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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal providededicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

SILENCE THE CLICKS? CRITICAL ANALYSIS OF THE CONSTITUTIONAL VALIDITY OF SECTION 69A OF THE INFORMATION TECHNOLOGY ACT, 2000 AND RULE 16 (3) OF THE IT RULES, 2021

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ABSTRACT

In particular, Section 69A of the Information Technology Act, 2000 (IT Act) and the Information Technology Rules, 2012 (IT Rules) are subject to a critical evaluation and investigation about their constitutionality in this essay. This article will conduct a thorough analysis to determine whether these rules violate the basic right to freedom of speech and expression guaranteed by Article 19(1)(a) of the Indian Constitution. In India, the state may control, monitor, or otherwise supervise any information that advances national security or sovereignty. Any information impacting its residents or passing through the state may be monitored by the government. With this authority, the government can monitor individuals involved in illicit or criminal activity. The examination will look at the justifications under Article 19(2) for restricting free speech and assess whether Rule 16(3) and Section 69A meet the proportionality standard set by court precedent.

INTRODUCTION

Section 69A of the Information Technology Act, 2000 (IT Act) empowers the Union Government to block content on the internet, when (1) the Government believes it is “necessary or expedient”, and (2) it is in the interests of the defense, sovereignty, integrity, or security of India or its relations with Foreign states, public order, or the incitement of a cognizable offense relating to these categories.¹ Since the new IT Rules went into effect, they have encountered many legal challenges. These challenges have come from social media platforms, particularly X (formerly Twitter). Rule 16 of the IT Rules, 2021 discusses information blocking in

¹ Vasudev Devadasan, ‘The Phantom Constitutionality of Section 69A: Part I’ (Constitutional Law and Philosophy, 22 October 2022) < <https://indconlawphil.wordpress.com/2022/10/22/the-phantom-constitutionality-of-section-69a-part-i> > accessed 17 April 2024

emergency situations. According to the applicable Rule 16(3), an authorized government officer may, within 48 hours of the incident, bring up the content that has to be blocked before an interdepartmental committee and request suggestions from the panel.

In *Shreya Singhal v Union of India*², Section 66 of the IT Act, 2000 was declared unconstitutional for violating the constitutional guarantee of free speech under Section 19 of the Indian Constitution. Despite this, authorities continue to use Section 66 of the IT Act, 2000 to arrest and refuse bail to people who may seem remotely controversial online. Consequently, Section 69A of the IT Act, 2000 was also challenged in the *Shreya Singhal* Case, but was regrettably upheld on the grounds that website blocking is permitted under clause 2 of Article 19 of the Indian Constitution, which permits "reasonable restrictions" on the freedom of speech and expression. This judgment despite being a largely beneficial one, has been ignored of its flaws and loopholes, of which we will be discussing further.

Rule 16(3) of the IT Rules, 2021 have been contested legally multiple times by newsassociation such as Digital News Publishers Association, Indian Broadcasting and Digital Foundation (IDBF) and others at the Madras and the Bombay High Courts.³ One such instance is in an order dated January 20, 2023, where the Government issued a ban using emergency powers under the above mentioned Rule of 16(3) of the IT Rules, 2021 and under Section 69A of the IT Act, 2000 to direct Twitter and YouTube to disable access to the BBC Documentary, India: The Modi Question, within India and prevent its re-upload. Following this ban, a PIL was filed in the Supreme Court of India against the Government's decision to impose a ban on the said documentary, alleging that it was 'illegal, malafide, arbitrary and unconstitutional'.⁴

JUDICIAL SCRUTINY: SHREYA SINGHAL AND BEYOND

As mentioned above, the Constitutional Validity of Section 69A was challenged and Upheld by the Supreme Court in *Shreya Singhal v Union of India*, the court said that 'blocking' could only

² *Shreya Singhal v Union of India*, AIR 2015 SC 1523

³ Aihik Sur, MC Explains: The emergency provisions of IT Rules used to block BBC documentary in India (Money Control, 23 January 2023) <[https://www.moneycontrol.com/news/business/mc-explains-the-emergency-provisions-of-it-rules-used-](https://www.moneycontrol.com/news/business/mc-explains-the-emergency-provisions-of-it-rules-used-to-block-bbc-documentary-in-india-9916751.html#)

[to-block-bbc-documentary-in-india-9916751.html#](https://www.moneycontrol.com/news/business/mc-explains-the-emergency-provisions-of-it-rules-used-to-block-bbc-documentary-in-india-9916751.html#)> accessed on 17 April 2024

