The Emergency Paradox: Misuse of powers under Rule 16 of the IT Rules, 2021

Background

Censorship of expression and curbing access to information are practices that precede the inception of the Internet, despite being provided a heavy impetus by its creation. The more elaborate that our means of accessing information become, the more intricate and complex are the procedures to restrict the same access. The scheme of emergency blocking of information in India predates to 1951, under the Telegraph Rules[1], but in the previous decade-and-a-half, it has gained greater limelight in the discourse on the right to free speech and expression through Section 69A of the Information Technology Act, 2000 (hereinafter referred to as the 'Act') and the Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules, 2009 ('Blocking Rules'). The role that digital technology and media played in the sphere of regulating access of information was heightened by the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021. ('Rules').

Chapter IV of the Rules provide for an oversight mechanism for the regulation of content with the procedure and safeguards in place for blocking information on digital platforms. A notable feature in this chapter is Rule 16, which provides for emergency powers to allow the executive to bypass the examination of a blocking request made by a Nodal Officer of the Ministry. This extensive power granted could only be used in *"any case of emergency nature, for which no delay is acceptable",* for grounds established under Section 69A and if deemed necessary and justifiable to block such information expediently.

In the years 2021 and 2022, the Ministry of Information and Broadcasting ('MIB') had blocked at least 95 websites, URLs or social media accounts under Rule 16[2]. In other words, the State deemed that there were 95 instances of absolute emergencies for them to block information in a manner that circumvents the adequate and reasonable procedure established, in just two years. This article aims to assess the extent to which emergency blocking has been extravagantly employed into action, which is, by the virtue of its name, an exceptional provision to be used only in

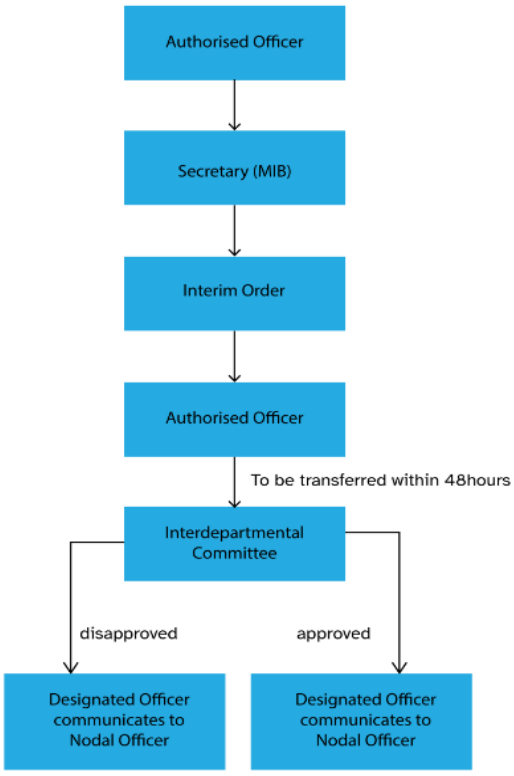
[1] Rule 419A, Telegraph Rules, 1951.

[2] Finding 404: A Report on Website Blocking in India, SFLC.in (2023). Available at: https://sflc.in/finding-404-report-website-blocking-india

extraordinary, unique and unprecedented circumstances. This approach raises the question of whether Rule 16 is on the brink of its misuse, eroding the essence and meaning of the word 'emergency' by providing the executive with an easier recourse to block access to information.

Emergency Procedure under Rule 16

In order for an emergency blocking to be brought into action, an Authorized Officer under the MIB would submit a recommendation to the Secretary, on their satisfaction that the grounds under Section 69A are being invoked. On their assessment of the urgency and necessity of the request, the Secretary would then pass an interim direction for the temporary blocking of the information, without affording the publisher or intermediary an opportunity to be heard. Within forty-eight hours of the issue of an interim direction, the Authorized Officer shall bring the request before an Inter-Departmental Committee, solely composed of members of the executive, for their consideration of the direction. This stage provides the Committee with the opportunity of either revoking the direction or passing it as a final blocking order, effective indefinitely.



The only scope of review is through the Review Committee under Rule 17, which would, once every two months, opine upon the blockings and ensure their compliance with Section 69A.

