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SUPREME COURT ON INTERNET SHUTDOWN

Anuradha Bhasan and ors v. Union of India and anr¹

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Introduction

On August 5 2019 Indian government shutdown the web connection within the valley of Jammu&Kashmir for Revocation of the special status of Jammu and Kashmir via scrapping of the Article 370 of the Constitution of India, Article 35A of the Constitution of India and therefore the introduction of Jammu and Kashmir Reorganisation Act, 2019.

On 6th of September 2019 400 people of Kashmir were arrested during which quite 200 were the leader of the valley which include 2 former Chief Minister of the state along side quite 50 leaders from Hurriyat.

On 1 October 2019, a three-judge bench consisting of Justices N. V. Ramana, Ramayyagari Subhash Reddy and Bhushan Ramkrishna Gavai of the Supreme Court of India, heard seven petitions on the lockdown. The Supreme Court's verdict that the web may be a part of Article 19 – key to providing India's citizenry with the 'basic freedoms' that include the liberty of expression it further said the liberty of speech and expression and therefore the freedom to practice any profession or keep it up any trade, business or occupation over the medium of internet enjoys constitutional protection under Article 19(1)(a) and Article 19(1)(g), thus making it a fundamental right. While pronouncing the judgment, the court stressed upon the importance of access to information during a democratic society and expressed its concern over the removing of rights during a casual and cavalier manner.

¹ WRIT PETITION (CIVIL) NO. 1031 OF 2019.

The court emphasised upon finding a balance between the safety concerns of State and liberty of individuals and observed that indefinite suspension of the web isn't permissible which repeated orders under Section 144 CrPC will amount to an abuse of power. Internet is simply not limited to the proper to speech and expression, but several other fundamental rights like access to healthcare and statutory welfare schemes to which an individual is legally entitled.

Background

After the Article 370 of Indian Constitution, 1950 was abrogated by the govt of India, the govt of India impose section 144 of Criminal Procedure Code, 1973 and complete shutdown of mobile internet. These imposition are there in jammu and kashmir since 5 August 2019.

According to the govt of India these restrictions and impositions are for the state al Security as Jammu and Kashmir is that the disputed areas of the Nation.

But consistent with the civilian these restriction and imposition are basically restriction on there right to access internet and these restriction are supressing their opinion.

