# The Phantom Constitutionality of Section 69A: Part II (twitter v the Union)

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Part one of this two-part series (here) examined how the Supreme Court's upheld Section 69A and the Blocking Rules on the assumption that there existed adequate safeguards against lawful content being taken down. However, we noted how in practice, the Blocking Rules offered few to no procedural safeguards against the takedown of content by the Government, raising the risk that lawful speech may be curtailed without oversight or contestation. We then noted how challenges to the *application* of Section 69A and the Blocking Rules like the one in *Tanul Thakur* offered courts a chance to revisit these procedural safeguards, making them meaningful and strictly enforcing them. This post analyses another such challenge to the application of Section 69A, Twitter's writ petition in the Karnataka High Court.

Twitter is not challenging the constitutionality of Section 69A, it is merely arguing *inter alia* that with respect to a set of thirty-odd blocking orders, no notices were issued, nor hearings granted to the individuals who created and uploaded the content (ie, 'originators'). Twitter thus contends that the blocking orders it has received are not in compliance with Section 69A and the Blocking Rules and cannot be affected.

Recall that Rule 8 of the Blocking Rules requires the Government to notify "*the person or the intermediary*" that is hosting the content the Government wishes to block. When the Government passes a blocking order against content on Twitter, the Government sends the blocking order to Twitter as the relevant intermediary. Twitter's lawsuit appears to confirm what commentators have been noting for years, that in practice originators are regularly not granted a notice and hearing under the Blocking Rules, but rather blocking orders are merely issued to intermediaries such as Twitter, which are legally compelled to remove the content under threat of imprisonment (*see* Section 69A(3) of the IT Act).

**Situating Twitter's challenge**

A couple of important points may be noted at this stage. First, the requirement of confidentiality under Rule 16 of the Blocking Rules, coupled with the lack of notice to originators, creates a system of secret censorship where the Government directly communicates content it wishes to block to technology platforms behind closed doors. Neither citizens nor judges are permitted to examine the contents of blocking orders, creating serious rule of law and free speech concerns. These problems are amplified as platforms have few incentives to defend their users' content against the Government and can be expected to simply take down all content the Government wants them to (this also makes Twitter's challenge at least superficially commendable).

Second, there may be legitimate situations where the Government cannot locate the originator. In fact, Rule 8 of the Blocking Rules is categorically phrased as an obligation to "*make all reasonable efforts to identify the person or intermediary who has hosted the information*" so as to notify them and grant them a hearing to defend their content. Thus, from a due process perspective, the crux of Twitter's petition comes down to answering when Rule 8 permits the government to not identify the originator and supply them with the blocking order. This may be further broken down into the following sub-questions: (1) do *both* the intermediary and the originator need to be notified under Rule 8; (2) *who* is responsible for notifying the originator, the government or can the intermediary also do so; and (3) when has the government made "*all reasonable efforts*" to locate the originator?

**Maintainability of Twitter's petition**

Before examining these questions, it is relevant to note that the Union has raised a preliminary objection to Twitter's writ petition. It argues that Twitter's action is effectively a writ petition to secure the free speech rights of Twitter's *users*, and Twitter, as a foreign corporation neither has free speech rights under the Constitution nor can it sue on behalf of its users to secure their constitutional rights. Twitter on the other hand, has chosen not to frame this as a free speech issue, instead characterising the legal action as mere judicial review of administrative action. In other words, Twitter alleges that by failing to notify originators, the Government is not following the procedure under Section 69A and the Blocking Rules, and its writ petition is merely one to ensure that the Government complies with the procedures set up by statute.

It is obvious that where a statute (or delegated legislation) requires the Government to carry out an act in one way, the act must be carried out in that way and no other (*Laxami Devi v State of Bihar*) Therefore, if the Blocking Rules require the originator to be notified, then the Government cannot block content without notifying the originator. Thus, Twitter's challenge may be viewed as merely a right to compel the government to act in accordance with the law, without getting into murkier questions of whether platforms can sue for the free speech rights of their users.

There are other reasons why the High Court may consider overruling the Union's preliminary objection. First, as the proceedings in *Tanul Thakur* demonstrate, ordinary citizens who do possess free speech rights cannot challenge government blocking due to a lack of notice and hearing, and the confidential nature of blocking orders (Thakur was denied the blocking order even under the RTI Act). It would be counter-intuitive for the High Court to uphold the Union's maintainability objection on the ground that originators, not Twitter, must challenge the blocking orders when the subject matter of Twitter's challenge are the very structures that are preventing originators from challenging blocking orders and Twitter is the only entity in possession of the blocking orders. Further, given that Indian courts have diluted the issue of *locus standi* to the point of obliteration in writ

petitions, Twitter's standing in this case would be an odd doctrinal hill to die on (eg, a counterfactual is, would the court have dismissed such a petition if filed by a 'public spirited citizen'?).

**Notifying originators**

The Union notes that Rule 8 uses the phrase 'originator *or* intermediary', and not 'originator *and* intermediary', thus contending that supplying the intermediary alone with the blocking order would satisfy the requirements of Rule 8. However, the blocking order would certainly constitute a restriction on the *originator's* right to free speech, after all it is content that the originator created or uploaded that is being blocked. Indeed, the Union's own objection to the maintainability of Twitter's petition argues that it is *originators*, not intermediary, who possess free speech rights against blocking orders. Thus, irrespective of the constitutionality of the State's restriction, it cannot be denied that the originators free speech rights are engaged by blocking orders under Section 69A. Once the originator's legal and constitutional rights are engaged, it flows naturally that both due process and the principles of natural justice demand that Rule 8 be interpreted in a manner that provides originators with the blocking order and an opportunity to contest it.

