

Internet blocking and shutdowns in India and international human rights law

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Abstract

This paper examines the provision for Internet blocking and shutdowns in Indian law, and compares it with international human rights law (IHRL). It finds that IHRL potentially offers a useful lens through which to view these actions; that IHRL is widely accepted by the Indian state, including the judiciary; and that IHRL provides a useful complement to constitutional analysis. It also finds that the Indian laws and practices around Internet shutdowns and online content blocking fall short of IHRL in significant ways, including when it comes to the principles of legality, legitimate aims, necessity, proportionality, transparency, and remedies for violation of rights. Finally, it offers suggestions on how to improve the laws and practices in each of these areas, so as to comply with India's IHRL obligations.

Keywords: International Human Rights Law, Internet shutdowns, Content blocking, Necessity, Proportionality, Transparency

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1. Introduction

पुरुषस्य वाग्रसो
Puruṣasya vāgraso
 “Speech is the essence of human beings”
 — Chāndogya Upaniṣad, 1.1.2

The advent of the Internet has allowed for the communication of speech and expression at an unprecedented scale and speed. In India, for instance, more people now have the opportunity to speak to a larger audience via the Internet than ever did via print, radio, television, and all other media combined in all the decades since Independence. Such rapid democratization of speech amplifies tensions that are inherent in freedom of speech, freedom of assembly, and the right to privacy.

Restrictions on speech, especially in the form of social sanction, are as old as speech itself. However, in liberal democracies, limitations are placed by constitutional principles, as also by socio-cultural norms, on what restrictions may be placed on expressive freedoms. Through a few different laws, the Indian government and courts have granted themselves—and through laws such as the Intermediary Guidelines Rules, the general public as well—the power to regulate online speech, which has often taken the form of shutting down of Internet access and blocking entire websites.

International human rights law (IHRL), which has developed since World War II, seeks to restrict the principle of sovereignty to the extent that a country’s domestic laws and practices fall afoul of international norms around human rights

- (Van der Vyver 2013, pt. 3, “State sovereignty is thus no longer an absolute right. Even insofar as it remains a prominent principle in international relations, its implementation has, at least *de facto* if not *de jure*, become subordinate to the values embedded in the human rights doctrine.”);
- Verdirame 2013, 33–34, “Human rights are conceived mainly as limits to the sovereignty of states which can be enforced by other states. Their violation is a matter of ‘international concern’ and a potential basis for interference.”;
- Sheeran 2013, sec. 4.5, “The growing influence of the inherent dignity of the human being has successfully eroded state sovereignty. It has developed human rights both as a constitutive principle within the UN Charter and arguably as a secondary foundation of the international legal order.”).

This paper seeks to look at whether IHRL provides a valuable and usable framework for looking at the regime of Internet blocking and filtering in India. To do so, the paper first looks at the laws surrounding website blocking and Internet shutdowns in India, sketching out a brief history of website blocking and Internet shutdowns in India. After that, we explore the applicability of IHRL in India, and the extent to which international norms can be applied to the domestic situation in India. Thereafter, we examine the IHRL related to Internet filtering and shutdowns, and see where Indian courts have failed to apply these standards. The paper concludes by noting the challenges in

applying IHRL in relation to Internet filtering and shutdowns in India, and proposes potential steps that could be taken.

2. Laws Relating to Blocking and Internet Shutdowns in India

There are, and have been, several bases for Internet shutdowns in India, including:

1. Section 144 of the Criminal Procedure Code;
2. Section 5 of the Telegraph Act, 1885, read with the Temporary Suspension of Telecom Services (Public Emergency or Public Safety) Rules, 2017;
3. Sections 20 and 21 of the Telecommunications Act, 2023 (yet to be notified);
4. State-level Police Acts.

Similarly, multiple legal provisions have been claimed for website blocking in India:

1. Section 67 of the (unamended) IT Act, 2000, read with Gazette Notification no. GSR. 181(E), dated February 27, 2003;
2. Indian Copyright Act;
3. The Civil Procedure Code and courts' inherent powers;
4. Section 69A of the IT Act, 2000 (as amended in 2008), read with the Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules, 2009;
5. Section 79(3)(b) of the IT Act;
6. State-level Police Acts.

It is not always clear what each provision is meant to cover. For instance, while the Telegraph Act is legally used for Internet shutdowns, and Section 69A of the IT Act is legally used to block access to thousands of specific websites and hundreds of mobile apps, the plain reading of the provisions does not make apparent why this should be so. Provisions relating to intermediary liability, thanks to some judgments, may also be used in conjunction with a court order to block websites.

Thus, there is a lot of ambiguity in the way that the laws are interpreted and applied. Some of these legal bases have been created by legislatures specifically for the purposes of blocking websites and access to the Internet, while others were evolved by the higher judiciary, and yet others evolved by police and magistrates.

2.1 History of Website Blocking in India

2.1.1 Blocking Before 69A

The Information Technology Act, as passed in 2000, did not contain any provisions relating to governmental blocking or filtering of the Internet. However, that did not prevent citizens from

seeking blocking of Internet content, the government from blocking websites, nor the court from ordering website blocks (Chima 2008).

During the Kargil War, the only Internet service provider (ISP) in India at that time—Videsh Sanchar Nigam Limited (VSNL)—blocked access to the website of the Pakistani newspaper Dawn (Chima 2008, 50–52), and had prior to that, blocked access by some subscribers to the Middle Eastern Socialist Network (MESN). When the blocking of the MESN was noticed and challenged in the Delhi High Court, VSNL did not deny it, but said they were empowered by the Telegraph Act. That writ petition seems to have disappeared into judicial limbo, with circumstances having changed but no verdict having been pronounced (Chima 2008, 51).

Eventually, in 2003, a government notification was published by the Department of Information Technology, under section 88 read with section 67 (on obscenity), which enabled the Indian Computer Emergency Response Team (CERT-In) to block websites “after verifying the authenticity of the complaint and after satisfying that action of blocking of website is absolutely essential” (Ministry of Electronics and Information Technology, Government of India 2003).

Interestingly, section 67 of the IT Act did not provide for blocking of websites, nor did GSR 181(E) limit itself to the blocking of obscene material. Clearly, the government felt there was some inherent, unenumerated power to block websites, in addition to what powers had been delegated by Parliament¹.

In August 2005, an expert committee constituted for this purpose, working in part on the recommendations of an “Inter-Ministerial Working Group on Cyber Laws & Cyber Forensics” (Ministry of Communications and IT 2005), recommended multiple amendments to the IT Act (Expert Committee on Amendments to the IT Act 2000 2005). However, there was no recommendation for a provision relating to blocking of websites or Internet shutdowns.

Based on the recommendations of the expert committee, the Information Technology (Amendment) Bill was introduced in the Lok Sabha on December 15, 2006. While this did mention a source of international soft norms (the United Nations Commission on International Trade’s Model Law on Electronic Commerce), it did not include section 69A, and the only reference to “remov[ing] or disabl[ing] access to [] material [being used to commit an unlawful act]” on a computer resource, was section 79(3)(b), which dealt with intermediary liability. The Parliamentary Standing Committee that studied the Bill and provided its recommendations did not raise the issue of Internet blocking or content removal.

However, in the amendments that were introduced in the Lok Sabha on December 16, 2008, section 69A, in its current form, was present. Eventually, amidst din in both the Lok Sabha and the Rajya Sabha, the IT (Amendment) Act, 2008, was passed by voice vote, without any discussion².

2.1.2 Internet Shutdowns

It is unclear when the first Internet shutdown order was passed in India. As early as January 26, 2012, a news report noted that “Mobile phone and portable Internet services were shut down from 9

AM till noon to ensure that no electronically controlled remote control devices were operated by militants.” (PTI 2012) That same report also seemed to suggest that this was a regular occurrence: “These services remain shut on Republic Day and Independence Day after militants used a mobile phone to trigger a bomb blast outside Bakshi Stadium in 2005.” (PTI 2012)

In August 2012, in multiple cities in India, including Bengaluru and Hyderabad, bulk SMS facilities (sending text messages to more than five people) were prohibited by the government when there was a mass panic amongst people from the North-East of India, based on rumours that circulated over SMS, Facebook, etc. At that time, a number of individual websites were blocked (Prakash 2012). However, the government ruled out the option of blocking entire social media websites, despite requests by some members of parliament that they do so (Chaturvedi 2012). Nor, importantly, did the government shut down the Internet.

