KARNATAKA HIGH COURT RULING ON CONTENT BLOCKING: A SETBACK FOR USER RIGHTS

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ABSTRACT

On June 30, 2023 the Karnataka High Court dismissed X's [hereinafter Twitter] writ petition challenging several blocking orders issued by the government in 2021 and 2022. It even imposed costs on Twitter. The blocking orders - pertaining to both tweets and user accounts - were issued under Section 69A of the Information Technology Act, 2000, which empowers the government to block content on several grounds. The government must follow a specific process when it seeks to block content, laid down in the Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules, 2009. One of the major contentions raised by Twitter in this case was that the government did not follow the required process. Twitter argued in part that the government was required to involve users/originators in the blocking process, which it did not. As per Twitter the government should have notified users about the possible blocking of their content, given them a hearing, and after blocking their content supplied them with a copy of the blocking order along with reasons for the same.

The High Court however disagreed. It stated that there was no precedent to suggest that the government had to make reasonable efforts to notify users, give them a hearing and supply them with a copy of the blocking order along with reasons. Moreover, it said that aggrieved users had not approached the court despite being more than capable of doing so. So the Court concluded that the fact that the government did not involve users in the blocking process did not invalidate the blocking orders. With respect, the High Court should

not have undermined the rights of users in this way. Binding law and sound public policy dictate that users should be involved in the blocking process. Thus, this article will focus on the decision's lacuna concerning users. It will make three points: (i) Notice should have been given to users (ii) A hearing should have been given to users and (iii) Blocking orders along with reasons for blocking of content should have been conveyed to users.

PART 1: INTRODUCTION

On June 30, 2023 a Single Judge Bench of the Karnataka High Court (Court) dismissed the online platform[1] X's writ petition challenging ten blocking orders issued by the respondent Union of India (Ministry of Electronics and Information Technology - MeitY) in 2021 and 2022. It also imposed costs on X (Twitter). The blocking orders - pertaining to both tweets and user accounts - were issued under Section 69A of the *Information Technology Act, 2000* (IT Act), which empowers MeitY to block content on several grounds.[2] MeitY must follow a specific process when it seeks to block content, laid down in the *Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules, 2009 (Blocking Rules).*[3]

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1 The terms 'platform' and 'intermediary' are used interchangeably in this article.

2 The grounds are as follows: "sovereignty and integrity of India, defence of India, security of the State, friendly relations with foreign States, or public order or for preventing incitement to the commission of any cognizable offence relating to above."; See: Section 69A, The Information Technology Act, 2000.

3 The process is as follows: Complaints requesting blocking of content are sent to Nodal Officers of various ministries who forward them to the Designated Officer, Ministry of Electronics and Information Technology (MeitY). A Committee for Examination of Requests comprising the Designated Officer and other members of the Executive Branch gives recommendations regarding the validity of such complaints, after hearing objections from intermediaries or originators of content, who receive a notice to participate in the deliberations of the Committee (which deliberations must be held no

One of the major contentions raised by Twitter in this case - *X Corp v. Union of India*[4] - is that MeitY did not follow the required process. Twitter argued in part that MeitY was required to involve content creators/uploaders (users/originators) in the blocking process, which it did not. As per Twitter, MeitY should have notified users about the possible blocking of their content, given them a hearing, and after blocking content, supplied affected users with a copy of the blocking order along with reasons for the same.

The Court however disagreed. It stated that there was no precedent to suggest that MeitY has to make reasonable efforts to notify users and give them a hearing. Moreover, it said that aggrieved users had not approached the Court despite being more than capable of doing so. As a result, the Court concluded that the fact that MeitY did not involve users in the blocking process did not invalidate the blocking orders.

With respect, the Court should not have undermined the rights of users in this way. Binding law and sound public policy dictate that users should be involved in the blocking process. Thus, in this article I will focus on the decision's lacuna concerning users/originators. I argue that the decision should have upheld and followed *Shreya Singhal v. Union of India*[5] (Shreya Singhal) and other rulings which clearly

sooner than 48 hours after provision of notice to intermediaries/originators). These recommendations are conveyed by the Designated Officer to the Secretary of MeitY, who gives her/his approval/disapproval to them. If s/he approves, then the Designated Officer directs the intermediary to block content. If s/he disapproves, then the Designated Officer informs the Nodal Officer of the same; See: The Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules, 2009.

