

The Phantom Constitutionality of Section 69A: Part I

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Section 69A of the Information Technology Act, 2000 (“**IT Act**”) empowers the Union Government to block content on the internet. The provision has been on the statute books for over a decade and survived a constitutional challenge in 2015. Nonetheless, subsequent legal and factual developments have once again shone a light on some of the provision’s underlying constitutional defects as well as the government’s use of this power to restrict online expression. Perhaps most prominently, the rapid proliferation of the internet and its centrality to shaping public discourse has led to a manifold increase in the use of the government’s blocking power, with the number of orders passed under Section 69A increasing from 471 in 2014 to 9,849 in 2020.

For those unfamiliar with Section 69, this first of two posts briefly re-caps the contents of the provision and the Supreme Court reasoning in finding the provision constitutional. It then examines gaps in the Supreme Court’s judgement that have been exploited by governmental practice since, and how legal challenges to the provision’s *application* have sought to fill these gaps. The next post builds on these developments to analyse Twitter’s challenge to specific blocking orders in the Karnataka High Court.

Section 69A, its Contents and Constitutionality

Section 69A empowers the Union Government to block the public from accessing “*any information*” on the internet when: (1) the Government believes it is “*necessary or expedient*”; and (2) it is in the interests of the defence, sovereignty, integrity, or security of India or its relations with foreign states, public order, or the incitement of a cognisable offence relating to these categories. When the government decides to block content, it must follow the procedure set out under the Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules, 2009 (“**Blocking Rules**”).

When blocking content, Rule 8 requires the Government to “*make all reasonable efforts to identify the person or intermediary who has hosted the information*” and issue them a notice asking them to explain why the content should not be blocked. The person uploading or initiating the content transmission (ie, a content “originator” under the IT Act) or the intermediary has 48 hours to respond. Based on the information available at the end of the 48-hour period (which may or may not include the originator/intermediary’s response) the Government shall pass an order on whether the content should be blocked. The Blocking Rules also contains an emergency procedure (Rule 9), under which the hearing is not required, and the Government merely passes an order directing the content be blocked. There does exist a “Review Committee” which is expected to

provide *post facto* scrutiny, examining whether the Government orders only blocked content on the grounds set out by Section 69A (security of India, public order etc.). Lastly, Rule 16 states that “*strict confidentiality*” is to be maintained with respect to actions taken under the Blocking Rules.

The constitutionality of Section 69A was challenged and upheld by the Supreme Court in *Shreya Singhal v the Union* (2015). The Court observed that blocking could only be resorted to in the interests of the security or defence of India, public order etc., which the Court highlighted were the same interests Article 19(2) of the Constitution permitted free speech to be restricted on. According to the Court, this demonstrated that Section 69A restricted expression in line with constitutional standards on free speech. Further, the Court ruled that the Blocking Rules ensured sufficient procedural safeguards against the Government restricting lawful speech by providing not just the intermediary, but also the content originator, with a hearing (if the latter could be identified). Crucially, the Court noted that blocking orders had to be made in writing, thus ensuring that “*they may be assailed in a writ petition under Article 226 of the Constitution.*” In other words, if the government’s decision to block specific content was ever in doubt as impermissibly restricting free speech, the blocking order in question could be challenged before a court under its writ jurisdiction.

Gaps in the Supreme Court’s analysis

Some gaps in the Supreme Court’s reasoning were evident on the day of the judgement, while others have been revealed over time. As has been argued on this blog before (here), the Court’s rationale that ‘because Section 69A permitted the executive to restrict speech on the same grounds as Article 19(2), the provision was constitutionally compliant’ is flawed. This 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 interfere with rights. The former constitutes a set of legal principles to determine when the latter is compliant with the former. For example, Article 19(2) permits restrictions on speech in the interests of ‘decency and morality’. When the Cinematography Act was challenged, the Supreme Court examined guidelines issued under the Act as to what constituted ‘restrictions in the interest of morality’; restrictions were to be made in cases of ‘lowering the sacredness of the institution of marriage and depicting rape, seduction and criminal assaults of women, and solicitation’. The existence of such specific language allowed the court to evaluate whether the type of content the government sought to restrict in fact was in the interests of ‘decency and morality’.

Incorporating constitutional standards directly within statutes within no greater specificity results in a breakdown of constitutionality scrutiny by courts because the statute has adopted the broader standard identical to the constitution, leaving nothing for the statute to be tested against. Take the following 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 provides no further

guidance. Logically, a court cannot test whether a statute expressly stating to be in the interests of public order satisfies the constitutional test of 'is the statute in the interests of public order'. Such a statute is thus *prima facie* constitutional but in truth public order includes a broad sweep of situations with a wide margin for edge cases that may at first glance engage public order interests but on further scrutiny not be within the confines of public order. This means courts will have to examine *every instance where such a law is applied* to determine whether it satisfies the *constitutional* standard of public order. The result of such a statute is effectively, 'the government can interfere when it is constitutionally permissible to do so', eliminating judicial scrutiny at the time of constitutional challenge but in practice allowing the executive to determine what is constitutionally permitted until each instance of the law being applied is challenged before a court.