In the years since, especially after their use in 2015 during protests in Gujarat (Munjal 2021), Internet shutdowns have become increasingly frequent, and have been ordered for a variety of reasons, including in advance of protests and school/job examinations (Times News Network 2018). There have also been prolonged shutdowns, as was the case in Jammu & Kashmir (Munjal 2021).

2.2 Provisions under the IT Act, Telegraph Act, and Other Laws

2.2.1 Website Blocking

Section 69A of the IT Act reads as follows:

69A. Power to issue directions for blocking for public access of any information through any computer resource.–

- i. Where the Central Government or any of its officers specially authorised by it in this behalf is satisfied that it is necessary or expedient so to do, in the interest of 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, it may subject to the provisions of sub-section (2), for reasons to be recorded in writing, by order, direct any agency of the Government or intermediary to block for access by the public or cause to be blocked for access by the public any information generated, transmitted, received, stored or hosted in any computer resource.
- ii. The procedure and safeguards subject to which such blocking for access by the public may be carried out, shall be such as may be prescribed.
- iii. The intermediary who fails to comply with the direction issued under sub-section (1) shall be punished with an imprisonment for a term which may extend to seven years and also be liable to fine.

The scope of Section 69A is very wide. The provision itself does not speak of the Internet; instead, it talks of government agencies or intermediaries being ordered to “*block for access by the public or cause to be blocked for access by the public any information generated, transmitted, received, stored or hosted in any computer resource.*” However, the language does seem to suggest that it refers to specific information available over the Internet, since it has to be accessible to “the public”—which requirement a private network, even a large one, presumably, would not satisfy.

While some have argued that the power to block Internet access can be found within Section 69A (Hariharan and Baruah 2015), others have argued that it isn’t clear whether Section 69A can cover Internet shutdowns (Software Freedom Law Centre 2021). The Rules drafted under Section 69A do not seem to contemplate Internet shutdowns, since they require the Designated Officer to contact the person or intermediary who has hosted the contentious information, and not just transmitted it³.

In 2020, the Supreme Court of India held that “*The aim of the section [69A] is not to restrict/block the internet as a whole, but only to block access to particular websites on the internet. Recourse cannot, therefore, be made by the Government to restrict the internet generally under this section.*” (Anuradha Bhasin v. Union Of India 2020, para. 81).

In 2009, the Information Technology (Procedure and Safeguards for Blocking for Access of Information By Public) Rules (“Blocking Rules”) were notified. The Blocking rules are broadly modelled on the procedure laid down by the Supreme Court in PUCL v. *Union of India* for phone tapping (PUCL v. Union of India 1996), which were in turn incorporated into Rule 419A of the Telecom Rules in 1999, which was subsequently amended in 2007 and 2014.

- The Blocking Rules allow any person to make a request to a ‘Nodal Officer’, which if approved by the Chief Secretary of the state (or if the blocking request is made *suo motu* by the Nodal Officer), shall be forwarded to a “Designated Officer” (“DO”, currently, the head of CERT-In).
- The DO places this before a committee. The DO also identifies the person / intermediary hosting the content, and issues notice for them to make a representation to committee within 48 hours regarding the content.
- The committee must then rule on whether the request is justifiable under Section 69A, and give specific recommendations in writing, which in turn are to be reviewed by the Secretary of the Department of Information Technology.

While Section 69A itself does not consider court orders, the Blocking Rules state that a court order for blocking shall be enforced by the DO. There are also procedures noted for emergency blocking, which would have to be placed before the committee for its consideration within 48 hours.

The provisions that protect Internet intermediaries from liability have also, paradoxically, been used to block websites. Section 79(1) and (2) provide broad protections for Internet intermediaries from liability, and list conditions they must satisfy for such protection to apply. Thereafter, Section 79(3) states:

79(3): The provisions of sub-section (1) shall not apply if—
... (b) upon receiving actual knowledge, or on being notified by the appropriate Government or its agency that any information, data or communication link residing in or connected to a computer resource controlled by the intermediary is being used to commit the unlawful act, the intermediary fails to expeditiously remove or disable access to that material on that resource without vitiating the evidence in any manner.

...

It's quite clear that Section 79(3) doesn't by itself grant the government the power to block websites. It merely provides that the exemption from liability that is provided to intermediaries under Section 79(1) would not apply in case an intermediary fails to "expeditiously remove or disable access" to material "being used to commit the unlawful act" as notified by the government. Thus, one way to interpret the provision would be: if an intermediary fails to disable access to specific content as directed by the government under Section 69A, it will lose its protection from liability for that specific content.

However, that interpretation was rejected when this provision was used as the basis for the Intermediary Guidelines Rules, 2011, which empowered members of the public to use the Rules to require intermediaries to remove content (which was partially struck down by the Supreme Court (*Shreya Singhal v. Union of India* n.d.)), as well as the Intermediary Guidelines Rules, 2021 and the Intermediary Guidelines Rules 2023, both of which again empowered the public to require content removal, though on more limited grounds (Intermediary Guidelines and Digital Media Ethics Code Rules 2021, Rule 5).

The 2021 and 2023 Rules also have provisions for blocking of information "in case of emergency" (Rule 16), as well as provisions (Rule 15) for the Ministry of Information and Broadcasting to impose content blocking orders upon online news and current affairs content publishers and online curated content publishers (which is meant to cover companies like Netflix and Hotstar), despite such powers not being granted explicitly under Section 79. The grounds for ordering the deletion or modification of content under these Rules are the prevention of "incitement to the commission of a cognisable offence relating to public order", and the grounds for ordering the blocking of content are those laid down in Section 69A of the IT Act.

The 2011 Rules allowed for a completely opaque system of content removal, that in effect provided for "invisible censorship" (Prakash 2011b). Though the Supreme Court struck down the portion of the 2011 Rules that provided the ability for individuals to request that intermediaries remove or disable access to content, they still enabled the government to require intermediaries to remove or disable content under Section 79. The court did not clarify the consequences of an intermediary failing to implement the Intermediary Guidelines Rules—which also require intermediaries to modify their terms of service.

Though Section 69A remains the only provision that explicitly empowers the government to block content online, as per my analysis of informally-collated ISP blocklists, the largest category among websites blocked in India is court-ordered blocking through interim ‘John Doe’ orders under the Copyright Act, even without formal findings of infringement. The Copyright Act doesn’t by itself permit website blocking, and indeed scholars have argued that the courts have misused their powers in blocking websites in such a manner (Padmanabhan 2014a, 2014b).

2.2.2 Internet Shutdowns

Before 2017, there were no clear provisions for shutting down Internet access. When the government did so, it was usually done by District Magistrates using the powers under Section 144 of the Criminal Procedure Code (Munjal 2021), which enable a District Magistrate, a Sub-Divisional Magistrate, or an Executive Magistrate specially empowered by the state government in this behalf, to order a person to take an action “with respect to certain property in his possession or under his management”, if the Magistrate “*considers that such direction is likely to prevent, or tends to prevent, obstruction, annoyance or injury to any person lawfully employed, or danger to human life, health or safety, or a disturbance of the public tranquility, or a riot, of an affray.*”

It is apparent that this provision does not enable Internet shutdowns, at least not for the reasons and in the manner that various governments were using them (Software Freedom Law Centre 2016; Bhardwaj et al. 2020). The Temporary Suspension of Telecom Services (Public Emergency or Public Safety) Rules, 2017 (“Suspension Rules”)—which allow the union and state governments to order temporary shutdown of the Internet due to a public emergency or for public safety—derive their power from section 7 of the Indian Telegraph Act, 1885.

- These Rules empower only a Home Secretary to order Internet shutdowns, via orders that lay down clear reasons, and only in cases where “necessary” or “unavoidable” due to a “public emergency” or “in the interest of public safety”.
- Any order passed by the Home Secretary must be sent to a Review Committee within 24 hours, and that committee must accept or revoke the Home Secretary’s order within five days.