4 X Corp. v. Union of India and Ors., MANU/KA/2230/2023 [refer to Manupatra version].

5 Shreya Singal v. Union of India, [2015] 5 SCC 1.

articulate the need for extending robust due process protections[6] to individuals before depriving them of fundamental rights. I engage with critiques that assert that Shreya Singhal is (i) not binding law and/or (ii) impractical to implement. I also discuss what future courts can do to more fully realize the promise of Shreya Singhal.

This article makes a contribution to existing literature by highlighting the role of Shreya Singhal in evolving the law on content blocking. Since the ruling was rendered in 2015, several critics have sought to diminish its significance regarding user due process rights. This article counters such a narrative in order to restore Shreya Singhal's status as a landmark decision bolstering user due process rights that is binding on the Court.

The article proceeds as follows - Part 2 will discuss the main contours of the Court's decision. Part 3 will critique the decision's shortcomings regarding user rights. Part 4 concludes by emphasizing the importance of integrating user due process rights into the content blocking process.

PART 2: THE KARNATAKA HIGH COURT DECISION

A] Context and Background:

The passage of three 'farm laws'[7] in September 2020 led to extensive protests in India. A significant degree of discontent was expressed online, through platforms such as Twitter. During this time

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6 The terms 'due process' and 'procedural safeguards' are used interchangeably in this article.

7 The farm laws were: The Farmers' Produce Trade and Commerce (Promotion and Facilitation) Act, 2020; The Farmers (Empowerment and Protection) Agreement of Price Assurance and Farm Services Act, 2020; The Essential Commodities (Amendment) Act, 2020; See: *Three farm laws to be rolled back. What were they all about?,* India Today (20/11/2020), available at https://www.indiatoday.in/india/story/three-farm-laws-to-be-rolled-back-what-were-they-all-about-1878746-2021-11-19, last seen on 12/11/2023.

public frustration with the government's response to the COVID pandemic was also articulated on Twitter among other platforms.

MeitY concluded that some of these expressions of discontent violated the law. Over the period of a year, from February 2021 to February 2022, it issued 10 content blocking orders to Twitter under Section 69A of the IT Act (Section 69A) read with the Blocking Rules. These orders called for the blocking of 1474 accounts and 175 tweets.[8] Twitter complied with these directions, under protest.

B] Court's Ruling:

Eventually, Twitter challenged the legality of a few account and tweet blockings from these 10 blocking orders (39 URLs were challenged, but the exact number of accounts and tweets that comprise these 39 URLs is undisclosed). It filed a writ petition in July 2022 before the Court arguing inter alia that i] Blocking of accounts in addition to tweets is disproportionate and hence unconstitutional ii] Blocking of accounts in addition to tweets is against a plain reading of Section 69A and hence in violation of statutory law iii] MeitY failed to provide reasoned blocking orders to Twitter, in violation of Section 69A iv] MeitY failed to provide notice to users in violation of procedural safeguards contained in the Blocking Rules.

The Court dismissed the writ petition for the following reasons -

One, it stated that blocking of accounts in addition to tweets is not disproportionate. The Court stressed that the blocking orders were issued after due deliberation; they were not the product of hasty action. Given the evenhandedness on display by MeitY, it is evident that the blocking of accounts which contained legal and illegal tweets does not

8 Supra 4, at 4.

violate the proportionality principle. Moreover, restricting MeitY to blocking tweets would have delayed efforts to stem the spread of illegal content as sifting illegal tweets from legal ones is an onerous and time-consuming task. In any event, the Court noted, the principle of proportionality cannot be invoked by a "juristic person and a foreign entity"[9] such as Twitter.

Two, the Court averred that blocking of accounts is permitted by the language of Section 69A. It acknowledged that account blockings will prevent legitimate content from being uploaded in the future. But it stated that Twitter was incorrect to argue that Section 69A only permitted blocking of already posted content. Twitter's interpretation of Section 69A, which focused on the past tense of the words used therein, was in the eyes of the Court too rooted in a "linguistic interpretation of statutes."[10] Such a reading failed to reflect the actual intent of the statutory provision.

