



Fuzzy law, unclear jurisprudence, trampled rights

Bottom Line: The legal regime that enables the government to block websites needs urgent reform

Blocking accounts:

1. On February 1, 2021, in the wake of the intensification of the farmers' protests and reports of violent incidents on January 26 – a number of Twitter accounts became inaccessible in India.
2. As outrage mounted, the Government of India clarified that it had invoked Section 69A of the Information Technology Act, and ordered Twitter to block access to these accounts.
3. The reason, it appeared, was the use of the hashtag #ModiPlanningFarmerGenocide, which was deemed a threat to public order.
4. The merits of this argument aside, the government's Section 69A order was clearly an overreach even on its own terms, as media outlets such as The Caravan had not used the hashtag.

Uneasy truce

1. Soon after, Twitter restored access to many of the withheld accounts. This prompted a sharp reaction from the government, including a non-compliance notice and veiled threats that Twitter's employees would be prosecuted for violating Section 69A.
2. A meeting between Twitter officials and the government appears to have yielded for now an uneasy truce.
3. On February 10, Twitter also published a blog post where it remarkably argued that the government's own actions in directing it to withhold access to the accounts of journalists, activists, and politicians, violated Indian law and the constitutional guarantee of the freedom of speech.

Laws and their (mis)interpretation:

1. These events of the last few days throw into sharp relief the unsatisfactory state of Indian law and how it is interpreted and applied by censorship-happy governments.
2. At present, the online free speech rights of Indian citizens depend entirely upon the extent to which multinational social-media platforms are able to stand up to the government's censorship requests, how willing they are to risk legal prosecution, and how much confidence they have that their interpretation of Indian free speech law will stand up in court, even over the claims of the government. It should be clear that this is not a sustainable situation.



The root lies in the IT Act

The root of the problem is Section 69A of the IT Act. Section 69A grants to the government the power to issue directions to intermediaries for blocking access to any information that it considers prejudicial to, among other things, the sovereignty and integrity of India, national security, or public order. Section 69A(3) envisages a jail sentence for up to seven years for intermediaries who fail to comply. In 2009, the government also issued “Blocking Rules”, which set up the procedure for blocking (including regular review by government committees), and also stated that all requests and complaints would remain strictly confidential.

Violation of rights

There are a number of problems with this legal structure.

1. The first is that it makes censorship an easy and almost completely costless option, for the government. Rather than having to go to court and prove a violation even prima facie of law, the government can simply direct intermediaries to block content, and place the burden of going to court upon the users.
2. It stands to reason that the easier it is to censor speech, the more likely it is that a government will resort to that option.
3. Furthermore, the confidentiality requirement means that the user will not even know why their account has been blocked and, therefore, will be in no position to challenge it.
4. Third, there are no procedural safeguards — no opportunity for a hearing to affected parties, and no need for reasoned orders. This, then, violates both free speech rights, as well as the right to due process.

Need for transparency

1. The Supreme Court’s judgment in the Kashmir Internet Ban case, it is, at least now, an arguable position of law that any order restricting access to the Internet, or information on the Internet, must be made public.
2. Consequently, a combination of bad law and unclear jurisprudence has created a situation where Twitter or the intermediary that might be caught in the government’s crosshairs is the only entity that is in a position to defend the free speech rights of Indian citizens.
3. Thus, while it may still be possible for Twitter to stand up to the government in obvious cases of overreach and abuse, such as the suspension of The Caravan.



Way Forward:

1. There is, thus, an urgent need for both legal and jurisprudential reform. Legally, the best-case scenario would be to prohibit the government from being able to directly order intermediaries to block access to online information, except in narrowly-defined emergency cases, and to require it to go through court to do so, with an adequate opportunity for affected parties to defend themselves.
2. Short of that, however, it is vitally important that blocking orders be made public, and that even under the current legal regime, affected parties be given the opportunity of a fair hearing before a blocking order is issued.
3. This process will also ensure that the blocking order is a reasoned one, and can be effectively challenged before a court if need be.
4. Long term, however, the hard work of contesting governmental impunity in cases of censorship, both in courts and outside, remains to be done.