Even the passing of the Suspension Rules has not prevented the misuse of Section 144 of the Criminal Procedure Code for carrying out Internet shutdowns (Munjal 2021). Investigations have shown that a state had ordered an Internet shutdown without having constituted the necessary committee under the Suspension Rules (Software Freedom Law Centre 2022a), and even uncovered an instance where “during the citizenship law protests in December 2019, the order to cut off the internet in Delhi was issued by the deputy commissioner of police—who is neither a home secretary nor a district magistrate.” (Munjal 2021).

In *Faheema Shirin R.K. v. State of Kerala* [Faheema Shirin R.K. v. State of Kerala (2019)]; this case will be discussed in detail in Part 3.4], which concerned restrictions put on Internet access within a girls’ hostel, the Kerala High Court held the right to access the Internet to be a fundamental right. In

2020, in the case of *Anuradha Bhasin*, wherein a newspaper editor from Kashmir challenged the arbitrary shutdown of Internet, the Supreme Court held that any restriction on Internet access by the government must be temporary, limited in scope, lawful, necessary and proportionate, and transparent [Anuradha Bhasin v. Union Of India (2020); The case will be discussed in greater detail in Part 3.4].

In 2023, Parliament passed the Telecommunications Act, which repeals the Indian Telegraph Act, but saves existing rules (including the Suspension Rules), unless they are superseded. Sections 20 and 21 of the Telecommunications Act provide for suspension of telecommunications services (including Internet services). Section 20 of the Telecommunications Act is largely similar to Section 5 of the Telegraph Act, though it even more clearly allows for suspension of Internet services. The Telecommunications Act has not yet been notified, and thus is not yet in effect.

3 International Human Rights Law

3.1 Applicability of IHRL in India

India was a founding member of the United Nations, having signed the Declaration by United Nations at Washington in January 1942 (Rajan 1973, 430), and having participated in the UN Conference of International Organization at San Francisco from 25 April to 26 June 1945 (Mohan 2013). On June 26, 1945, India was among 50 countries to sign the UN Charter, which it joined after ratifying the Charter on October 30, 1945 (Rajan 1973, 430).

India participated actively in the drafting of the Universal Declaration of Human Rights and has ratified six of the nine key international human rights treaties⁴, including the International Covenant on Civil and Political Rights (ICCPR). India was also a member of the former UN Commission on Human Rights since its inception in 1947, and after the Commission was replaced by the Human Rights Council (UNHRC) in 2006, India has been elected to UNHRC five times, with the latest stint being from 2019–2022 (Ministry of External Affairs, India 2020). Thus, it is clear that India has been a keen participant in and supporter of the international human rights regime.

When it comes to the applicability of international human rights law, as with all international law, three important questions arise:

- who has the power to bind India to international commitments: the Parliament or the executive?
- can international treaty obligations be enforced in India in the absence of a law specifically incorporating such obligations or of specific executive actions (such as ratification of a treaty)?
- can international human rights law be enforced even in the absence of a specific treaty?

The Constitution of India refers to international law and treaties in Article 51, as part of the Directive Principles of State Policy⁵. Under India's Constitution (Article 246 read with entries 10–14 of the Union List), the power to enter into international treaties and to implement them domestically, along with the power to implement decisions undertaken at international bodies, lies with the Parliament. Furthermore, Article 253 clarifies that this is the case even for matters that are domestically within the legislative competence of state governments.

However, Article 73 of the Indian Constitution has been interpreted to mean that the executive has the same powers as Parliament in terms of entering into binding international obligations and enforcing them (Chandra 2017, 32–34). This has thus resulted in what one scholar terms “formal monism, functional dualism” (Chandra 2017).

Traditionally, this was understood by Indian jurists, as Justice Krishna Iyer put it in *Jolly George v. Bank of Cochin* (1980), that “until the municipal Law is changed to accommodate the [treaty], what binds the courts is the former not the latter.” However, this understanding was upended by the Supreme Court engaging in judicial activism in the form of judicial interpretation, and granting itself the power to directly incorporate international law into domestic law, even from conventions that India is not a party to, as long as the law is not in contravention of any specific domestic law (Chandra 2017, pt. 4.2).

Notably, some Indian human rights statutes themselves refer to international covenants. The Protection of Human Rights Act, 1993, for instance, provides an explicit reference to international covenants such as the ICCPR via its definition of the term “human rights”⁶

2(d) “human rights” means the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by courts in India;

2(f) “International Covenants” means the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights adopted by the General Assembly of the United Nations on the 16th December, 1966 and such other Covenant or Convention adopted by the General Assembly of the United Nations as the Central Government may, by notification, specify.

That a covenant like the ICCPR applies to all state parties is underscored by the UN Human Rights Committee's General Comment 31, which states: “The obligations of the [ICCPR] in general and article 2 in particular are binding on every State party as a whole. All branches of government (executive, legislative and judicial), and other public or governmental authorities, at whatever level – national, regional or local are in a position to engage the responsibility of the State party.” (UN Human Rights Committee 2004, para. 4)

While some scholars have seen the incorporation of international law and norms into Indian jurisprudence as a part of the “strategic choice for national courts determined to protect their own

authority and to reclaim domestic democratic processes” (Benvenisti 2008), it could also be seen as ad-hoc and haphazard⁷.

3.2 Sources of IHRL

The sources of international human rights law, including as it relates to the freedoms of opinion, expression, assembly, and association, are varied and numerous (Jayawickrama 2002, chaps 21–22).

As Toby Mendel notes, “The office of the United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression is the only specialised UN mandate that focuses exclusively or even primarily on the fundamental right to freedom of expression.”(2015) Since 2011, successive UN Special Rapporteurs on freedom of expression have been focusing extensively on issues pertaining to digital censorship.

Another source of international standards on freedom of expression is the Joint Declarations that have been adopted annually since 1999 by the (originally three, but now four) special international mandates: the UN Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Cooperation in Europe (OSCE) Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression, and the African Commission on Human and Peoples’ Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information.

Indian courts have also relied on the judgments of the European Court of Human Rights (Anuj Garg v. Hotel Association of India 2007), European Court of Human Rights, the Court of Justice of the European Union, and the Inter-American Court of Human Rights (Puttaswamy v. Union of India 2017), along with national decisions of courts in the United Kingdom, United States of America, South Africa, and Canada.

3.3 IHRL related to Website Blocking and Internet Shutdowns

While website blocking and Internet shutdowns affect people’s civil and political rights as well as economic, social, and cultural rights, there have not been any significant pronouncements in terms of international human rights law on economic, social, and cultural rights impacts of website blocking and Internet shutdowns. Hence, in this paper, I look mainly at the two aspects of civil and political rights that have been the subject of international human rights law pronouncements: freedom of expression and freedom of assembly, association, and public participation.

3.3.1 Freedom of Expression

There are two main primary texts on the freedom of expression at the international level: the Universal Declaration of Human Rights (UDHR), and Article 19 of the International Covenant on Civil and Political Rights (ICCPR).

Article 19 of the UDHR⁸, and Article 19 of the ICCPR⁹ provide for the freedom of opinion and expression. Article 29(2) of the UDHR¹⁰, and Article 19(3) of the ICCPR¹¹ provide for limitations on the freedom of expression.

In 2011, the UNHRC underscored the applicability of the ICCPR for online expression by noting that:

Any restrictions on the operation of websites, blogs or any other internet-based, electronic or other such information dissemination system, including systems to support such communication, such as internet service providers or search engines, are only permissible to the extent that they are compatible with paragraph 3. Permissible restrictions generally should be content-specific; generic bans on the operation of certain sites and systems are not compatible with paragraph 3. It is also inconsistent with paragraph 3 to prohibit a site or an information dissemination system from publishing material solely on the basis that it may be critical of the government or the political social system espoused by the government (UN Human Rights Committee 2011, para. 43).

And since 2012, the UNHRC has held across multiple resolutions that “the same rights that people have offline must also be protected online, in particular freedom of expression, which is applicable regardless of frontiers and through any media of one’s choice, in accordance with articles 19 of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.” (UN Human Rights Council 2012b)

Any restriction on freedom of expression, must, under international law, fulfil the three criteria laid down in Article 19(3) of the ICCPR: legality, legitimate objective, and necessity and proportionality.