The Court elaborated that the intent of Section 69A is to prevent harm caused by incendiary content that falls within the proscribed grounds enumerated in the Section. The goal of prevention is not served by an interpretation which waits for incendiary content to be posted, for it to spread far and wide and only then for MeitY to step in after a cumbersome procedure and block it. Only for the malcontents involved to again post incendiary content while adopting a "better luck next time"[11] approach. It's more effective to deter such conduct by empowering MeitY to block accounts in addition to tweets.

Three the Court stated that MeitY did provide reasoned blocking orders to Twitter - in effect if not formally. This is because Twitter was part of the process which culminated in the issuance of

9 Ibid, at 30.
10 Ibid, at 19.
11 Ibid, at 20.

blocking orders. This was a deliberative process involving "high functionaries of the government."[12] During this process, in fact, Twitter successfully urged a Review Committee to unblock 10 user accounts.[13] Thus, overall, the blocking process was marked by "processual fairness"[14] during which Twitter was made aware of the problematic nature of the content at issue. So it is incorrect to assert that Twitter was not provided with the reasons behind the blocking orders.

Four, the Court asserted that MeitY did not have to provide notice to users. This is because the text of Rule 8(1) of the Blocking Rules requires the Designated Officer of MeitY to provide notice to either the user or the intermediary, not the user and the intermediary. MeitY followed this rule by providing notice to the intermediary, Twitter.

The Court denied that the following words of Shreya Singhal change this interpretation: "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…"[15] While dismissing Twitter's reliance on this portion of Shreya Singhal, the Court said "the observations in a judgment cannot be construed as the provisions of a statute."[16] The Court also noted that the details of affected users were with Twitter but it never shared those details with MeitY or urged MeitY to contact users. Finally the Court states that even if there was a failure to notify users, this is an issue for users to raise, not intermediaries like Twitter.

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12 Ibid, at 26.
13 Ibid.
14 Ibid.
15 Ibid, at 27.
16 Ibid.

PART 3: ASSESSMENT OF THE DECISION: A SETBACK FOR USER RIGHTS

The Court's analysis of the law on content blocking deserves critical scrutiny. In this part I focus on how the Court erred on the issue of user due process rights. I also discuss some potential critiques of my position and suggest ways in which courts in the future can better uphold user due process rights.

This decision is of considerable significance. If the law on content blocking evolves in the direction laid down by the Court then the free speech rights of users will suffer disproportionately. Whereas platforms will still have access to basic due process safeguards [such as notice, a hearing and some semblance however attenuated of reasons behind a blocking order][17] users will have their content blocked without recourse to even these safeguards.[18]

A] The Court Did Not Follow Shreya Singhal on User Due Process Rights

Primarily, the Court errs in its interpretation of Shreya Singhal. Shreya Singhal is binding law regarding user rights under Section 69A and the Blocking Rules. It stresses the importance of robust due process rights for users.

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17 Twitter Inc. v. Union of India & Anr., W.P. No. 13710/2022, Intervention Application (Aakar Patel), at 20. This application specifies that notice and a hearing is given to platforms but not to users during the content blocking process.

18 This is not to assert that the outlook is rosy for platforms. But they emerge out of this decision with slightly more rights and vastly more resources to push for these rights. Twitter is a multi-billion dollar corporation that possesses the wherewithal to push back against overbroad government action; ordinary users lack access to such resources. Such a power differential signifies that a premium should have been placed by the Court on doing more to secure the rights of ordinary users, to enable them to push back in the future.

While interpreting the Blocking Rules, Shreya Singhal clearly specifies that notice should be given to the intermediary and the user/originator where "the originator is identified."[19] Moreover, it clearly lays out that after notice is given, a pre-decisional hearing i.e. a hearing before a blocking order is passed should be provided to both the intermediary and the user.[20] Finally, it emphasizes that blocking orders along with reasons must be conveyed to the user as well - not just the intermediary. Doing so enables users to exercise their rights and challenge the validity of blocking orders via writ petitions before High Courts.[21]

Unfortunately, as explained above, the Court deprived users of these due process rights. It ignored Shreya Singhal. As will be seen later, the Court also ignored other precedent emphasizing the need to extend due process protections to individuals before depriving them of fundamental rights.[22]

B] Criticism of Shreya Singhal and User Due Process Rights

Several commentators have criticized Shreya Singhal's directions on user due process rights. They contend that the judgment is not binding precedent[23] and also that it is impractical to implement.[24]

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19 Supra 5, at ¶ 110.