As noted previously on this blog (here), such an interpretation also clearly flows from the decision in *Shreya Singhal v the Union*, where the Supreme Court observed:

> "*It is also clear from an examination of Rule 8 that it is not merely the intermediary who may be heard. If the "person" i.e. the originator is identified he is also to be heard before a blocking order is passed.*"

Where the originator behind online content has openly taken ownership or is *prima facie* identifiable and contactable, there is no justification for them not being notified and it stands to reason that the Government itself can notify them. However, there may be situations where the originator is not easily identifiable to the Government but *is* identifiable to the platform. For example, a Twitter user account may have a username '*xyz*' but Twitter itself may possess the user's email id or the ability to notify the user within the platform. The Union has contended that in such situations, Twitter itself could have informed its users of the blocking orders. However, this situation is complicated by the existence of Rule 16 of the Blocking Rules, which states that all actions taken pursuant to a blocking complaint must remain confidential. It is unclear whether Rule 16 prevents an intermediary such as Twitter with supplying the relevant user with the blocking order, and the Karnataka High Court should clarify that it does not. This would preserve the anonymity of the user should they desire it, but also allow them the opportunity to contest the blocking order if they so desired.

Notifying identifiable users or permitting platforms to providing their users with the blocking orders would certainly fall within the realm of 'reasonable efforts' to notify originators under Rule 8. There may be narrower situations concerning websites, where the originator is not immediately identifiable and there does not exist a centralised

authority like a grievance officer at a social media platform that can notify individual website owners. What constitutes 'reasonable effort' to notify in such cases may have to be developed on a case-by-case basis, eg, the government could notify domain name registrars, who could notify the owners of the website. Nobody is suggesting the government be required to use investigatory resources to identify and notify originators, but notice should be delivered to publicly available contact information.

**Alleged need for secrecy**

As discussed above, Rule 16's confidentiality requirements must at least be read narrowly enough to allow the originator to be provided with the blocking order. However, even this interpretation does not address our earlier rule of law concern of the government of government and technology companies colluding behind closed doors to block content. This practice is hit directly by another facet of Article 19(1)(a), the right of all citizens to *receive* information (*Ministry of Information & Broadcasting v Cricket Assn of Bengal*). When content is blocked under Section 69A, not only is the originator's right to *speak* curtailed, but every citizen's right to *receive* (the blocked) information is also restricted. Thus, in principle, *any citizen* should be entitled challenge a blocking order as it restricts their right to receive information under Article 19(1)(a). Once this is accepted, Rule 16 cannot stand in its current form, as every citizen has a right to see the blocking order and potentially challenge the restriction on their right to receive information in court. A first step to ensuring this would be to mandate that, when someone attempts to visit a blocked webpage, the Government and internet service must display a notice indicating the webpage has been blocked under Section 69A.

The Union has contended that issuing notices to originators may alert them and cause them to evade law enforcement or cause them to be more aggressive and spread content through other accounts. However, it must be noted that Section 69A is not an investigatory provision. The Government is not utilising Section 69A to *apprehend* originators, but merely block their content. If the Government is in parallel investigating the identity of the originators, the simple answer is to not utilise Section 69A till they are apprehended. Blocking their content is as likely to alert unlawful actors as a notice is, and it does not stop them spreading similar content from other accounts or locations. There may be a narrow set of circumstances in which the Government may *not* wish to disclose the content being blocked, eg, to not draw attention to websites that habitually host unlawful content such as child pornography or the glorification of violence. However, in such situations, the government's rationale for not disclosing an order that restricts content should be testable by courts. As noted by the Supreme Court in *Anuradha Bhasin v the Union*:

> "*As a general principle, on a challenge being made regarding the curtailment of fundamental rights as a result of any order passed or action taken by the State which is not easily available, the State should take a proactive approach in ensuring that all the relevant orders are placed before the Court, unless there is some specific ground of privilege or countervailing public interest to be balanced, which must be specifically claimed by the State on affidavit. In such cases, the Court could determine whether, in the facts and circumstances, the privilege or public interest claim of the State overrides the interests of the petitioner.*"

**Conclusion**

Before the internet, if the Government sought to restrict speech, it had the ability to target a few central locations such as newspapers, magazines, broadcasting organisations, and public figures. With the advent of the internet, ordinary individuals have been given an unparalleled ability to shape public discourse, increasing democratic participation. However, despite millions more speakers, resilience to censorship has not necessarily increased because the concentration of speakers on online platforms such as Facebook, YouTube, and Twitter constitutes a key vulnerability and vector through which censorship can be operationalised. Current practice, where the Government issues orders to social media companies and has content blocked is in some ways *even less* resilient to censorship. Unlike newspapers and broadcasters who are directly incentivised to protect their own content, social media companies have few incentives to defend their users' content. Users are kept in the dark, and even if notified may lack the legal resources that a traditional media company has to contest the State's restriction.

Thus, provisions such as Section 69A and the Blocking Rules represent the last bastion of protection against State restrictions on free speech in the online domain. Ensuring due process is essential to ensuring that *if* a blocking order breaches constitutional standards on free speech, it can be meaningfully challenged before a court. Such provisions must also reflect the architecture of the internet. For example, different types of intermediaries (a website, a social media platform, a chat forum) may have different levels of information on originators, and when the government is deemed to have made "*all reasonable efforts*" to identify the originator should be tailored to the type of intermediary hosting or transmitting the content.

Lastly, due process also requires state capacity. While the majority or originators who have the content blocked by the Government may choose not to contest the blocking order (eg, if they know their content to be illegal), thousands of others may choose to challenge it. Even to ensure due process under the Blocking Rules, the Government will need to facilitate hearings for originators within the 48-hour period for anybody who decides to challenge a blocking order. With the government issuing thousands of blocking orders a year, State capacity represents another dimension to the due process challenges posed by online speech.