3.3.2 Freedom of Assembly, Association, and Political Participation

The freedoms of assembly¹², association¹³ and political participation¹⁴ are closely linked to one another as well as to the freedom of expression, opinion, and thought.

These rights apply online just as they do offline. In a recent report titled, “Ending Internet shutdowns: a path forward”, the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Clément Nyaletsossi Voule, noted that,

The right to access and use internet and other digital technologies for the purposes of peaceful assembly is protected under article 20 of the Universal Declaration of Human Rights and article 21 of the International Covenant on Civil and Political Rights. As indicated in general comment No. 37 of the Human Rights Committee on Article 21: The Right to Peaceful Assembly, “[a]lthough the exercise of the right of peaceful assembly is normally understood to pertain to the physical gathering of persons, article 21 protection also extends to remote participation in, and organization of, assemblies,

for example online.” This protection covers those activities associated with peaceful assemblies that “happen online or otherwise rely upon digital services,” including planning and organizing a gathering, mobilizing resources; disseminating information, preparing for and traveling to the event; communicating with other organizers and participants leading up to and during the assembly; monitoring or broadcasting the assembly. In turn, interference with such technologies can result in the violation of this fundamental freedom (Voule 2021, para. 8).

3.4 Application of IHRL Principles in the Indian Context

3.4.1 Legality

Article 19 of the ICCPR, as well as Articles 20, 21, and 22, all require that restrictions be provided by law. In this section, it will be mostly Article 19 that is examined, but the same principle applies to the other articles as well.

The UN Human Rights Committee’s General Comment 34 notes the following requirements for legality (UN Human Rights Committee 2011, paras. 24-25)

- Restrictions must be provided by law, which does not include restrictions enshrined in traditional, religious, or other such customary law;
- The law must be “formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly”;
- The law must be “made accessible to the public”;
- The law may not “confer unfettered discretion for the restriction of freedom of expression on those charged with its execution”;
- The law must “provide sufficient guidance to those charged with their execution to enable them to ascertain what sorts of expression are properly restricted and what sorts are not”;
- The law “be compatible with the provisions, aims and objectives” of the ICCPR, apart from complying with Art. 19(3) of the ICCPR (on legitimate aims);
- The law must “not violate the non-discrimination provisions” of the ICCPR;
- The law must “not provide for penalties that are incompatible with the Covenant, such as corporal punishment.”

Thus, the burden falls upon the legislature to lay down clear guidelines, which are not overly broad, as to when the executive may restrict freedom of expression. It is apparent that Section 5 of the Telegraph Act and Section 69A of the IT Act, as well as Section 20 of the Telecommunications Act,

do not lay down clear guidelines, and indeed confer upon the union government great discretion for the restriction of freedom of expression.

In the Supreme Court case of *K.A. Abbas v. Union of India* (K.A. Abbas v. Union of India n.d.), this exact objection had been taken up by the petitioners, who based it additionally on the theory of separation of powers. The petitioners in that case argued that because Section 5B(1) of the Cinematograph Act copies the language of Article 19(2) and authorises the central government to issue directions to the film censorship board on that basis, it showed that the “legislature has not indicated any guidance to the Central Government” (K.A. Abbas v. Union of India n.d., 468).

However, the five-judge bench did not examine the issue of the wholesale copying of the language of Article 19(2). They rejected the argument about delegated legislation, holding that “*Of course, Parliament can adopt the directions and put them in schedule to the Act (and that may still be done), it cannot be said that there is any delegation of legislative function.*” (K.A. Abbas v. Union of India n.d., 469) So, unfortunately, this practice of copying the principles laid down in Article 19(2) of the Constitution and turning those principles into statutory law to guide the executive seems to be unobjectionable to the Supreme Court of India, though this would go against the IHRL requirements as stated by the UNHRC in General Comment 34.

3.4.2 Legitimate Aims

Article 19(2) of the Constitution of India allows the state to impose “reasonable restrictions” on the exercise of freedom of expression “*in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.*”

Under the UDHR and ICCPR, which allow for restrictions to be provided by law in cases of necessity “*for respect of the rights or reputations of others; for the protection of national security or of public order (ordre public), or of public health or morals.*” Thus the legitimate aims under the Indian Constitution are greater than those provided under IHRL.

Section 5(2) of the Telegraph Act reproduces five of the grounds under the Constitution:

- a) sovereignty and integrity of India;
- b) security of the State;¹⁵
- c) friendly relations with foreign states;
- d) public order; and
- e) preventing incitement to the commission of an offence

But it also mandates a prerequisite in the form of

- a) occurrence of any public emergency; or
- b) in the interest of the public safety.

Section 69A too reproduces five of the constitutional grounds:

- a) sovereignty and integrity of India;
- b) security of the State;
- c) friendly relations with foreign States;
- d) public order; and
- e) preventing incitement to the commission of any cognizable offence relating to above.¹⁶

But it also adds:

- f) defence of India.

Specifically, it *does not apply* to:

- g) Decency or morality;
- h) Contempt of court.

Instead of clarifying what conditions qualify as breaches of “public order” or harm to “friendly relations with foreign States” or threats to “security of the State”, the legislature has wrongly conferred all the discretion that it has under the Constitution on to the executive. It does not clarify what the distinction is between a restriction framed to safeguard the “sovereignty and integrity of India” and one framed to provide for the “defence of India”. There are no guidelines provided by the legislature as to what may constitute a “public emergency”, or what may be “in the interest of the public safety”, nor broad phrases such as “public order” or “friendly relations with foreign States”.

This clearly goes against the UNHRC’s General Comment 34’s stated requirement that “laws must provide sufficient guidance to those charged with their execution to enable them to ascertain what sorts of expression are properly restricted and what sorts are not.” (UN Human Rights Committee 2011, para. 26) Indeed, the Suspension Rules do not lay down the specific kinds of circumstances under which the Home Secretary may invoke the powers granted under the Rules; they merely require that the Review Committee ensure that the orders are in conformance with Section 5(2) of the Telegraph Act.

Further, the history of website blocking and Internet shutdowns in India, recounted above, shows that district magistrates, ISPs, and even entities like the CERT-In, have engaged in website blocking and Internet shutdowns, despite not having been granted the power to do so by Parliament. Moreover, Internet shutdowns have even been ordered during democratic non-violent protests (Internet Freedom Foundation 2024), to prevent cheating during exams (Software Freedom Law Centre 2022b), and other such reasons that are clearly do not pertain to legitimate aims as laid down either under Art. 19(3) of the UDHR, Art. 19(2) of the Indian Constitution, Section 69A of the Information Technology Act, nor Section 5(2) of the Telegraph Act. This points to a deficit in the rule of law.

3.4.3 Necessity

The language used in Section 69A is that the central government should be satisfied that it is “necessary or expedient” to block or cause to be blocked. “Expedience”—the quality of being fit or suitable to cause some desired end (‘Expedient’ 2021)—is clearly a far lesser standard than “necessity”. International law rules out expedience as a standard for restriction of the freedom of expression, given that it requires necessity be demonstrated. Special Rapporteur David Kaye elaborated on the meaning of “necessity” by stating:

The State must establish a direct and immediate connection between the expression and the threat said to exist. Restrictions must target a specific objective and not unduly intrude upon other rights of targeted persons, and the ensuing interference with third parties’ rights must be limited and justified in the light of the interest supported by the intrusion. The restriction must be the least intrusive instrument among those which might achieve the desired result (Kaye 2016b, para. 17, references omitted.).

In another report to the Human Rights Council, Kaye added “*Network shutdowns invariably fail to meet the standard of necessity. Necessity requires a showing that shutdowns would achieve their stated purpose, which in fact they often jeopardize.... In Kashmir, police have reported on the positive role of mobile phones in locating people trapped during terrorist attacks.*” (Kaye 2017, para. 14.)

Interestingly, in the *Shreya Singhal* judgment, the Supreme Court didn’t seem to notice the words “or expedient” in the text of the provision; while discussing Section 69A, they state, “*First and foremost, blocking can only be resorted to where the Central Government is satisfied that it is necessary so to do*” (*Shreya Singhal v. Union of India* n.d., emphasis added.). One might be tempted to argue that this is, in effect, a reading down of Section 69A, but given that this was not explicitly noted by the court as such reading down, it is hard to justify that argument. Further, the court’s wording suggests that what it considers important is the satisfaction of the union government as to “necessity”, rather than a demonstration to the citizenry by the union government of “necessity”.