20 Ibid: "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."

21 Supra 5, at ¶ 109.

22 Vasudev Devadasan, *The Karnataka High Court on Twitter's complaint: Carte blanche to the government,* Indian Constitutional Law and Philosophy (Jul. 2, 2023), available at https://indconlawphil.wordpress.com/2023/07/02/the-karnataka-high-court-on-twitters-complaint-carte-blanche-to-the-government/, last seen on 09/08/2024.

23 Divyansha Sehgal and Gurshabad Grover, *Online Censorship: Perspectives From Content Creators and Comparative Law on Section 69A of the Information Technology Act* (Apr. 13, 2023), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4404965, last seen on 09/08/2024.

24 Tanul Thakur v. Union of India, W.P. (C) No. 788 of 2023, Written Submission on Behalf of Respondent, MeitY, p. 7.

As per this view, the Court may have been correct to dismiss Twitter's arguments. Specifically, critics contend that:

i] Shreya Singhal is Not Binding Precedent: The Supreme Court did not declare Section 69A and the Blocking Rules unconstitutional[25] nor did it read down the Section and the Rules.[26] The Court echoes this sentiment when it states that notifying users about the possibility of their content being blocked is "not mandatory."[27]

ii] Shreya Singhal is Impractical to Implement: Even if there is some validity - on paper - to the Supreme Court's comments on user due process rights, the argument goes, it is difficult to implement them.[28] They are in effect nugatory. Specifically, critics contend that it is difficult to implement Shreya Singhal regarding a] notice to users and b] reasoned order to users.

First, notice to users. What if MeitY mechanically asserts in the court that it is not able to contact users? When questioned in cases like *Tanul Thakur v. Union of India*[29] (Tanul Thakur) is that when questioned MeitY officials have simply asserted that efforts were made to contact users but they were unsuccessful.[30] In this way, there is no way to hold MeitY accountable if it has not made reasonable efforts to contact users. So far, courts have not pushed MeitY to substantiate its claims

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25 Supra 4, at 18: "In SHREYA SINGHAL, supra the challenge in a social action litigation (u/a 32 of the Constitution), to the validity inter alia of section 69A of the Act & the Website Blocking Rules came to be repelled by the Apex Court on the ground that Rule 8 provides for sufficient substantive & procedural safeguards." *See also,* Merrin Muhammed Ashraf, *Reimagining Regulation of Speech on Social Media Platforms in India,* 7(4) NUJS JOURNAL OF REGULATORY STUDIES 21, p. 39 (2022).

26 Supra 23, at 8.

27 Supra 4, at 29.

28 Supra 24.

29 Tanul Thakur v. Union of India & Ors., W.P. (C) 13037/2019, Delhi High Court Order (May 11, 2022).

30 Supra 24. *See also* Tanul Thakur v. Union of India & Ors., W.P. (C.) No. 13037 of 2019, Counter Affidavit, at 17-18.

that efforts were made with evidence of such efforts in the form of emails sent etc.

It has also been contended that some users, if given notice, will be stirred to post more unlawful content[31] "through…[anonymous] accounts"[32] and accounts on other platforms. They will become aware of the fact that MeitY knows about their online activities and so more easily escape capture.[33] As a result, MeitY should not give them notice.

Second, reasoned orders to users. Critics also contend that the Supreme Court in Shreya Singhal failed to fully articulate user rights to reasoned blocking orders.[34] While it stated that reasoned orders have to be given to the user and intermediary, it left untouched Rule 16 of the Blocking Rules[35] (Confidentiality Rule) which MeitY has since cited to deny giving copies of blocking orders to users even when they request it.

Therefore, the argument goes that courts will not be able to enforce the due process safeguards of Shreya Singhal even if they want to because they will be told that a] reasonable efforts to give noticewere

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31 Supra 4, at 85-86.

32 Vasudev Devadasan, *The Phantom Constitutionality of Section 69A: Part II (Twitter v the Union),* Indian Constitutional Law and Philosophy, available at https://indconlawphil.wordpress.com/2022/10/24/the-phantom-constitutionality-of-section-69a-part-ii-twitter-v-the-union/, last seen on 09/11/2023; *See also,* Supra 4, at 85-86: "Informing the user by notice will only cause more harm. The user will get alert of the same and get more aggressive, change his identity and will try to do more harm by either getting himself anonymous and spread more severe content through multiple accounts from the same platform or from other online platforms."