It is pertinent to note here that blocking orders, despite being an unambiguous violation of one's right to freedom of speech and expression, are given legal legitimacy under the reasonable restrictions in Article 19(2). However, the provision for reasonable restrictions under Article 19(2) does not *prima facie* legitimize the limitation of the freedoms under Article 19(1)(a). Such restrictions would nevertheless be subject to the tests of reasonableness and proportionality. In order to eliminate the risk of arbitrary implementation of these restrictions, they would be

amenable to being procedurally reasonable, allowing for the body of the substantive law to be supported by adequate procedural safeguards, as observed in *People's Union for Civil Liberties v. Union of India & Ors.*[3] and supported by *Justice K.S. Puttaswamy & Ors. v. Union of India & Ors*[4]. In order to understand the same, we must assess the procedural safeguards established to prevent the misuse of emergency powers in curbing one's right to free speech.

Procedural Safeguards under Rule 16

Comparing the text of Rule 16 with the forerunner in the emergency blocking mechanism, Rule 419A of the Telegraph Rules, we note that the former does not assure a publisher/intermediary with any safeguards. Rule 16 is devoid of oversight and protective measures, highlighting the importance of legislative entrenchment of checks and balances in a transparent oversight on Rule 16

A few points where Rule 16 has evidently diverted from the holistic and balanced approach adopted by Rule 419A are:

1. Rule 419A provides for a mandatory and automatic forward of the blocking direction to the Review Committee for their scrutiny and reconsideration[5], whereas the same is merely recommendatory under Rule 16, leaving this vital power to the discretion of the Review Committee.
2. A blocking order would automatically lapse within sixty days, with the scope of being renewed, only for a maximum period of 180 days, on the basis of a new order being passed.[6] This safeguard, absent from Rule 16, allows for the revaluation of the necessity and proportionality of the blocking. It prevents enforcing an indefinite blanket block and provides for an intermediary to rectify or mitigate the risk leading to the blocking.
3. Rule 419A(14) restricts the unnecessary interception of information and emphasizes on the protection of secrecy and privacy. This safeguard signifies the legislative intent behind the

[3] People's Union for Civil Liberties v. Union of India & Ors., AIR 1997 SC 568.
[4] Justice K.S. Puttaswamy & Ors. v. Union of India & Ors., (2019) 1 SCC 1.
[5] Rule 419A (2), Telegraph Rules, 1951.
[6] Rule 419A (6), Telegraph Rules, 1951.

Rule, ensuring that such emergency powers are employed in extreme circumstances, prioritizing the privacy of individuals.

Absence of Pre and Post-Decisional Hearing

The Principles of Natural Justice, resting at the crux of Article 14 of the Constitution, provide for the doctrine of *Audi Alteram Partem* which entitles an individual/entity with the opportunity to be heard before the passing of any order against their favor.[7] This consists of two elements: the right to be provided a notice of any claims/charges raised against them; and the right to a pre-decisional hearing. On a bare reading of Rule 16, it is noticeable that both the conditions of the principle are absent. Rather, sub-rule (2) overtly diminishes the requirement of a pre-decisional hearing, in violation of the principles of natural justice.

Further, no scope, procedure or forum of an appeal of the blocking order has been provided, barring the writ jurisdiction of the High Court under Article 226 of the Constitution[8]. Considering that the blocking of a website can result in the loss of business, revenue and reputation, a publisher/intermediary would not only be excluded from being provided information on the blocking, but also from playing an active role in challenging the order. The order is virtually incontestable as the only scope of overturning and reviewing the order rests with the *suo motu* powers and discretion of the Review Committee, severely limiting the scope of judicial and executive review.

Transparency into Assessment of Blocking Requests

Rule 16 of the Blocking Rules 2009 mandates absolute and blanket confidentiality regarding all blocking requests and the reactive actions taken by the publishers/intermediaries to effectuate the blocking on their platforms. While the removal of the confidentiality provision is a welcome move, no provision has been carved out entitling a publisher/intermediary access to information on the procedure adopted effectuating the blocking. This pushes the publisher/intermediary into the dark on whether blocking directions have been issued against their content, the grounds and reasons for

[7] Maneka Gandhi v. Union of India, AIR 1978 SC 597.
[8] Tanul Thakur v. Union of India [W.P.(C) 13037/2019, CM APPL. 53165/2019].

the same, the factors considered by an Authorizing Officer before passing an interim blocking direction, the reasons for the Review Committee to uphold or reject the order, and so on. Further, the lack of transparency into the functioning of the inter-departmental committee, as mentioned earlier, can raise aspersions of unguided administrative discretion. Moreover, under our report on website blocking in India, titled 'Finding 404', which dug into the procedure adopted under emergency blocking in India, we had filed several RTIs seeking clarity into the blocking procedure adopted. The questions attempted to scope the number of directions issued by the Authorizing Officer, the number of websites/URLs blocked under Rule 16 and a copy of the directions, in each case, which ultimately led us to dead-ends as no response was provided to us.[9]