At this point it is worth appreciating that Courts in India typically judge the constitutionality of a statute in the abstract, ie, is the *text of the statute* (not the application of the law *vis-à-vis* a particular individual) constitutionally permissible. Now, if the text of the statute effectively states, 'the government will act constitutionally', such a law can never be tested against constitutional standards (and consequently never struck down) because such a statute amounts to nothing more than a promise on the government's behalf to act within the inherently blurry confines of the Constitution. Two possible avenues of recourse may exist against such a statute. First (as noted here) that such a statute may be challenged as delegating excessive power and insisting that the statute set out more specific instances in which State intervention is permitted, so that courts may then test whether such instances would satisfy constitutional standards. Second, the application of the law to specific individuals and situations may be challenged, allowing courts to differentiate between constitutional and unconstitutional governmental actions within the broad sweep of what the statute authorises. Developments since the Supreme Court upheld Section 69A demonstrate how this latter approach may play out.

Challenges to the application of Section 69A

Recall that the Blocking Rules require the Government to provide 48 hours' notice and a hearing to the originator or intermediary prior to taking a decision on blocking content. In *Tanul Thakur v Union*, the Petitioner alleged that his satirical website 'Dowry Calculator' had been blocked under Section 69A but he had not been served notice or granted a hearing. Several commentators have noted (see here and here) that the requirement for notice and hearing is a rule honoured more in the breach than in the observance, with the government often directly requiring intermediaries to block content and refusing to disclose blocking orders, citing the confidentiality requirements in Rule 16. This practice is particularly egregious in situations such as Thakur's case, or the blocking of the *Caravan's* twitter account, where the originator has publicly taken ownership for the content, dispelling any notion that the Government could not locate and notify the content originator.

In *Tanul Thakur's* challenge, the Delhi High Court directed the Government to provide the content originator with a copy of the blocking order and a *post-facto* hearing as to why his content should not continue to be blocked. While the High Court did not delve into a discussion on the constitutionality of blocking the satirical website, the order is an acknowledgement of: (i) the need to offer originators an opportunity to contest restrictions on their free expression; (ii) the failure on behalf of the government to offer such a hearing (the government appears not to have contended the order was passed under the emergency procedure) and (iii) the importance of supplying the originator with a copy of the blocking order. The order by the High Court takes on special significance given that the Supreme Court expressly upheld Section 69A on the understanding that the blocking order would be made available, allowing for court challenges to individual instances of content blocking. Thus, *Tanul Thakur's* case represents a challenge to the application of Section 69A that, at the very least, takes us back to how Section 69A was *intended* to operate by Parliament and the *Shreya Singhal* court. It should serve as valuable precedent mandating the disclosure of the blocking order to the originator and the grant of a hearing, ultimately facilitating a challenge under Article 226 before a High Court.

Conclusion

In *Tanul Thakur*, the petitioner discovered his website was blocked, filed an RTI to obtain a copy of the blocking order, was denied a copy of the blocking order on the basis of Rule 16's confidentiality requirements, and had to approach the High Court to obtain a copy of the order. Now having obtained the order, the petitioner can in earnest begin to assert his constitutional argument that the satirical website 'Dowry Calculator' does not fall under the heads of security, defence, integrity of India, public order, or incitement to an offence. This is a single instance of content blocking, with the Government blocking thousands of other such instances every year.

Most importantly, *Tanul Thakur* represents how, independent of lawfulness of the speech being blocked, the application of Section 69A and the Blocking Rules raise significant questions of due process. Individuals cannot meaningfully assert that their free speech is being restricted online absent vital procedural safeguards. Unlike older mediums such as print and broadcast, where government restrictions were applied against a handful of clearly identifiable organisations, Section 69A represents a new frontier of government restrictions on speech where the content of a multitude of citizens is blocked, often *through* intermediaries such as Google, Twitter, and Facebook. With the decision in *Shreya Singhal* creating a preliminary bar on an immediate constitutional (re-)challenge to Section 69A, the courts scrutinising *how* the Government is applying Section 69A will likely shape how due process, the rule of law, and constitutional speech protections apply within this new paradigm of free speech. Twitter's recent challenge to specific blocking orders before the Karnataka High Court represents one such opportunity and will be discussed in the next post.