33 Ibid.

34 Devdutta Mukhopadhyay, *MeitY defends blocking of satirical Dowry Calculator website #FreeToMeme,* Internet Freedom Foundation (Mar. 16, 2020), https://internetfreedom.in/meity-defends-blocking-of-satirical-dowry-calculator-website/, last seen on 09/08/2024.

35 Rule 16, The Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules, 2009: *"**Requests and complaints to be confidential. —** Strict confidentiality shall be maintained regarding all the requests and complaints received and actions taken thereof."*

made but the user couldn't be contacted b] reasonable efforts to give notice should not be made in some cases because that will further encourage wrongdoers and c] The Confidentiality Rule bars giving users a copy of reasoned blocking orders. Courts will therefore have to conclude that Shreya Singhal cannot be enforced in practice. So, the Court in this case did not err by overlooking Shreya Singhal.

C] Countering the Critics of Shreya Singhal and User Due Process Rights

These critiques of Shreya Singhal are unsustainable for the following reasons -

(i) Shreya Singhal is Binding Precedent: It is true that the Supreme Court did not strike down Section 69A and the Blocking Rules as unconstitutional. But it clearly went beyond merely upholding the validity of Section 69A and the Blocking Rules. It read them in a way that enhanced the procedural safeguards contained therein. The Supreme Court took pains to offer an interpretation of Section 69A and the Blocking Rules that would make them comport with constitutional strictures. That reading/interpretation is binding precedent.[36]

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36 Jyoti Panday, *The Supreme Court Judgment in Shreya Singhal and What It Does for Intermediary Liability in India?*, The centre for Internet & Society (11/04/2015), available at https://cis-india.org/internet-governance/blog/sc-judgment-in-shreya-singhal-what-it-means-for-intermediary-liability, last seen on 09/08/2024. *See also,* Gautam Bhatia, *The Supreme Court's IT Act Judgment, and Secret Blocking*, Constitutional Law and Philosophy Blog (25/03/2015), available at https://indconlawphil.wordpress.com/2015/03/25/the-supreme-courts-it-act-judgment-and-secret-blocking/, last seen on 09/08/2024; Vasudev Devadasan, *The Karnataka High Court on Twitter's complaint: Carte blanche to the government*, Constitutional Law and Philosophy Blog (02/07/2023), available at https://indconlawphil.wordpress.com/2023/07/02/the-karnataka-high-court-on-twitters-complaint-carte-blanche-to-the-government/, last seen on 09/08/2024; Kartik Kalra, *The Karnataka High Court's Twitter Judgment – II: On nationalist rhetoric as legal reasoning*, Constitutional Law and Philosophy Blog (03/07/2023), available at https://indconlawphil.wordpress.com/2023/07/03/guest-post-the-karnataka-high-courts-twitter-judgment-ii-on-nationalist-rhetoric-as-legal-reasoning/, last seen on 09/08/2024.

Moreover, multiple commentators and even the Delhi High Court have upheld the legitimacy of Shreya Singhal, its reading of Section 69A and the Blocking Rules and followed its vision.[37] For instance, in round one of the Tanul Thakur litigation, Thakur's writ petition relied on Shreya Singhal to argue that his due process rights to notice, a hearing and access to the Section 69A order blocking his website had been denied. Subsequently the Delhi High Court directed MeitY to grant him a post decisional hearing and access to the order blocking his website dowrycalculator.com.[38]

(ii) Shreya Singhal's Vision Can be Implemented: There are ways to overcome the alleged practical difficulties in implementation. This is especially so regarding notice. For instance, Rule 15 of the Blocking Rules requires the Designated Officer of MeitY to "maintain (a) complete record of the request received (to block content) and action

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37 Vrinda Bhandari et. al., *Revising the Information Technology Act, 2000,* p. 14-15, xKDR (30/03/2024), available at https://papers.xkdr.org/papers/20230330Baileyetal_itAct.pdf, last seen on 09/08/2024. *See also,* Vasudev Devadasan, *The Phantom Constitutionality of Section 69A: Part I (Twitter v the Union),* Indian Constitutional Law and Philosophy, available at https://indconlawphil.wordpress.com/2022/10/22/the-phantom-constitutionality-of-section-69a-part-i/, last seen on 09/11/2023; Vasudev Devadasan, *The Phantom Constitutionality of Section 69A: Part II (Twitter v the Union),* Indian Constitutional Law and Philosophy, available at https://indconlawphil.wordpress.com/2022/10/24/the-phantom-constitutionality-of-section-69a-part-ii-twitter-v-the-union/, last seen on 09/11/2023; Sachin Dhawan & Ronika Tater, *Tanul Thakur Case: Delhi High Court Should Quash Blocking Order, Vindicate Legacy of Shreya Singhal,* Medianama (09/06/2022), available at https://www.medianama.com/2022/06/223-website-block-shreya-singhal-high-court/, last seen on 10/08/2024.