issues

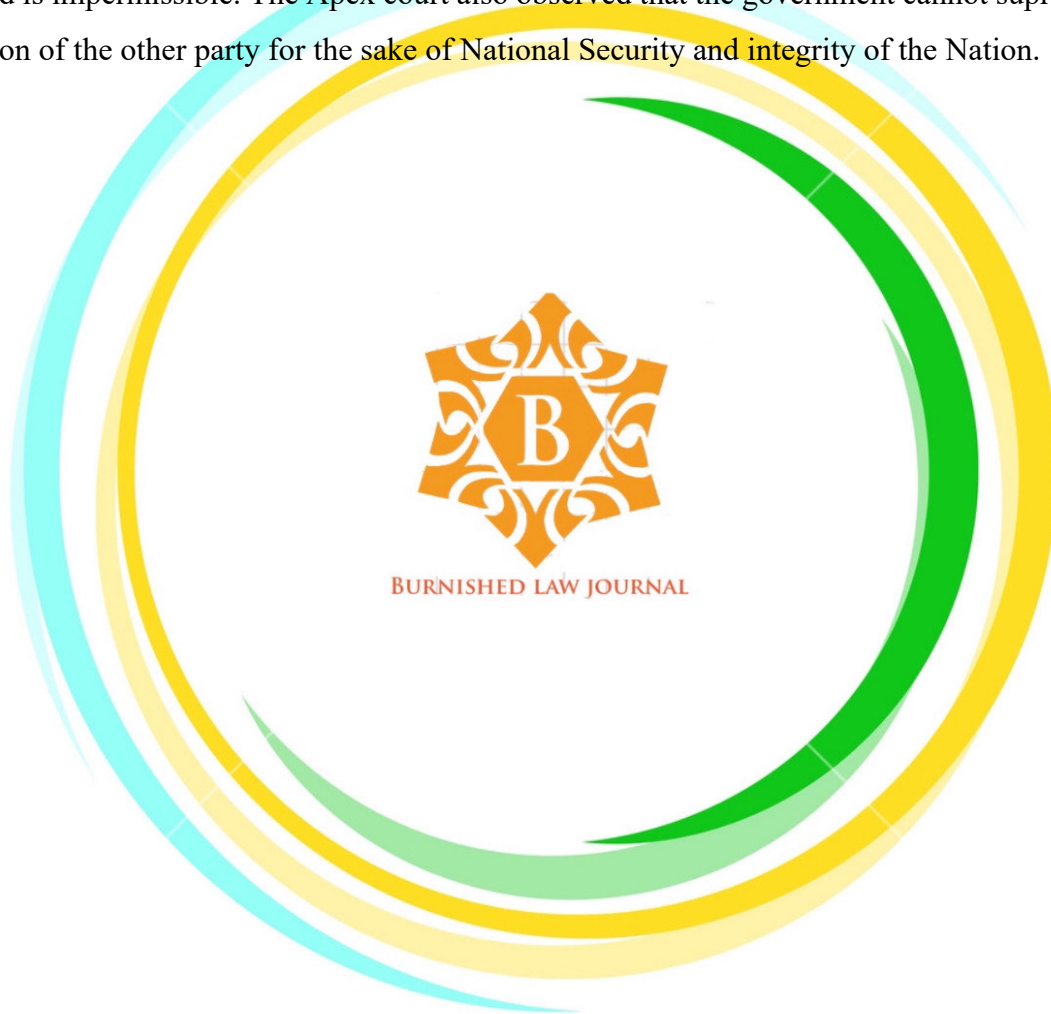
- *Whether the Government can claim exemption from producing all the orders passed under Section 144, Cr.P.C. and other orders under the Suspension Rules?*
- *Whether the freedom of speech and expression and freedom to practise any profession, or to carry on any occupation, trade or business over the Internet is a part of the fundamental rights under Part III of the Constitution?*
- *Whether the Government's action of prohibiting internet access is valid?*
- *Whether the imposition of restrictions under Section 144, Cr.P.C. were valid?*
- *Whether the freedom of press is violated due to the restrictions?*

Analysis

Supreme Court on 11 January 2020 given the verdict in case of Anuradha Bhasan and ors v. Union of India and anr² according to which right to access internet is the part of Article 19(1)(a)

² Supa 1

of Indian Constitution, 1950³. Article 19(1)(g)⁴ which is subject to restrictions provided under Article 19 (6) of the Indian Constitution, 1950⁵ and Court said internet shutdown for the long period is impermissible. The Apex court also observed that the government cannot suppress the opinion of the other party for the sake of National Security and integrity of the Nation.



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³ Protection of certain rights regarding freedom of speech etc

(1) All citizens shall have the right

(a) to freedom of speech and expression;

⁴ to practise any profession, or to carry on any occupation, trade or business.

⁵ Nothing in sub clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub clause, and, in particular, nothing in the said sub clause shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to,

(i) the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or

(ii) the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise.

Supreme court affect the restriction on the elemental Right during the amount of Section 144 of Crpc⁶ within the area of the jammu and Kashmir. Court said article 19(1) (a)⁷ of the Indian Constitution, 1950 deals with the liberty of Speech and expression, court said internet is that the a part of expression as on the social media platform one can express ones opinion. But due the web shutdown on mobile internet individual isn't ready to express their opinion as in Indian within the survey conducted by Government of India there are 90% population use mobile internet instead of broadband⁸. In today's world the web stands because the most utilized and accessible medium for exchange of data . The revolution within the cyberspace has been phenomenal within the past decade, wherein the limitation of space for storing and accessibility of print medium has been remedied by the usage of internet.

The case of Secretary, Ministry of data & Broadcasting, Government of India during this context, one may note that this Court, during a catena of judgments, has recognized free speech as a fundamental right, and, as technology has evolved, has recognized the liberty of speech and expression over different media of expression. Expression through the web has gained

⁶ 144. Power to issue order in urgent cases of nuisance of apprehended danger.