⁴ PIL filed in SC challenging Centre's decision to ban BBC documentary (Economic Times Legal World, 30 January 2023)

< <https://legal.economictimes.indiatimes.com/news/industry/pil-filed-in-sc-challenging-centres-decision-to-ban-bbc-documentary/97434559> > accessed on 16 April 2024

be done cases of the security and defence of India, public order etc, which constituted to the reasonable restrictions under Article 19(2) of the Constitution of India. Furthermore, the Court decided that by giving both the intermediary and the content creator a hearing, the Blocking Rules provided enough procedural safeguards against the Government limiting legitimate communication. But when one reads between the lines of this flawed judgment, their reasoning fails to acknowledge the distinction between: (1) constitutional standards that state action must be tested against by courts; and (2) statutory language that sets out when the Government can't interfere with rights.

The vagueness in the terminology of the Constitution serves a basis for it to be challenged, for example, the constitution says 'state interventions are constitutional in the interests of public order', the statute says 'the government can restrict speech in the interests of public order' but there is no provisions or explanation as to what constitutes as public order, so stating that the Section 69A of IT Act, 2000, is constitutional on the grounds on Clause 2 of Article 19 of the constitution has no legal nexus. Such a statute is prima facie constitutional but in truth public order includes a broad sweep of situations which at the first glance may seem to be in the confines of public order but on further scrutiny not be within the hands of public order at all.⁵

The Supreme Court while deciding this case overlooked a crucial difference, that is of 'reasonable restriction' imposed by 'law' and that of 'direction'. A 'law', whether made by the Union or a state, President or Parliament, is a general norm applicable to all. It is different from a 'direction', which is made to a specific person. What Sections 69 and 69A of the IT Act effectively do is to give a government servant the power to determine the extent of an individual's freedom of speech. This is at the heart of the problem with these sections of the law.⁶ However, the Supreme Court interpreted Article 19(2) incorrectly in the Shreya Singhal case. The section gave Parliament the authority to enact legislation permitting speech restrictions. What it did not anticipate was Parliament ceding its legislative authority.

In case of blocking powers under Section 69A of the IT Ac, 2000, they are subject to 'reasons

⁵ Vasudev Devadasan, 'The Phantom Constitutionality of Section 69A: Part I' (Constitutional Law and Philosophy, 22 October 2022) <<https://indconlawphil.wordpress.com/2022/10/22/the-phantom-constitutionality-of-section-69a-part-i>> accessed 17 April 2024

⁶ Alok Prasanna Kumar, Section 69A of IT Act must also go (Deccan Herald, 25 July 2021) <<https://www.deccanherald.com/opinion/section-69a-of-it-act-must-also-go-1012522.html#>> accessed on 17 April 2024

have to be recorded in writing in such blocking order so that they may be assailed in a writ petition'. However, these orders are marked 'confidential' and 'secret', then transmitted directly to service providers. Making it difficult for the authors an opportunity of defence and the general public to challenge them. Therefore evidently, the issue is not just the constitutionality of the Section concerned but also the procedures of its applications and the battle of transparency, and this was the case of *Twitter v Information Technology Ministry* (The Twitter Case), twitter argues that there is no transparency in the functioning of the MeITY, and also alleged violation of fundamental rights under Articles 19(1)(a) and 19(1)(g) along with Article 14 to challenge the action of the Central Government.⁷ Same was the case of *Tanul Thakur v Union of India*⁸, the petitioner's satirical website 'Dowry Calculator' had been blocked under Section 69A, but he had not been served notice or granted a hearing: Tanul Thakur's case thus constitutes a challenge to the execution of Section 69A that, at the very least, returns us to the way that Parliament and the Shreya Singhal court intended for Section 69A to function.

RULE 16(3): THE PROCESS UNDER MICROSCOPE

Millions of users throughout India could experience a radical shift in how they access and use the internet if the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 are implemented. Many of the suggested modifications carry out, albeit more deftly, what we originally referred to as a "Chinese model of online surveillance and censorship" in 2018. Information blocking in emergencies is covered under Rule 16, and Rule 16(3) states that, in the event of an emergency, an authorized government officer may, within 48 hours, bring up the content to be blocked before an interdepartmental committee and ask the panel for recommendations.