38 Supra 29. *See also*, Vasudev Devadasan, *The Phantom Constitutionality of Section 69A: Part II (Twitter v the Union),* Indian Constitutional Law and Philosophy, available at https://indconlawphil.wordpress.com/2022/10/24/the-phantom-constitutionality-of-section-69a-part-ii-twitter-v-the-union/, last seen on 09/11/2023*:* "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…the order is an acknowledgement of: (i) the need to offer originators an opportunity to contest restrictions on their free expression…(ii) the importance of supplying the originator with a copy of the blocking order…Thus, *Tanul Thakur's* case… 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."

taken thereof."[39] If efforts have been made to contact users, they will be reflected in this record. A future court can thus call for and examine this record if it is in doubt about whether reasonable efforts were genuinely made to contact users.[40]

Moreover, if a user still cannot be contacted after reasonable efforts have been made, then MeitY can direct the platform to contact the user. In fact, platforms have been tasked with notifying users in the recently enacted *Digital Services Act* (DSA) in the European Union and in several other jurisdictions.[41] Platforms in India usually do not take the initiative to notify users because of the concern that doing so will violate the Confidentiality Rule.[42] MeitY has not provided clarity on this point; further it has so far refused to seek the assistance of platforms to contact users.

However, giving users notice in this way will not violate the confidentiality of the complainant,[43] which is the justification given by MeitY for having the Confidentiality Rule.[44] Specifically, MeitY has argued that the Confidentiality Rule exists to protect the identity of the individuals who make the complaints that trigger the blocking process. But clearly, a complainant's identity is not compromised if a user is simply informed by a platform that their content may be blocked by

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39 Rule 15, The Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules, 2009: *"**Maintenance of records by Designated Officer. —** The designated officer to maintain the database of the records of the cases of blocking of information by public access and the action taken by him in each case respectively. He shall maintain both in electronic format and in the register."*

40 Sachin Dhawan & Ronika Tater, *Tanul Thakur Case: Delhi High Court Should Quash Blocking Order, Vindicate Legacy of Shreya Singhal,* Medianama (09/06/2022), available at https://www.medianama.com/2022/06/223-website-block-shreya-singhal-high-court/, last seen on 13/11/2023.

41 Article 9(5), Digital Services Act, Regulation (EU) 2022/2065 (19/10/2022).

42 Supra 32.

43 The complainant is the person who initiates the blocking process by sending a complaint to the concerned Nodal Officer; Supra 3.

44 Tanul Thakur v. Union of India & Ors., W.P. (C.) No. 13037 of 2019, Counter Affidavit, at 22. *See also, supra* n. 37, p. 17-18.

the government. A user doesn't have to be informed of the identity of the complainant to be given notice of the possibility of blocking (along with a hearing regarding the same and a copy of the eventual blocking order).

If MeitY wishes to maintain confidentiality for other reasons - to the extent that users should not be notified by platforms - then its "...rationale…should be testable by courts."[45] In other words MeitY should have to make a viable case in favor of confidentiality and against user notification. If it fails to do so, then the lack of notice (as a result of MeitY refraining from directing a platform to notify users or preventing a platform from notifying users on confidentiality grounds) should render any subsequent blocking order void.