Similarly, Section 5(2) of the Telegraph Act also uses the phrase “necessary or expedient” while talking about the standard required for satisfaction of the central government before ordering the blocking or interception of telegraphs. Even academic commentators on the provision’s constitutionality (See, e.g., Ramachandran 2014) do not seem to have highlighted the vast difference between the standards of ‘necessity’ and ‘expediency’.

The judiciary even seems to have read the phrase “necessary or expedient” into Section 144 of the Criminal Procedure Code, even though that section doesn’t mention either word (*Md. Gulam Abbas v. Md. Ibrahim* 1977, which holds that “*It may however be noted that the Magistrate is not concerned with individual rights in performing his duty under Section 144 but he has to determine what may be reasonably necessary or expedient in a situation of which he is the best judge.*”).

Indeed, the phrase “necessary or expedient” is used in thousands of sections of Indian law (“Necessary or Expedient” Doctypes: Laws’ n.d.), including in other provisions relating to the restriction of speech, such as Sections 19 and 20 of the Cable Television Networks (Regulation) Act,

which allow the central government to ban specific TV programmes or even to ban entire cable networks (The Cable Television Networks (Regulation) Act 1995).

The office of the UNHCHR put out a report on Internet shutdowns in 2022 (Office of the United Nations High Commissioner for Human Rights 2022). In that report, India was criticised for blocking Internet access during protests and exams (Office of the United Nations High Commissioner for Human Rights 2022, paras 11, 13). Further, the report notes that:

Network shutdowns invariably fail to meet the standard of necessity. Necessity requires a showing that shutdowns would achieve their stated purpose, which in fact they often jeopardize. Some governments argue that it is important to ban the spread of news about terrorist attacks, even accurate reporting, in order to prevent panic and copycat actions. Yet it has been found that maintaining network connectivity may mitigate public safety concerns and help restore public order. During public disturbances in London in 2011, for example, authorities used social media networks to identify perpetrators, disseminate accurate information and conduct clean-up operations. **In Kashmir, police have reported on the positive role of mobile phones in locating people trapped during terrorist attacks.** [emphasis added]

It is also worth noting that courts in India very often pass ex parte orders for the blocking of all websites listed by a plaintiff, without scrutinising whether each of the websites listed actually violates any law, or the necessity of such blocking. This is how a website like Google Docs came to be ordered to be blocked by the Delhi High Court in 2014 in a copyright infringement case (Pranesh Prakash 2014), an order that was thankfully reverted later.

The UNHRC's General Comment 34 (UN Human Rights Committee 2011, para. 34), as well as various human rights courts' judgments (Konaté v. Burkina Faso 2014, paras. 148-149; The Sunday Times v. The United Kingdom 1979, para. 62) hold that proportionality is implicit in the concept of "necessity". So even though Article 19 of the ICCPR only uses the term "necessity" and not "proportionality", the latter concept has been read into the former.

3.4.4 Proportionality

As noted above, in IHRL, proportionality analysis has become central to analysis of permissible limitations or restrictions, even in circumstances where "proportionality" is not explicitly mentioned in the text. Much of this has been driven by courts in Latin America and Europe.

This has led to entire books devoted to the proportionality principle (Barak 2012; Brady 2012; Hulsroj 2013; Huscroft, Miller, and Webber 2014; Jackson and Tushnet 2017; Klatt and Meister 2012; Sullivan and Frase 2009), including works that analyse it from a comparative perspective, (Kremnitzer, Steiner, and Lang 2020; Stone Sweet and Mathews 2019; Yap 2020), as well as works that develop critiques of the principle (Duarte and Sampaio 2018; Urbina 2017).

3.4.4.1 Proportionality Analysis in Indian Courts

Traditionally, “proportionality” analysis has been quite alien to Indian courts. Instead, Indian courts have been guided by UK common law, which follows the standard of ‘reasonableness’, which in the UK is guided by the doctrine of *Wednesbury* unreasonableness (Chugh 2004; Chandrachud 2013, 192). However, since the early 2000s, Indian courts have occasionally turned to the term “strict scrutiny” (borrowed from US judgments) (Khaitan 2008, 179), though it is unclear whether they have either followed the same standard as the US, nor how exactly this seemingly higher standard has been employed differently from “reasonableness” (Khaitan 2008, 179–81).

Additionally, at around the same time, Indian courts seem to also have increasingly turned to the term “proportionality” in their judgments, mirroring a similar shift in the UK since the 1980s. As Chandra (2020) notes, “even at its lowest level of scrutiny, proportionality requires the court to determine that the measure was legitimate, suitable, necessary and balanced.” This, she notes,

“implies a deeper level of scrutiny of the State’s reasons as compared to *Wednesbury* and places a greater restriction on the scope of State power. At higher levels of scrutiny, the court signals that rights are extremely important, that rights-infringing State action is presumptively illegitimate, and that the State is tasked with justifying, based on clear and cogent evidence, that it infringed the right only in very exceptional circumstances.”

But, as Chandrachud (2013) convincingly argues, “*the proportionality test in India, however, is merely Wednesbury unreasonableness in disguise. Though the Supreme Court of India has transplanted the language of ‘proportionality’ into its decisions, perhaps to borrow from the global legitimacy associated with the proportionality doctrine, the Court applies a veiled Wednesbury standard of review and calls it proportionality.*”

Despite the explicit (apparent) adoption of proportionality as a limiting standard by both the majority and the minority in the Puttaswamy (Aadhaar) case, the judges seem to have applied the standard very differently. As correctly noted by Chandra (2020): “*On the one hand, the Court articulates a very high standard of substantive scrutiny, implying thereby that rights are of great normative significance and can be overcome only in exceptional circumstances. However, at the same time, the Court is highly deferential to the State and places minimal evidential burdens on it.*”

3.4.4.2 Proportionality and Blocking of Specific Content

With respect to blocking of Internet content, in 2011, Special Rapporteur Frank La Rue noted that:

States’ use of blocking or filtering technologies is frequently in violation of their obligation to guarantee the right to freedom of expression, as the criteria mentioned under chapter III are not met. Firstly, the specific conditions that justify blocking are not established in law, or are provided by law but in an overly broad and vague manner,

which risks content being blocked arbitrarily and excessively. Secondly, blocking is not justified to pursue aims which are listed under article 19, paragraph 3, of the International Covenant on Civil and Political Rights, and blocking lists are generally kept secret, which makes it difficult to assess whether access to content is being restricted for a legitimate purpose. **Thirdly, even where justification is provided, blocking measures constitute an unnecessary or disproportionate means to achieve the purported aim, as they are often not sufficiently targeted and render a wide range of content inaccessible beyond that which has been deemed illegal.** Lastly, content is frequently blocked without the intervention of or possibility for review by a judicial or independent body (La Rue 2011b), Emphasis added.

Privacy-enhancing technologies are often censorship-resistance technologies as well, and make it more difficult for governments to target censorship more specifically (especially against uncooperative entities that lie outside their jurisdictions). For instance, secure protocols like HTTPS effectively prevent the government from ordering an ISP to block a particular page within a website rather than blocking the entire website, because they prevent the ISP from learning which particular page within a website a user is seeking access to. This consequence of security/privacy is not analysed in the commentary on proportionality.

Another aspect of proportionality that only finds a little mention in IHRL analysis is that of time: how long is particular content to be blocked? This too is a necessary part of proportionality. I am yet to see a content-blocking order issued by any Indian court or executive that contains any instructions on how long that content is to be blocked. The Blocking Rules do not contain any time-limiting provisions either, and do not require the block orders to be reviewed to see if they are still relevant. In many cases, websites that have long disappeared off the face of the Web are still blocked by ISPs. This does not apply only to executive-initiated blocks: even courts block websites using ex-parte orders without any time limits.

