section 87(2)(zg) directly references Section 79(2); i.e., safe harbour. This is another reason it is impossible to argue that the impugned Rule does *not* result in loss of safe harbour if not followed; the loss of safe harbour is the Rule's intent.

196. I do not see how under Section 87(2)(zg) the Central Government could possibly, by a Rule, create a FCU to 'identify' any

information relating to the Government's business as fake, false or misleading. There is no proximate or discernible nexus between a fact check unit and social media or intermediaries. A fact check unit will check facts wherever they are found; it is media-agnostic.

197. Further, what the impugned Rule does is to create substantive law beyond the parent statute. Nothing in Section 69A or Section 79 permits this targeted unilateralism in relation to digital content. The substantive law created is this: the intermediary, on receiving a communiqué from the FCU or the Central Government, and without any of the protections of Section 69A (which have oversight in the form of a mechanism for the most serious issues, inter alia by requiring reasons and by following prescribed procedures and safeguards), must, at the risk of losing safe harbour, excise the content so identified. That is not mere rule-making. That is substantive law.

198. In any case, no rule-making power can be exercised outside the frame of Article 19(2).

199. The *Shreya Singhal* decision amply makes this clear. That is indeed the reason why the Supreme Court engaged in the exercise of reading down — preserving the obvious social need but keeping it narrowly tailored to fit within Article 19(2).

XI *Legislative Competence*

200. Mr Datar's intervention came very late in the day. We allowed him to address. His starting point was that any expansion of Article

19(2) could not be done by a delegated legislation or by rules; it needs a Constitutional amendment. That is correct: *IR Coelho v State of TN*.[73] But Mr Mehta's submission is not about an expansion of Article 19(2) at all, but that the Rule *fits within* Article 19(2) as it stands. Equally, Mr Mehta does not quarrel with the proposition in general terms that where a fundamental right is sought to be restricted, the burden is on the State to justify it: *Sahgir Ahmad v State of UP & Ors*.[74] Mr Mehta's case is that there is no fundamental right infringement at all on account of the impugned Rule.

F. CONCLUSIONS

201. Before I proceed, I clarify that I have not found it necessary to look at every single submission in the multiple written submissions filed before, during and after the hearings, nor to consider every single judgment. I have dealt with what I believe is the essence of the dispute. Much may have been said in writing, but oral arguments were far more condensed.

202. What troubles me about the impugned 2023 amendment, and for which I find no plausible defence is this: the 2023 amendment is not just too close to, but actually takes the form of, censorship of user content. There is no material difference between this and the newsprint cases of the 1990s. I should not be misunderstood: this is not a comment on this or that dispensation or the present

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73 (2007) 2 SCC 1.

74 (1955) 1 SCR 707.

government. I am only considering the effect of the impugned amendment. What it does is to shift the responsibility for content accuracy from the creator or originator of the content to the service provider or intermediary, an entity that axiomatically has no control over the content at all. But an intermediary is the one that has safe harbour and, as a business entity, is regulated by the government in myriad ways. The impugned amendment makes the government's chosen FCU the *sole* authority to decide what piece of user-content relating to the undefined and unknowable 'business of the government' is or is not fake, false or misleading. The lack of definition of these words: business of the government; fake; false; and misleading makes the amendment both vague and overbroad. Anything might be the business of government. Anything could be said to be 'fake'. 'Misleading' is entirely subjective. And as to 'truth' and 'falsity', throughout recorded human history there are few, if any, absolute truths. Perceptions, perspectives, possibilities, probabilities — all will to a greater or lesser extent colour what one chooses to believe or hold or chooses not to believe or hold. The assumption that there are absolute truths to even the business of government, even if we knew what that included and what it did not, is unsubstantiated.

203. How the FCU will go about its business is also unknown. We are simply asked to trust it. This is not a question of trust, and especially not of distrust in any particular dispensation. It is simply a matter of setting the impugned Rule against the settled law and seeing whether it passes established Constitutional tests.