Wrongdoing users will become aware of the fact that MeitY is aware of them even when their content is blocked; blocking will thus have the same effect as a notice. It's not MeitY's responsibility to capture wrongdoers; if the government wants to apprehend wrongdoers without alerting them, it can rely on other powers in other laws to do so.[46] The relevant government agencies can request MeitY to desist from sending notices to the concerned individuals while it pursues its investigations into them.[47]

A concern remains regarding reasoned orders to users. It is true that it is virtually impossible for users to obtain copies of blocking orders even when they file Right to Information (RTI) requests. Unfortunately, the Confidentiality Rule is cited to deny many such requests.[48] The hope is that recent rulings like Tanul Thakur will clearly signal to authorities that the weaponization of the Confidentiality Rule

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45 Supra 32.
46 Ibid.
47 Ibid.
48 Supra 17, at 10-11.

in this way is impermissible. More needs to be done perhaps at the level of the Supreme Court to restrict the pernicious deployment of this Rule to keep users in the dark about how and why their content has been blocked. At the very least, the Confidentiality Rule should be read down to assert that it will not apply to users whose content has been blocked.[49]

D] Additional Precedent in Favor of User Due Process Rights

Even if the critics of Shreya Singhal are correct when they assert that it lacks precedential value regarding user rights, there are other precedents which call for the kind of safeguards it espouses. Unfortunately, the Court did not consider these precedents. They are-

(i) Precedent on the Right of Judicial Redress and Right to Transparency: The Court overlooks important precedent on judicial redress and transparency. Two cases in particular bear mentioning - *Ram Jethmalani and Ors v. Union of India*[50] and *Anuradha Bhasin v. Union of India*.[51] Jethmalani, focusing on the importance of judicial redress, specifies that "it is imperative that…petitioners are not denied the information necessary for them to properly articulate the case and be heard, especially where such information is in the possession of the State."[52] Denial of blocking orders to users "impedes the(ir) ability to contest them."[53] A user cannot exercise her right to judicial redress and challenge a blocking order if she doesn't have access to it or even knowledge of it.

Bhasin condemns a similar lacuna in transparency – in the context of internet shutdowns - as violative of the mandate of Article

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49 Supra 32.
50 Ram Jethmalani and Ors. v. Union of India, (2011) 8 SCC 1.
51 Anuradha Bhasin v. Union of India, AIR 2020 SC 1308.
52 Supra 50, at ¶ 66; See: Supra 4, at 10.
53 Supra 17, at 10.

19 of the Constitution. That is why this landmark ruling called for the publication of internet shutdown orders. And it has rightly been argued that such logic compels the publication of content blocking orders or at least the provision of such orders to users.[54]

(ii) Precedent on Article 21 and Due Process Rights: The Court also fails to recognize that users have due process rights/natural justice rights under Article 21 of the Constitution. These rights entail that they be given notice, a hearing and a reasoned order[55] - because the government cannot deprive persons of their fundamental rights without furnishing them with these basic due process safeguards.[56]

(iii) Precedent on the Principle of Proportionality: It is clearly laid down in a number of judgments that the government cannot violate fundamental rights including the fundamental right to speech without adhering to the principle of proportionality.[57] This requires the government to use the least restrictive means to achieve the ends of a given law. The Court did not engage in a discussion of whether denial of user rights satisfies the principle of proportionality i.e. whether it constitutes the least restrictive means to achieve the ends of Section 69A.[58]

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54 Ibid.

55 Supra 17, at 13; Tanul Thakur v. Union of India & Ors., W.P. (C.) No. 13037 of 2019, at 6. *See also* Vasudev Devadasan, *The Karnataka High Court on Twitter's complaint: Carte blanche to the government,* Indian Constitutional Law and Philosophy (02/07/2023), available at https://indconlawphil.wordpress.com/2023/07/02/the-karnataka-high-court-on-twitters-complaint-carte-blanche-to-the-government/, last seen on 14/11/2023.

56 Maneka Gandhi v. Union of India, 1978 AIR 597; PUCL v. Union of India & Anr., AIR 1997 SC 568. Olga Tellis & Ors v. Bombay Municipal Corporation & Ors., 1986 AIR 180; Allauddin Mian & Ors. v. State of Bihar, 1989 AIR 1456.

57 Justice K S Puttaswamy (Retd.) & Anr. v. Union of India & Ors., W.P. (Civil) No. 494 of 2012; Madhyamam Broadcasting Limited v. Union of India & Ors., Civil Appeal No. 8130 of 2022.

58 Kartik Kalra, *The Karnataka High Court's Twitter Judgment – II: On nationalist rhetoric as legal reasoning*, Constitutional Law and Philosophy Blog (03/07/2023), available at https://indconlawphil.wordpress.com/2023/07/03/guest-post-the-karnataka-high-courts-twitter-judgment-ii-on-nationalist-rhetoric-as-legal-reasoning/, last seen on 09/08/2024.