3.4.4.3 Proportionality and Internet Shutdowns

With respect to Internet shutdowns, in their ‘Joint Declaration on Freedom of Expression and Responses to Conflict Situations’ (2015), four special rapporteurs on freedom of expression noted that “*filtering of content on the Internet, using communications ‘kill switches’ (i.e. shutting down entire parts of communications systems) and the physical takeover of broadcasting stations are measures which can never be justified under human rights law.*” (UN Special Rapporteur on Freedom of Opinion and Expression et al. 2015, para. 4(c))

This position seems to be based on the idea that shutting down of Internet access, even when provided for by law, can never be either “necessary”—being the only option available—nor proportionate in terms of being balanced with the state’s interest. They continue:

We wish to express our concerns over the adverse effects that the shutting down of the internet and telecommunication networks, as well as landline and television channels,

may have on these rights, especially on the right to disseminate and receive information and the right to peacefully assemble and associate, including online. With particular regard to internet access, we recall that the same rights that people have offline must also be protected online... **The complete shutdown of the internet and telecommunication networks would appear to contravene the fundamental principles of necessity and proportionality that must be met by any restriction on freedom of expression. Shutdowns fail to reach the established test for restrictions to the right to freedom of opinion and expression under article 19(3) of the ICCPR, as well as for restrictions on the freedom of peaceful assembly and of association under articles 21 and 22(2) ICCPR.**

Access to the internet and telecommunications networks are crucial to prevent disinformation, and they are crucial to protect the rights to health, liberty and personal integrity, by allowing access to emergency help and other necessary assistance. Access to telecommunications networks is also crucial to ensure accountability of authorities for possible human rights violations, including the excessive use of force against peaceful protesters and others. We express our deep concern that the network disruptions will fuel chaos and unrest in Jammu and Kashmir, and that they contribute to a climate fear and uncertainty in the population (Vice-Chair of the Working Group on Arbitrary Detention et al. 2019). [emphases added]

This was reiterated by the Special Rapporteur David Kaye in 2016 when he noted that:

Service shutdowns and associated restrictions are a particularly pernicious means of enforcing content regulations. Such measures are frequently justified on the basis of national security, the maintenance of public order or the prevention of public unrest. In 2015, the Special Rapporteur, together with representatives of the Organization for Security and Cooperation in Europe, the Organization of American States and the African Commission on Human and Peoples' Rights condemned as unlawful Internet "kill switches". In one year alone, there were reports of shutdowns in Bangladesh, Brazil, Burundi, the Democratic Republic of the Congo, India and Pakistan (Kaye 2016a, para. 48).

In 2021, the Special Rapporteur on the rights to freedom of peaceful assembly and of association noted in his report to the Human Rights Council that

Shutdowns are thus inconsistent with proportionality requirements. They impose extreme burdens on those exercising expression and peaceful assembly rights and exert significant chilling effects on decisions regarding whether to participate in public assemblies (Voule 2021, para. 20).

In 2021, India voted in favour of a Human Rights Council resolution which

"...condemn[ed] unequivocally measures in violation of international human rights law that prevent or disrupt an individual's ability to seek, receive or impart information

online, including Internet shutdowns and online censorship, call[ed] upon all States to refrain from and to cease such measures, and also call[ed] upon States to ensure that all domestic laws, policies and practices are consistent with their international human rights obligations with regard to freedom of opinion and expression, and of association and peaceful assembly, online.” (UN Human Rights Council 2021, para. 11).

Just a few years before, the Indian government strengthened its powers to engage in Internet shutdowns. Further, in 2023, the Telecommunications Act was passed, which explicitly allows for Internet shutdowns. While they seemingly fall short of IHRL, are they in line with the Constitution of India?

Unfortunately, the Supreme Court did not get a chance to examine the constitutionality of the Suspension Rules in the Anuradha Bhasin case, as none of the parties seem to have raised it (Anuradha Bhasin v. Union Of India 2020, para. 84). Thus, for the time being it has to be assumed that Indian law doesn't prohibit Internet shutdowns, and thus they can be seen as a necessary and proportionate executive action in exercise of legitimate state interests (Anuradha Bhasin v. Union Of India 2020, paras. 86-100).

After a lengthy analysis of the powers under Section 144 of the Cr.P.C., the Supreme Court noted in 2017, with the passage of the Suspension rules, *“the position has changed,”* and that *“with the promulgation of the Suspension Rules, the States are using the aforesaid Rules to restrict telecom services including access to the internet.”* (Anuradha Bhasin v. Union Of India 2020, para. 83).

However, the reality remains that despite the introduction of the Suspension Rules which in effect denude district magistrates of the power to suspend Internet access, district magistrates across India have continued to issue orders suspending Internet access (Internet Freedom Foundation 2020), displaying the problem with rule of law in India.

Quite interestingly, some human rights courts have taken into account the lack of rule of law as a factor when engaging in necessity and proportionality analysis. For instance, in the case of *Tolstoy Miloslavsky v. The United Kingdom*, the European Court of Human rights held that the imposition of excessive penalties had a deterrent effect on the exercise of the freedom of expression, and was of the view that the granting of excessive damages for defamation constituted a violation of Article 10 of the European Convention of Human Rights (Tolstoy Miloslavsky v. The United Kingdom 1995).

The African Court on Human and Peoples' Rights crucially noted that even when specific restrictions were allowed (such as criminal damages for defamation), *“they are not necessary in a democratic society, when there is no guarantee, given the magnitude of the combined lethargic state of the domestic rule of law at the time, a reasonable relationship of proportionality to the legitimate goal pursued”* (Konaté v. Burkina Faso 2014, para. 154)

Thus, there is an argument to be made that the weak rule of law in India only calls for heightened scrutiny by the judiciary, and a higher standard must be applied when proportionality analysis is required.

3.4.5 Transparency

The issue of transparency of law hasn't received much focus in IHRL, with a UN Human Rights Council resolution on 'Human rights, democracy and the rule of law'(UN Human Rights Council 2012a) being a limited exception. In this section, I argue that transparency is a core part not only of rule of law but also IHRL, due to the requirement under IHRL that any restrictions on freedom of expression be "promulgated by law".

In the Second Treatise of Government, John Locke notes that *"whoever has the legislative or supreme power of any commonwealth, is bound to govern by established standing laws, promulgated and known to the people, and not by extemporary decrees"*(Locke 1690, paras. 131). Similarly, Lon Fuller in his book 'The Morality of Law', held that a law that is not publicly promulgated does not count as a genuine law (Fuller 1969). In India, if a law is not published in the official gazette, it can be held not to be in force. Thus, publicity and transparency of a law is an inherent requirement of legality.

One Special Rapporteur noted, *"States should provide full details regarding the necessity and justification for blocking a particular website, and determination of what content should be blocked should be undertaken by a competent judicial authority or a body which is independent of any political, commercial, or other unwarranted influences to ensure that blocking is not used as a means of censorship"* (La Rue 2011a, para. 70). Another Special Rapporteur noted, *"a detailed and evidence-based public justification' is critical to enable transparent public debate over restrictions that implicate and possibly undermine freedom of expression."*(Kaye 2015, para. 35)

Thus, any restriction of freedom of speech must provide adequate information to the public, as well as those whose speech is being restricted, to challenge it. Secret orders cannot be held to be "provided by law". Accordingly, the law must be clear, precise, and publicly accessible in order to provide individuals with adequate guidance.

This seeming requirement of transparency is in stark contrast to Rule 16 of the Blocking Rules, which mandates that *"strict confidentiality shall be maintained regarding all the requests and complaints received and actions taken thereof."* It is notable that this rule has not been observed strictly by MEITY at all times, since they have in the past responded to RTI requests, even post-2009, asking for details of blocked websites, including how many of those requests came from the judiciary, and some details about the deliberations of the committee for the examination of requests (Prakash 2011a).

Notably, in the case of *Shreya Singhal v. Union of India*, the court seems not to have examined the implication of Rule 16, even though it was mentioned in paragraphs 107 and 108. In paragraph 109, however, the court notes that under Section 69A, *"reasons have to be recorded in writing in such*

blocking order so that they may be assailed in a writ petition under Article 226 of the Constitution.” This seems to imply that the blocking order and the reasons therefor need to be available to the public, such that they may be assailed in a writ petition under Article 226 of the Constitution.