204. By shifting responsibility for user content to the vulnerable segment, viz., the intermediary, the amendment of 2023 effectively allows the government, through its FCU, to be the final arbiter not just of what is or is fake, false or misleading; but, more importantly, of the right to place an opposing point of view. We have already seen examples, and they are not entirely hypothetical. The government routinely rebuts criticism. If, in addition, this is now dubbed fake, false or misleading (and there are no guidelines to suggest why it cannot), then criticism and debate are stifled. There is little achieved in saying that the guidelines will come later. There is no assurance of that either; and they should have been in place by now if there was such an intent.

205. Again, I should not be misunderstood to suggest that the problem of digital fakes is not serious. It is; but it is serious because it is a deliberate distortion, and it needs to be exposed and demonstrated to be so by an open dialectic of debate and discourse. This is, to be sure, noisy, raucous, and a messy business. But that is the nature of a democratic republic with ensured freedoms: the cacophony of dissent and disagreement is the symphony of a democracy at work. The view of the FCU or the PIB that a particular piece of information relating to the business of the government is fake or false or misleading should not be allowed to be taken inviolate; most certainly, its publication cannot be subject to penalty and loss of immunity.

206. Who, after all, is to fact check the fact checker? Who is to say if the view of the FCU is fake, false or misleading? *Quis custodiet ipsos custodes*?

207. Of equal concern is the attempt in the impugned amendment to impermissibly expand the remit of Article 19(2). This, as I have noted, is directly contrary to the government's own stand before the Supreme Court in *Kaushal Kishore*, where it argued that Article 19(2) is exhaustive. I fail to see how the amendment is within the scope of *Shreya Singhal* either. To the contrary: it fails every test set out in that decision, especially for overbreadth and vagueness. The impugned amendment is ultra vires Article 19(1)(a), Article 19(2), Article 19(1)(g), Article 19(6), Article 14, violates the principles of natural justice and is also ultra vires Section 79 of the IT Act.

208. As a general and perhaps even inflexible rule, I would suggest that *every* attempt to whittle down a fundamental right must be resisted root and branch. The slightest possibility of a fundamental right abridgment cannot be allowed to stand. Every attempt to limit any fundamental right must be demonstrably confined to its permissible limits within Articles 19(2) to 19(6). Everything else is illegitimate. For between the 'abyss of unrestrained power' and the 'heaven of freedom' lie these three Articles of our Constitution: Articles 14, 19 and 21. These are the famous words of YV Chandrachud CJI in *Minerva Mills v Union of India & Ors.*[75]

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75 (1980) 3 SCC 625.

209. The submission on Article 14 and the invalid classification is, in my view, correctly placed. As I have noted, information relating to the business of the Central Government is a subset fully included in the 2022 amendment.[76] There is no particular reason why information relating to the business of the Central Government should receive 'high value' speech recognition, more deserving of protection with a dedicated cell to identify that which is fake, false or misleading, as opposed to precisely such information about any individual or news agency. There is material, indicated above, about what is called the epistemic apocalypse. We have seen that other than point to instance of 'fakery', there is no material at all of any particular 'public interest' or 'national interest' peril — and these are not even within the permissible parameters of Article 19(2). Consequently, it follows that separating out the business of the Central Government for preferential treatment is class legislation, not a rational or permissible classification. I will accept that it is not open to intermediaries to disclaim *all* responsibility: no Petitioner has suggested that. Wholesale abandonment of all responsibility is irresponsible.[77] But that only reinforces the point that *all* information deserves equal treatment.

210. The questions of overbreadth and vagueness are indeed troubling. I do not believe it is any answer to suggest that, though we do not have it now, in the fullness of time the FCU will evolve some

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76 I have chosen not to consider the Division Bench order in *Agij Promotion of Nineteenonea Media Pvt Ltd & Ors v Union of India & Anr,* 2021 SCC OnLine Bom 2938, since that is clearly an interim order.