Lack of Independence of the Review Committee

Provided that the Review Committee established under Rule 17 is the only recourse available for setting aside blocking orders, its composition is heavily influenced by the Executive. Its members compose of the Cabinet or Chief Secretary, Secretary of Legal Affairs and Secretary of the Department of Telecommunications or State Government (except home secretary).[10] The disproportionate power granted to the members of the executive in the absence of any guidelines or principles, which are essential in the exercise of such power, raises the question of independence of the committee.[11] The repercussions of the unguided administrative discretion under the Review Committee have become apparent with several blocking orders being challenged in High Courts across the country.

Challenges to Rule 16 before Courts

A few months following the enforcement of the Rules, a writ petition had been filed at the Delhi High Court by the media organization 'The Quint'[12] on the grounds that Rule 16 (amongst others) is violative of Article 19(1)(a), and does not fall under the protection of Article 19(2). The Court

[9] Explanation to Rule 17, Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021.

[10] District Registrar and Collector v. Canara Bank, (2005) 1 SCC 496.

[11] Quint Digital Media Ltd. v. Union of India [W.P. (C) 3659/202]. Petition available at: https://www.forbesindia.com/media/supplement_pdf/Quint_Fresh_CM_June2021_ServiceCopy%20Redacted_01.pdf

[12] Agij Promotion of Nineteenonea Media (P) Ltd. v. Union of India [WP (L) No. 14172 of 2021].

had noted that the Rules had a *chilling effect* on the right of freedom of speech and expression. No safeguards had been provided on the extent of discretion granted to the Committee in the text of the Rules, which raised the question of the arbitrary exercise of powers . The Court also observed that this power could be wielded against journalists/writers/publishers and considerably damage the independence and freedom of press in India. However, while passing an interim order, the Court observed that the provisions of Rule 16 are *prima facie* in line with the reasonable restrictions imposed by Article 19(2) of the Constitution and that they are fundamentally similar to Rule 9 of the Blocking Rules, in nature.

Further, it questions the rule-making power bestowed upon the Central Government under Section 87 of the Act, as the extent of control and restriction imposed by the Rules exceed the legislative character of the Act and the delegated authority on the executive to legislate on such matters.

Shortly thereafter, several other petitions were also filed in the High Courts of Bombay[13], Kerala[14] (where SFLC.in is assisting in the matter), and Madras[15] challenging the emergency blocking powers of the executive, along with other provisions under the Rules.

Conclusions

The analysis of Rule 16 goes beyond the conversation of free speech and press in India, but addresses a larger constitutional and jurisprudential issue: the power of determining what constitutes a threat to public order rests with the administrative bodies of the executive. Provided that there is little interpretation of emergent situations of blocking information by the courts in India, this mechanism hangs by a thin thread. It raises important questions, such as whether discretion should be rested in the Executive on the determination of an 'emergent situation', and which conditions provoke the same. Most importantly, if the procedure is so heavily shielded by the lack of transparency and access to information, how can there be an assurance of the reliance on proportionality and necessity while enforcing blocking?

[13] Praveen Arimbrathodiyil vs. Union of India & Anr. [WP(C) No. 9647/2021].
[14] Indian Broadcasting & Digital Foundation v. Ministry of Electronics and Information Technology & Ors [WP/25619/2021].
[15] Shreya Singhal v. Union of India, AIR 2015 SC 1523.

The constitutionality of Rule 9 of the Blocking Orders, which is parallel to Rule 16, was upheld in *Shreya Singhal v. Union of India*[16] on the conditions that the following safeguards ought to be implemented: (i) a pre-decisional hearing provided to the identified intermediaries/originators, prior to the blocking of the content (in line with the principles of natural justice) and (ii) recording of reasons under which the blocking order was executed, in order for them to be subjected to the oversight of judicial review and to be challenged under Article 226 of the Constitution. However, since the same have not yet been extrapolated for the execution of Rule 16, the question of their passing the constitutional muster remains alive, and must be answered urgently.

In order to get a greater understanding of content takedown and website blocking in India, refer to our comprehensive report here.

[16] Annexure 4, Finding 404: A Report on Website Blocking in India, SFLC.in (2023). Available at: https://sflc.in/finding-404-report-website-blocking-india