In his 2016 report, the UN Special Rapporteur specifically highlighted the harms of Rule 16 of the Blocking rules, when he noted:

Transparency can help ensure that subjects of Internet regulation are able to meaningfully predict their legal obligations and challenge them where appropriate. Gaps in compliance with these standards threaten the ability of individuals to understand the limits placed on their freedom of expression online and seek appropriate redress when their rights are violated.

Despite multiple reform attempts, transparency concerning government requests is still lacking.... Several States prohibit disclosures concerning government requests for content removal or access to user data. India, for example, prohibits online intermediaries from disclosing details of government orders to block access to Internet content, as well as any action they take in response to such orders (Kaye 2016a, paras. 64-65).

In the *Anuradha Bhasin* case, which concerned Internet shutdown orders in Jammu & Kashmir, the government was notably frank and stated outright that it would not produce orders that had been used to block Internet and mobile access, and claimed privilege. Eventually, the government provided the court with a few sample orders, claiming that it could not produce all the orders, as they kept changing.

The court rejected this reasoning, citing two reasons:

- (1) a “democracy, which is sworn to transparency and accountability, necessarily mandates the production of orders as it is the right of an individual to know. Moreover, fundamental rights itself connote a qualitative requirement wherein the State has to act in a responsible manner to uphold Part III of the Constitution and not to take away these rights in an implied fashion or in casual and cavalier manner” (*Anuradha Bhasin v. Union Of India 2020*, para. 16); and
- (2) that “there is not only a normative expectation under the Constitution, but also a requirement under natural law, that no law should be passed in a clandestine manner.” (*Anuradha Bhasin v. Union Of India 2020*, para. 17)

Despite the *Anuradha Bhasin* judgment, it has been noted that governments have been lax in actually publishing Internet shutdown orders, and thus on-ground compliance with the judgment remains low (Malhotra 2023; Mishra 2021). Further, it is worth noting that the *Anuradha Bhasin* judgment only applies to Internet shutdown orders, and not to website blocking orders. Thus, while the judiciary has ordered a limited amount of transparency, there is still much distance to go both in terms of compliance with that order, as well as with getting transparency for website blocking orders.

3.4.6 Remedy for Violation of Rights

Article 2(3) of the ICCPR requires state parties to ensure that persons whose rights under the Covenant have been violated have an effective remedy (International Covenant on Civil and Political Rights 1966, Art. 2(3)). The idea of “an effective remedy” can be taken as being two-fold: First, the remedy of the speech restriction ceasing to be; and second, the remedy of restitution for the wrongful deprivation of rights.

In 2011, the Centre for Internet and Society documented how they misused the 2011 Intermediary Guidelines Rules (under Section 79 of the IT Act) to invisibly remove content from search engines, e-commerce platforms, etc., without any right-of-reply or right-to-reinstate content having been given to those whose right were violated (Dara 2011).

While the revised Intermediary Guidelines Rules have a provision that a significant social media intermediary provides an “adequate and reasonable opportunity to dispute the action being taken by such intermediary and request for the reinstatement of access to such information, data or communication link”(Intermediary Guidelines and Digital Media Ethics Code Rules 2021), none of the laws that have been invoked to impose Internet shutdowns or website blocking provide any means of restitution or damages for losses suffered as a result of such shutdown or blocking.

Courts have often seen the existence of procedural remedies as a sufficient safeguard, despite the existence of substantive infirmities. Thus, allowing affected parties to challenge a government ban has been seen as being a sufficient safeguard in both *Shreya Singhal* (in upholding 69A, on the basis of it having procedural safeguards that allow the orders to be challenged) and in *Anuradha Bhasin*. This, however, inverts the proportionality test: it shifts the onus, from the government having to justify a restriction of human rights by showing that its decision is proportionate, to a petitioner having to display that the government’s actions are not proportionate.

Rightfully, the existence of remedies ought to be seen as an independent requirement. The existence of procedural remedies such as a right of appeal (often to the same executive branch that passed the order) ought not be used to defeat proportionality analysis, as they have been in Indian cases. If that were to be allowed, then the Constitutional right (under Articles 32 and 226) to petition the higher judiciary for violation of rights would protect all laws from questions of procedural infirmity, since it could be argued the very existence of a right to petition a law provides a “sufficient safeguard”.

Further, even on purely procedural grounds, such procedural remedies cannot rightfully be said to exist as safeguards, since there is a lack of transparency. This lack of transparency often effectively prevents affected parties from challenging a ban, since even if they come to know of a ban, they have no clarity on which entity ordered the ban, when and on what grounds, who they have to approach for a remedy, and who has standing as an affected party. Thus, “invisible censorship” is effectively enabled by provisions such as Section 79 of the IT Act (Prakash 2011b), and Rule 16 of the Blocking Rules (Grover and Sarkar 2020).

3.4.7 Jurisdictional Spillover

In a report on online censorship, the Special Rapporteur noted that:

“Even if content regulations were validly enacted and enforced, users may still experience unnecessary access restrictions. For example, content filtering in one jurisdiction may affect the digital expression of users in other jurisdictions. While companies may configure filters to apply only to a particular jurisdiction or region, there have been instances where they were nevertheless passed on to other networks or areas of the platform. For instance, in 2013 State-mandated filtering carried out by Airtel India led to restrictions on the same content on several networks in Oman belonging to its partner, Omantel.” (Kaye 2016a, para. 47).

The Airtel India example he cited was one of inadvertent spillover. However, there have been a number of cases where the courts have explicitly argued that geographically limited content removals or blocking would not suffice (Ramdev v. Facebook 2019; X v. Union of India 2021). These cases seek to apply geographically limited laws and geographically limited jurisdiction of Indian courts beyond such geographical limitations, setting the stage for conflict of laws.

3.4.8 Mandatory Restrictions

Apart from allowing certain restrictions, under international law, states are also under an *obligation to prohibit* certain forms of speech. For instance, Article 20 of the ICCPR requires states to place specific prohibitions:

1. Any propaganda for war shall be prohibited by law.
2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

In addition, Article 34 of the UN Convention on the Rights of the Child states:

States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:

- (a) The inducement or coercion of a child to engage in any unlawful sexual activity;
- (b) The exploitative use of children in prostitution or other unlawful sexual practices;
- (c) The exploitative use of children in pornographic performances and materials.

The UN Security Council Resolution 1624 requires states to “Prohibit by law incitement to commit a terrorist act or acts.” (UN Security Council 2005; for analysis of the international law on free speech consequent to this resolution, see Shiryaev 2012; and Ronen 2010)

The international law on what forms of speech are required to be prohibited was summarised by UN Special Rapporteur Frank La Rue (La Rue 2011c, paras 20–36) as:

1. Child pornography
2. Direct and public incitement to commit genocide

3. Advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence
4. Incitement to terrorism

All the limitations discussed above—legality, necessity, proportionality, transparency, and remedies—continue to apply even when the restrictions are mandatory.

3.4.9 Cases Applying IHRL on Freedom of Expression

Most of the landmark Indian cases on Internet censorship—*MySpace v. Super Cassettes*, *Shreya Singhal v. Union of India*, *Ramdev v. Facebook*, *Anuradha Bhasin v. Union of India*—make no use of international human rights instruments or standards, nor do they refer to India’s international human rights obligations.

One notable exception is the case of *Faheema Shirin R.K. v. State of Kerala* (2019), in which the Kerala High Court was adjudicating on restrictions applied by a public university on the usage of mobile phones and laptops by students staying in the university’s hostels. The court refers quite extensively to international human rights standards, and in particular quotes two resolutions by the Human Rights Council (which the judge mistakenly attributes to the United Nations General Assembly): Resolution 26/13, which “*affirms that the same rights that people have off-line must also be protected online, in particular freedom of expression...*” (UN Human Rights Council 2014), and Resolution 23/2 which calls upon states to “*ensure that women and girls exercising their right to freedom of opinion and expression are not discriminated against*” (UN Human Rights Council 2013).

