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Right to be heard before Twitter, but not Go!

The contrast between the safeguards that the govt must follow versus what it expects social media platforms to follow is deeply concerning

Written by Guest

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Note, Prasad is not incorrect that Twitter acted in disregard of Rule 4(8), but one wonders why his own ministry does not provide these procedural safeguards when it disables access to information.

By Yashaswini Basu & Krishnesh Bapat

Over the past few weeks, the Union government and Twitter have been at loggerheads over the implementation of the new IT Rules, governing social media platforms, that became operational in May 2021. The latest in this stand-off was Twitter temporarily disabling access to the account of Ravi Shankar Prasad, the minister of electronics and information technology, on June 25. This was on the ground of violation of the Digital Millennium Copyright Act of the US. Reportedly, Prasad posted a copyrighted song without permission of the publishers. The minister complained that Twitter's action was in gross violation of Rule 4(8) of the IT Rules 2021 that mandates significant social media intermediaries such as Twitter to provide a notice to a user before disabling access to their account, as well as an adequate and reasonable opportunity to dispute such a decision.

Note, Prasad is not incorrect that Twitter acted in disregard of Rule 4(8), but one wonders why his own ministry does not provide these procedural safeguards when it disables access to information.

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Social media platforms are town-halls in today's digital age, a conduit for people to freely express opinions, interact with others and receive information. Any restriction of speech on these platforms infringes the fundamental rights guaranteed under Article 19(1) of the Indian Constitution. These restrictions are usually imposed either by the government, which directs the platforms to regulate the content according to applicable laws or by platforms themselves by restricting content according to their community guidelines/terms of service.

While the 2021 IT Rules govern the procedure significant social media intermediaries must comply with before they disable access to content, the government has the power to restrict speech on the internet by issuing orders under Section 69A of the Information Technology Act 2000 without providing authors any opportunity to be heard.

The safeguards subject to which the government restricts access to content are provided in a separate set of IT Rules from 2009, dealing with blocking access to information. Unlike the 2021 Rules, the 2009 Rules require the government to simply "make all reasonable efforts" to identify the person or intermediary hosting the information that needs disabling, without sufficient procedural safeguards. Once a person or intermediary is identified, the 2009 Rules require MeitY to grant

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them an opportunity to justify the allegedly unlawful content. The emergency provision of the Rules, however, empowers the ministry to issue content-blocking orders without according the person/the intermediary the opportunity to be heard.

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The problem is threefold. First, the MeitY merely has to make “reasonable efforts” to identify the person or intermediary. Such ambiguity enables MeitY to censor content even without notifying its originator. More important, the 2009 Rules permit MeitY to identify the person or the intermediary. Thus, if MeitY were to censor the content posted on Twitter by Prasad, they may choose not to provide a notice or any opportunity of hearing to Prasad and directly ask Twitter’s representative’s to appear before them!

Second, while the 2021 Rules require social media platforms to provide their users with grounds for disabling access to their accounts, the 2009 Rules impose no such obligations upon the government. In fact, Rule 16 of the 2009 Rules permits the government to not even reveal the complaint/ request based on which they are disabling content! And third, in emergency situations, the government can censor content even without making any efforts to identify the person or the intermediary. Yet again, this rule doesn’t define the nature of the emergency and suffers from vagueness which in turn enables arbitrary use.

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Rule 4(8) of the 2021 Rules, cited by Prasad, indicates that MeitY is conscious of the importance of providing an opportunity to be heard to a person whose speech is proposed to be restricted as well as upholding transparency in any such restriction order. Through this Rule, they have sought to provide legal recognition to Santa Clara Principles, albeit in a diluted form.

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Disappointingly, this is conspicuously lacking in the 2009 Rules where Rule 8 only requires MeitY to issue the directions for blocking to the intermediary and not to the user whose content is being blocked. The Union government surely must have a greater obligation than social media platforms to provide a right to be heard that is guaranteed under Article 21. Similarly, it also has a greater obligation to protect the freedom of speech and expression of Indians guaranteed under Article 19(1) of the Constitution of India. It follows naturally that they must also impose similar obligations upon themselves.

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It is worth mentioning that the [Supreme Court](#) discussed the 2009 Rules in *Shreya Singhal (2015)* and found that they were not constitutionally infirm, on the basis that if the originator of the information is identified they are “also to be heard before a blocking order is passed”. Thus, the Court’s interpretation of the 2009 Rules requires MeitY to give an opportunity of being heard to a user if they are identified.

But, anyone can guess how many such individuals MeitY actually hears before it censors their speech on the internet. In February 2021, reports emerged about the Twitter accounts of about 250 users from diverse walks of life being blocked without any prior notification or even a post facto notice. Clearly, there is a dissonance between the legal precedents and the ground realities of platform governance.

The concern here is not the constitutional infirmity with the 2009 Rules, but the contrast between the safeguards that the government must follow versus what the government expects social media platforms to follow. In the interest of protecting the constitutional rights of internet users, it is recommended that the government imposes upon itself greater obligations of transparency, which will not only foster greater public trust in law enforcement authorities and our institutions but is also a right of the citizens.

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