77 *Ajit Mohan (Vice President and Managing Director of Petitioner 2, Facebook India Online Services Pvt Ltd) v Legislative Assembly*, *National Capital Territory of Delhi & Ors*, (2022) 3 SCC 529.

sort of working protocol, guidelines or yardsticks. These are being, in that self-applied to handpicked content and without any indication of the processes to be followed it is difficult to accept that the impugned Rules are sufficiently narrowly tailored. These issues are discussed in *Shreya Singhal*, and those findings apply with equal force here.

211. Further, the lack of contemporaneous guidelines raise the other question, never fully answered. As I have noted, the entire argument of the Union has more or less proceeded on the basis that all users are individuals. But, as we have seen immediately, that is entirely incorrect. Users are also entities such as news outlets and journals. Not only do they have their own fact-checking systems, but they and their individual writers publish in print *and* online. The decisive test must surely be that if the material in print cannot be subjected to FCU checking and compelled deletion, there is no reason why, merely because the exact same material **also** appears online it is susceptible to unilateral determination of fakeness, falsity or being misleading.

212. I have not been able to accept the submission, perhaps implicitly suggested, that there has been no violation — in the form of censorship or unilateral takedown *as yet* — and therefore there is no call for interference; or that the assault is on 'mere possibility of abuse'. It is not my reading of the law that petitions can only lie infringement by infringement. The entire discussion in *Shreya Singhal* on 'the chilling effect' militates against an acceptance of any such submission, for the finding of the Supreme Court is clearly

directed towards the *anticipated future* impact of a rule. The very words 'chilling effect' suggest only this.

213. More importantly, this argument is founded on the entirely incorrect theory that the government is somehow *parens patriae*; it is duty bound to ensure that citizens receive only 'correct information' (or what the government considers correct information); that the reasonable reader is infantile and cannot decide for herself or himself; and so on to the end of the chapter. This is again circular, for it is posited on the assumption that government-related information is somehow special and deserving of extra protection. This sits at odds with the fact that the biggest megaphone and the loudest voice is that of the government: if there is one entity that does not need such protection, it is the government. It already has an 'authentic' voice; possibly, *the* most authentic voice. And it has so far been unafraid to use it.

214. Finally, I believe it is unthinkable that any one entity — be it the government or anyone else — can unilaterally 'identified', (meaning picked out and decided) to be fake, false or misleading. That surely cannot be the sole preserve of the government. The argument that the government is 'best placed' to know the 'truth' about its affairs is equally true of every citizen and every entity. Paradoxically, complaints of a grievous nature (pornography, child abuse, intellectual property violations) can only be taken down only after following a grievance redressal procedure; yet *anything* relating to the business of the Central Government can be 'identified' as fake, false or misleading by the FCU — and cannot be hosted.

215. For these reasons, and the ones set out at greater length in the preceding discussion, I would strike down the 2023 amendment to Rule 3(1)(b)(v) of the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 and make Rule absolute accordingly, with no order on costs.

216. I express my thanks to Mr Mehta, Mr Seervai and Mr Datar but in particular must make mention of Mr Farasat and Mr Bhatia. I would also be wholly remiss if I failed to mention the contributions of Ms Arti Raghavan, Ms Meenaz Kakalia, Ms Radhika Roy and Ms Aditi Saxena. It is because of their ability and organization that we were able to complete the hearing.

217. I regret that I have been unable to persuade Justice Gokhale to my perspective, nor I to share hers. We have, with due respect to each other's views, agreed to disagree. To my mind, not only does that redound to the credit of our system since it permits and even encourages independence and dissent, but it is possibly the most complete answer to the very issue at hand, reinforcing thoroughly my view: that in our country, and under our Constitution, an alternative view should not ever be allowed to go unsaid, unheard or unread.

218. I make no order of costs. The Interim Application will not survive and is disposed accordingly.

(G. S. Patel, J)