However, the judge also mistakenly holds that “*the Human Rights Council of the United Nations have found that right to access to Internet is a fundamental freedom,*” whereas Human Rights Council has merely held that Internet facilitates freedom of expression, and that all rights such as freedom of expression must be protected online as well. Based on these, Justice P.V. Asha went on to hold that

“... the international conventions and norms are to be read into the fundamental rights guaranteed in the Constitution of India in the absence of enacted domestic law occupying the fields when there is no inconsistency between them. Going by the aforesaid dictum laid down in the said judgment, the right to have access to Internet becomes the part of right to education as well as right to privacy under Article 21 of the Constitution of India.”

Thus, in this judgment, the right to have access to the Internet was held to be a fundamental right under Articles 21 and 21A of the Constitution, and emphasis was placed on international covenants while doing so.

A search on the legal search engine Indian Kanoon leads to only one case in which a UN Special Rapporteur on freedom of expression’s report was cited by a high court (*M. Nedunchezian v. Bar*

Council of Tamil Nadu 2015) and only one in which a petitioner invoked them (Shibu Baby John v. State of Kerala 2020).

Is the general lack of reliance on IHRL because lawyers do not use them as part of their arguments, or because judges do not see them as being very relevant? This question is difficult to answer, since the writ petitions and amicus curiae briefs placed before the Supreme Court are not available in the public domain. It is difficult to say whether it is the judges or the parties before the court that fail to use IHRL.

4. Conclusion

International human rights law provides an interesting framework for analysis of where to strike the balance between competing claims of rights and permissible restrictions—albeit usually limited, though sometimes useful. While Internet shutdowns and blocking of websites affect people’s civil and political rights as well as economic, social, and cultural rights (ESCR), there have not been any significant IHRL pronouncements on ESCR when it comes to Internet shutdowns, but there has been important IHRL analysis under civil and political rights frameworks.

This paper establishes that Indian laws relating to Internet shutdowns and content blocking fall short of the requirements imposed by IHRL in terms of legality, legitimate aims, necessity, proportionality, transparency, and provision of remedies.

1. Internet shutdown orders and content blocking orders are often promulgated in violation of existing laws;
2. Indian laws and delegated legislation do not provide precise guidance to the executive on the circumstances under which they may legally restrict speech;
3. Such laws do not conform to the standards of necessity and proportionality, do not set time limits on website blocks, and even allow completely disproportionate actions such as Internet shutdowns which, as multiple international authorities have noted (La Rue 2011b; UN Special Rapporteur on Freedom of Opinion and Expression et al. 2015; Kaye 2016a), contravene IHRL;
4. They restrict transparency, neither making it known why any particular website is blocked, nor allowing ISPs and other intermediaries to make such information public; and
5. They do not provide remedies such as a right of reinstatement of content.

In order to bring these laws into conformity with IHRL, some of them need to be completely rewritten, and others amended. In many cases, it is judicial overreach that needs to be curbed. Thus, laws such as the Copyright Act and the Civil Procedure Code need to be amended to lay down grounds for when the judiciary may and may not order the blocking of websites.

Given the serious human rights concerns raised by suppression of speech via blocking of websites, the IT Act should be amended to require that *ex parte* blocking should not be ordered either by the judiciary or by the executive. Instead, it could be achieved either with the state attorney general’s

office—or amicus curiae appointed by the court if the matter is before a court—being required to mount a defence against the blocking of websites, similar to the role performed by public defenders in criminal cases.

Requirements of necessity and proportionality need to be embedded into the legal process—for instance, by requiring time limits placed for each website block, along with periodic reviews of each blocked website. Internet shutdowns should be expressly prohibited by law.

To further transparency, orders for the blocking of websites should be published online, along with the minutes of the meetings in which the blocking has been discussed, as well as the evidence presented before the committee to substantiate the need for blocking.

Blocking orders should contain information on each website, with a justification of how its blocking is compliant with constitutional and IHRL obligations: more specifically, whether and how the block falls under the grounds provided for under Indian law, whether there are no other means of countering the harm from the speech expressed, whether a block is the least restrictive means to counter the harm, and whether this will have undesirable consequences outside of Indian jurisdiction. This should apply both to the original block orders, as well as the periodic reappraisals.

The government should not only proactively make public the orders that the executive has passed, but also the orders the judiciary has passed (and passed on to the executive for enforcement).

Additionally, there need to be penalties for unlawful blocking of websites, apps, and internet access, which need to be enforced, along with remedies for those who have had their freedom to seek and impart information unlawfully denied, including monetary recompense.

IHRL is only as useful as its use, in both popular and political discourse and judicial pronouncements: if IHRL is widely used, it is useful; conversely, if it is not widely used, it is not useful. Currently, the application of IHRL in India has been haphazard. While NGOs are quite fond of quoting IHRL, it is unclear whether lawyers are making arguments based on IHRL in the courtrooms. At any rate, it is apparent that courts are not making much use of IHRL. Arguably, a more systematic engagement with IHRL would benefit Indian statutory and constitutional interpretation.

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Notes

¹ The use and misuse of this power are examined in depth in a monograph by Raman Jit Singh Chima ([Chima 2008](#)).

² The author's personal recollection, watching the proceedings live on television ([Times News Network 2008](#)).

³ Rule 8(1):

“On receipt of request under rule 6, the Designated Officer shall make all reasonable efforts to identify the person or intermediary who has hosted the information or part thereof as well as the computer resource on which such information or part thereof is being hosted

and where he is able to identify such person or intermediary and the computer resource hosting the information or part thereof which have been requested to be blocked for public access, he shall issue a notice by way of letters or fax or e-mail signed with electronic signatures to such person or intermediary in control of such computer resource to appear and submit their reply and clarifications, if any, before the committee referred to in rule 7, at a specified date and time, which shall not be less than forty-eight hours from the time of receipt of such notice by such person or intermediary.”

⁴ These being: the International Covenant on Civil and Political Rights (ICCPR); the International Covenant on Economic, Social and Cultural Rights (ICESCR); the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Convention on the Rights of the Child (CRC); the Convention on the Rights of Persons with Disabilities (CRPD). India has also signed, but not ratified, the International Convention for the Protection of all Persons from Enforced Disappearance (ICPPED); and the UN Convention against Transnational Organized Crime (UNTOC).

⁵ Article 51 states:

Article 51.— The State shall endeavour to

- (a) promote international peace and security;
- (b) maintain just and honourable relations between nations;
- (c) foster respect for international law and treaty obligations in the dealings of the organized peoples with one another; and
- (d) encourage settlement of international disputes by arbitration.

While first draft of that provision had stronger language, which said, “The State shall...” in place of “The State shall endeavour to...” ([Hegde 2010, 58](#)), the Article was passed with the weaker language and as part of the non-justiciable Directive Principles of State Policy.

⁶ The Protection of Human Rights Act, 1993:

⁷ Even Benvenisti ([2008, 261](#)) admits that an Indian High Court once mistook the Rio Declaration on Environment and Development, a mere declaration—and thus a soft norm—for an “agreement” that was “enacted”. This demonstrates a lack of serious engagement with international law.

⁸ Article 19 of the UDHR states:

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

⁹ Clauses 1 and 2 of Article 19 of the ICCPR state:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers,

either orally, in writing or in print, in the form of art, or through any other media of his choice.

¹⁰ Clause 2 of Article 29 of the UDHR states:

2. In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

¹¹ Clause 3 of Article 19 of the ICCPR allows for ‘certain restrictions’:

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - (a) For respect of the rights or reputations of others;
 - (b) For the protection of national security or of public order (ordre public), or of public health or morals.

¹² Article 20(1) of the UDHR states:

1. Everyone has the right to freedom of peaceful assembly and association.

Article 21 of the ICCPR states:

Article 21. The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

¹³ Article 22 of the ICCPR states:

1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.
2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.

¹⁴ Article 21(2) of the UDHR states:

2. Everyone has the right to equal access to public service in his country.

Article 27(1) of the UDHR states:

1. Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.

¹⁵ The Telecommunications Act 2023 changes this to “defence and security of the State”.

¹⁶ It is to be noted that Section 69A doesn’t speak of “incitement to the commission of an offence”, but “incitement to the commission of any cognizable offence relating to the above [five grounds]”. This is an noteworthy and welcome difference from the wording of both Section 5(2) of the Telegraph Act, as well as Article 19(2) of the Constitution.