(1) In cases where, in the opinion of a District Magistrate, a Sub-divisional Magistrate or any other Executive Magistrate specially empowered by the State Government in this behalf, there is sufficient ground for proceeding under this section and immediate prevention or speedy remedy is desirable, such Magistrate may, by a written order stating the material facts of the case and served in the manner provided by section 134, direct any person to abstain from a certain act or to take certain order with respect to certain property in his possession or under his management, if such 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, or an affray.

(2) An order under this section may, in cases of emergency or in cases where the circumstances do not admit of the serving in due time of a notice upon the person against whom the order is directed, be passed ex parte.

(3) An order under this section may be directed to a particular individual, or to persons residing in a particular place or area, or to the public generally when frequenting or visiting a particular place or area.

(4) No order under this section shall remain in force for more than two months from the making thereof: Provided that, if the State Government considers it necessary so to do for preventing danger to human life, health or safety or for preventing a riot or any affray, it may, by notification, direct that an order made by a Magistrate under this section shall remain in force for such further period not exceeding six months from the date on which the order made by the Magistrate would have, but for such order, expired, as it may specify in the said notification.

(5) Any Magistrate may, either on his own motion or on the application of any person aggrieved, rescind or alter any order made under this section, by himself or any Magistrate subordinate to him or by his predecessor-in-office.

(6) The State Government may, either on its own motion or on the application of any person aggrieved, rescind or alter any order made by it under the proviso to sub-section (4).

(7) Where an application under sub-section (5) or sub-section (6) is received, the Magistrate, or the State Government, as the case may be, shall afford to the applicant an early opportunity of appearing before him or it, either in person or by pleader and showing cause against the order; and if the Magistrate or the State Government, as the case may be, rejects the application wholly or in part, he or it shall record in writing the reasons for so doing. D.- Disputes as to immovable property.

⁷ supra 4.

⁸ Software freedom Law Centre's Tracker of 2019.

contemporary relevance and is one among the main means of data diffusion. Therefore, the liberty of speech and expression through the medium of internet is an integral part of Article 19(1)(a)⁹ and accordingly, any restriction on an equivalent must be in accordance with Article 19(2)¹⁰ of the Constitution.

Internet is useful in carrying the trade and commerce in the area where it is needed. With rapid increase in the technology India become the Gopal Hub for IT sector. There are many people who earn the bread through Internet and hence the freedom of trade and commerce through the medium of the internet is also constitutionally protected under Article 19(1)(g)¹¹, subject to the restrictions provided under Article 19(6)¹².

State of Gujarat v. Mirzapur Moti Kureshi Kassab Jamat¹³, the second prong of the test, wherein this Court is required to find whether the imposed restriction/prohibition was least intrusive, brings us to the question of balancing and proportionality. These concepts are not a new formulation under the Constitution. In various parts of the Constitution, this Court has taken a balancing approach to harmonize two competing rights. In the case of Minerva Mills Ltd. v. Union of India¹⁴, and Sanjeev Coke Manufacturing Company v. M/s Bharat Coking Coal Ltd¹⁵, this Court has already applied the balancing approach with respect to fundamental rights and the directive principles of State Policy. In case of CPIO v Subhash Chandra Aggarwal¹⁶ It is also crucial for the standard of proportionality to be applied to ensure that neither right is restricted to a greater extent than necessary to fulfil the legitimate interest of the countervailing interest in question..." which means the standard proportionality must be used as there should neither be more restriction nor more exemption this need to balance as stated in the case of

⁹ Supra 4.

¹⁰ Nothing in sub clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub clause 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

¹¹ supra 5

¹² supra 6

¹³ (2005) 8 SCC 534

¹⁴ (1980) 2 SCC 591

¹⁵ (1983) 1 SCC 147

¹⁶ (2019) SCC OnLine SC 1459.

Chintaman Rao v. State of Madhya Pradesh¹⁷, interpreted limitations on personal liberty, and the balancing thereof, as follows:

“The phrase “reasonable restriction” connotes that the limitation imposed on an individual in enjoyment of the proper shouldn't be arbitrary or of an excessive nature, beyond what's required in the interests of the public. The word “reasonable” implies intelligent care and deliberation, that is, the selection of a course which reason dictates. Legislation which arbitrarily or excessively invades the proper can't be said to contain the standard of reasonableness and unless it strikes a correct balance between the liberty guaranteed in Article 19(1)(g) and therefore the group action permitted by clause (6) of Article 19, it must be held to be wanting therein quality.”