E] Public Policy Arguments in Favor of User Due Process Rights

Finally, the Court erred from a policy perspective about user due process rights. There are several important policy reasons why the Court should have strengthened rather than weakened due process protection of users. They are -

(i) Users Can Better Clarify the Context of their Content Than Intermediaries: If a hearing is given to users, they will be able to provide more context about the circumstances surrounding their content and perhaps the legality of their content. In this way, MeitY might, at the pre-decisional stage itself, be able to satisfactorily resolve many cases.

Often intermediaries will not be able to provide such context and clarification. They do not know the details surrounding why their users posted content; indeed, it's virtually impossible for them to gain such insights given that they host millions of users and given that they receive hundreds of blocking requests every year.[59]

(ii) Platforms Have Little Incentive to Defend Their Users Before the Government: Given their size, platforms hardly suffer if a few thousand users get censored. In fact, if anything, platforms will be more likely to over comply with government blocking requests and engage in "collateral censorship."[60] It is true that Twitter attempted to defend a few of its users before MeitY in this case. But it must be kept in mind that Twitter challenged a minuscule percentage of the tweets and accounts that MeitY ordered it to block. It is likely that users would have responded more robustly in a hearing with MeitY and challenged

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59 Supra 17 at 10.

60 Jack M. Balkin, *Free Speech is a Triangle,* 118 Columbia Law Review 2011, at 2017 (2018), available at https://columbialawreview.org/wp-content/uploads/2018/11/Balkin-FREE_SPEECH_IS_A_TRIANGLE.pdf, last seen on 12/11/2023.

more tweet and account blockings in court, given that they had a lot more to lose than Twitter.

PART 4: CONCLUSION

The Court had an opportunity to make an important contribution to the law on content blocking. With respect, it did not do so. This article has detailed the reasons why, especially with regard to overlooking Shreya Singhal and other Supreme Court precedent on procedural safeguards that must be satisfied before fundamental rights can be restricted. It has also discussed critiques of Shreya Singhal as well as how such critiques can be resolved. It acknowledges that a concern remains regarding Shreya Singhal, which hopefully can be addressed soon in pending matters.

Several positive developments have taken place since the Court's ruling. Twitter has reportedly filed an appeal against the order of the Single Judge Bench.[61] The Division Bench should take this opportunity to reverse course and uphold robust due process protections for users.

Moreover, a similar matter - the Tanul Thakur case - is pending before the Delhi High Court. In fact, this is the second round of litigation in the Tanul Thakur case. In the first round, Thakur won recognition of some due process rights like a post decisional hearing and access to the Section 69A order that blocked public access to his website dowrycalculator.com.[62] After the post decisional hearing was

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61 Aihik Sur, *X, formerly Twitter appeals Karnataka court ruling on blocking orders: Sources,* Money Control (02/08/2023), available at https://www.moneycontrol.com/news/business/x-formerly-twitter-appeals-karnataka-court-ruling-on-blocking-orders-sources-11078421.html, last seen on 14/11/2023.

62 As discussed above, at p. 9: "For instance, in round one of the Tanul Thakur litigation, Thakur's writ petition relied on Shreya Singhal to argue that his due process rights to notice, a hearing and access to the Section 69A order blocking his website had been

held, another blocking order was issued. However, Thakur was denied access to this blocking order as well. Consequently, in the second round he's fighting for his due process right to the latest blocking order issued for his website, along with reasons for the same. If the Delhi High Court rules in his favor again, it will further strengthen the legacy of Shreya Singhal.

A future Supreme Court Bench can do even more to protect user rights. Unlike High Courts, it can go beyond Shreya Singhal to protect user rights. Specifically, it can strike down the Confidentiality Rule to remove any doubt that MeitY cannot deny copies of blocking orders (with reasons) to users. A future Supreme Court Bench can thereby ensure that members of the general public also get access to blocking orders so that they may challenge them. This is because when content is blocked their right to receive speech (which is an integral part of the right to free speech) is affected.[63] And longstanding principles of judicial redress dictate that they must be given some recourse for the same.

denied. Subsequently the Delhi High Court directed MeitY to grant him a post decisional hearing and access to the order blocking his website dowrycalculator.com."

[63] The Secretary, Ministry of Information & Broadcasting v. Cricket Association of Bengal & Anr, 1995 SCC (2) 161.