Section 69A of the IT Act should also apply to the content that has to be prohibited. The Central government may impose blocking orders on platforms under Section 69A for a variety of reasons, including the preservation of India's sovereignty and territorial integrity, national security, cordial relations with other countries, and public order. The examination of Rule 16 addresses a broader constitutional and jurisprudential issue that extends beyond the discussion of free speech and the press in India: the administrative bodies of the executive branch have the authority to decide what poses a threat to public order. Rule 16 is devoid of oversight and

⁷ *Twitter v Information Technology Ministry*, WP No. 13710 of 2022, Karnataka High Court

⁸ *Tanul Thakur v Union of India*, W.P. © 13037/2019, CM APPL. 53165/2019

protective measures, highlighting the importance of legislative entrenchment of checks and balances in a transparent oversight on Rule 16.⁹

Clause 2 of the Rule 16 in its exact wordings mentions that ‘in case of emergency nature.....without giving him an opportunity of hearing’ implied that it grants excessive power to the government to block information without following the well-established legal test of proportionality. This test, laid down in Supreme Court judgement of *Anuradha Bhasin v Union of India*, requires restrictions on speech to be; (1) In pursuit of a legitimate aim, (2) necessary to achieve that aim and (3) proportionate to the aim. And by bypassing this proportionality test in emergency situations, Rule 16(3) grants the Government broad discretion to censor information, potentially stifling legitimate speech. The Indian Broadcasting and Digital Foundation (IBDF) argued in a petition that the blocking of content under Rules 16 & 17 of the IT Rules without the other side being given any opportunity of being heard was in violation of natural justice, and that it also impacted trade, commerce, and business of its members¹⁰. There is also a ‘chilling-effect’ that this Rule creates on free speech, as contested by the Leaflet and Journalist Nikhil Wagle before the Bombay High Court in 2021. Platforms and users might self-censor to avoid the risk of content takedown, hindering open discourse and the free flow of information.

As far as the case of Ban imposed on the BBC Documentary, India: The Modi Question is concerned, the PIL filed by advocate ML Sharma urges the Court to answer the question on the imposing of Emergency Provisions without the Declaration of Emergency under Article 352 of the Constitution of India by the President. This is an extremely important question to ponder upon because the wordings of the Rule itself says ‘in emergency cases’, which clearly states that there has to be a state of emergency being declared in the country, which was not the case situation associated to this ban being imposed under Rule 16(3) of the IT Rules, 2021. It seems likely that the discussion around Rule 16(3) will go on. The courts' decision regarding how to balance the government's national security interest with the fundamental right to freedom of speech and expression will determine whether or not it is deemed constitutionally acceptable.

⁹ The Emergency Paradox: Misuse of powers under Rule 16 of the IT Rules, 2021 (Software Freedom Law Centre, 17 February 2023) < https://sflc.in/wp-content/uploads/2023/06/annexure-5_the-emergency-paradox-misuse-of-powers-under-rule-16-of-the-it-rules-2021.pdf > accessed on 18 April 2024

¹⁰ Aihik Sur, MC Explains: The emergency provisions of IT Rules used to block BBC documentary in India (Money Control, 23 January 2023) <<https://www.moneycontrol.com/news/business/mc-explains-the-emergency-provisions-of-it-rules-used-to-block-bbc-documentary-in-india-9916751.html#>> accessed on 17 April 2024

CONCLUSION

Just because the government does it, it's not legal.

~Alok Prasanna Kumar, Co-founder, Vidhi Centre for Legal Policy

This essay has argued that the broad and capricious net thrown by Section 69A of the IT Act, 2000 and Rule 16(3) of the IT Rules, 2021 restricts free speech and expression on the internet. These provisions are vulnerable to exploitation because they lack independent monitoring, procedural protections, and unambiguous definitions. This study shows how these rules are in opposition to the essential liberties protected by Articles 14, 19, and 21 of the Indian Constitution. A rights-based strategy that places a high priority on proportionality, judicial scrutiny, and openness is required to combine national security considerations with the inalienable right to free speech in the digital era. This can be accomplished by requiring explicit and explicit grounds for material removal, strengthening the self-regulatory framework for online intermediaries, and implementing tougher court scrutiny for content takedown petitions. Then and only then will India be able to negotiate the challenges of internet regulation without compromising the fundamentals of a democratic and free society.

In addition, the absence of court supervision during the removal procedure fosters an atmosphere that is favourable to arbitrary censorship. This study emphasizes how urgently legislation must be changed to guarantee a fair strategy that preserves the fundamentals of an open and free internet while defending public safety and security. India can work toward a digital ecosystem that supports free expression and a safe online space by enacting stronger judicial monitoring, requiring respect to natural justice principles, and setting clear and open guidelines for material removal.