Even government of India cannot impose order secretly regarding the imposition of Section 144 of Crpc in the area. It should be made public and individual should know about the order.

According to Software freedom Law Centre's Tracker of 2019 show that india has top the list with maximum numbers of internet shutdown with 381 since 2012 and in 106 in 2019 itself only.¹⁸

Jammu and Kashmir is facing internet shut since August 2019 and broadband are also not working properly.

Temporary suspension of telecom services 2019 under Section 5(2) of indian telegraph act¹⁹ which states there is no necessary to publish the suspension of telecom service in the disputed

¹⁷ AIR 1951 SC118

¹⁸ Software freedom Law Centre's Tracker of 2019.

¹⁹ On the occurrence of any public emergency, or in the interest of the public safety, the Central Government or a State Government or any officer specially authorised in this behalf by the Central Government or a State Government may, if satisfied that it is necessary or expedient so to do in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign states or public order or for preventing incitement to the commission of an offence, for reasons to be recorded in writing, by order, direct that any message or class of messages to or from any person or class of persons, or relating to any particular subject, brought for transmission by or transmitted or received by any telegraph, shall not be transmitted, or shall be intercepted or detained, or shall be disclosed to the Government making the order or an officer thereof mentioned in the order: Provided that the press messages intended to be published in India of correspondents accredited to the Central Government or a State Government shall not be intercepted or detained, unless their transmission has been prohibited under this sub-section.]

areas but here in Apex Court made mandatory to publish these suspension of telecom service in the area.

Section 144, Cr.P.C²⁰. is one of the mechanisms that enable the State to *maintain public peace*. It forms part of the Chapter in the Criminal Procedure Code dealing with “Maintenance of Public Order and Tranquillity” and is contained in the subchapter on “urgent cases of nuisance or apprehended danger”. The structure of the provision shows that this power can only be invoked in “urgent cases of nuisance or apprehended danger”. While the imposition of Section 144 of Crpc needs close scrutiny by the Judicial Magistrate as to whether the imposition is Necessary in that area or not.

A Bench of seven Judges in the Madhu Limaye case²¹ was constituted to reconsider the law laid down in Babulal Parate²² and the constitutional validity of Section 144, Cr.P.C. This Court, while affirming the constitutional validity of Section 144, Cr.P.C. reiterated the safeguards while exercising the power under Section 144, Cr.P.C. The Court highlighted that the power under Section 144, Cr.P.C. must be:

- (a) exercised in urgent situations to prevent harmful occurrences. Since this power can be exercised absolutely and even ex parte, “the emergency must be sudden and the consequences sufficiently grave”
- (b) exercised in a judicial manner which can withstand judicial scrutiny.

In Gulam Abbas v. State of Uttar Pradesh²³, this Court held that an order passed under Section 144, Cr.P.C. is an executive order which can be questioned in exercise of writ jurisdiction under Article 226 of the Constitution. The Court reiterated the circumstances in which the power can be exercised.

it can observe that Section 144 of Crpc can be imposed when there is need or threat to the national security of the nation then section 144 of Crpc is imposed this agreed in case of Babulal Parate where court observe:

²⁰ Supra 7.

²¹ 1978 AIR 47, 1978 SCR (1) 749.

²² 1961 SCR (3) 423.

²³ (1982) 1 SCC 71

“The language of Section 144 is somewhat different. The test laid down within the section isn't merely “likelihood” or “tendency”. The section says that the Magistrate must be satisfied that immediate prevention of particular acts is important to counteract danger to public safety etc. the facility conferred by the section is exercisable not only where present danger exists but is exercise also when there's a fear of danger.”

This Court in Ramlila Maidan Incident, In re case²⁴ further enunciated upon the aforesaid distinction between “public order” and “law and order” situation: “The distinction between “public order” and “law and order” is a fine one, but nevertheless clear. A restriction imposed with “law and order” in mind would be least intruding into the guaranteed freedom while “public order” may qualify for a greater degree of restriction since public order is a matter of even greater social concern.

The Court orders passed under Section 144, Cr.P.C. have direct consequences upon the fundamental rights of the public in general. Such an influence, if utilized in an off-the-cuff and cavalier manner, would end in severe illegality. This power should be used responsibly, only as a measure to preserve law and order. The order is hospitable review, in order that a person aggrieved by such an action can always approach the acceptable forum and challenge an equivalent. But, the aforesaid means of review will stand crippled if the order itself is unreasoned or unnotified. This Court, in the case of Babulal Parate, also stressed upon the requirement of having the order in writing, wherein it is clearly indicated that opinion formed by the Magistrate was based upon the material facts of the case. This Court held as under: “9. Subsection (1) confers powers not on the executive but on certain Magistrates...Under subsection(1) the Magistrate himself has to form an opinion that there is sufficient ground for proceeding under this section and immediate prevention or speedy remedy is desirable. Again the subsection requires the Magistrate to make an order in writing and state therein the material facts by reason of which he is making the order there under. The subsection further enumerates the particular activities with regard to which the Magistrate is entitled to place restraints.”

The power under Section 144, Cr.P.C., being remedial also as preventive, is exercisable not only where there exists present danger, but also when there's a fear of danger. However, the danger contemplated should be within the nature of an “emergency” and for the aim of preventing obstruction and annoyance or injury to a person lawfully employed.

²⁴ WRIT PETITION (CRL.) NO. 122 OF 2011

The power under Section 144, Cr.P.C can't be wont to suppress legitimate expression of opinion or grievance or exercise of any democratic rights.

An order passed under Section 144, Cr.P.C. should state the fabric facts to enable review of an equivalent . The power should be exercised during a real and reasonable manner, and therefore the same should be gone by counting on the fabric facts, indicative of application of mind. This will enable judicial scrutiny of the aforesaid order.

While exercising the facility under Section 144, Cr.P.C., the Magistrate is duty sure to balance the rights and restrictions supported the principles of proportionality and thereafter, apply the smallest amount intrusive measure.

Repetitive orders under Section 144, Cr.P.C. would be an abuse of power.

As per the supreme court verdict internet shutdown for a long period of time it is impermissible. But here in this Apex Court Judgement the time period is not provided by the court. This could be challenged as the court hasn't talked about how long there is internet should be shutdown in the area.

Similar in case section 144 of Crpc, 1973 apex court held that state cannot suppressed the opinion of the individual by the method of section 144 of Crpc. This section is subject to protect the nation from the threat of National emergency not to suppressed the voice of the individual. But the Court silent on the government actions.

Here supreme court is also silent on the action of the Government of india as in the case of internet shutdown or Section 144 of Crpc. This verdict is more like an advisory judgement given by the Apex court to the government and satisfy the need of the petitioner. Here Supreme Court does not hold the stringent Rules over the s arbitrary activities of the Government of India.

Conclusion

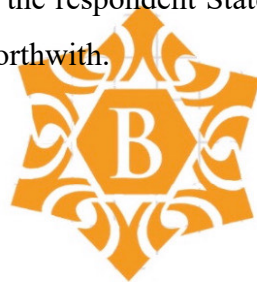
The Supreme Court's verdict seems to put the apex court of the country in that unenviable position. 'Reasonableness of Section 144 orders must be assessed based on territorial reach, nature of restrictions and time period,' the Bench said on Friday. And it is the lack of 'reasonableness', which has certainly shrunk in governance, law and order in the name of 'control', that the court has questioned and demands to be restored. The power under Section

144, Cr.P.C can't be wont to suppress legitimate expression of opinion or grievance or exercise of any democratic rights.

The court made it clear that an indefinite suspension of internet services is impermissible.

Suspension are often for “temporary duration” only, and must “adhere to the principle of proportionality and must not extend beyond necessary duration”.

An order suspending internet services indefinitely is impermissible under the Temporary Suspension of Telecom Services (Public Emergency or Public Service) Rules, 2017. Suspension can be utilized for temporary duration only. SC declare that the liberty of speech and expression and therefore the freedom to practice any profession or keep it up any trade, business or occupation over the medium of internet enjoys constitutional protection under Article 19(1)(a) and Article 19(1)(g). The restriction upon such fundamental rights should be in consonance with the mandate under Article 19 (2) and (6) of the Constitution, inclusive of the test of proportionality. SC direct the respondent State/competent authorities to review all orders suspending internet services forthwith.



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