

CASE COMMENT: ANURADHA BHASIN VS UNION OF INDIA (RIGHT TO INTERNET JUDGEMENT)

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INTRODUCTION

The recent internet ban in Rajasthan to minimize the chances of cheating and copying in the examination again ignites anger in the public. This is just another instance of how practically all parties and governments have used the internet shutdown as a law and order or administrative action. India has witnessed the highest number of internet shutdowns in 2022, a report by digital rights advocacy firm Access Now shows. The highest number of internet bans are imposed in Kashmir i.e. 49 out of 84 in India, a report by Access Now recorded.¹ From 2012 to 2021, there were a total of 552 instances of internet outages in India, with Jammu and Kashmir seeing the longest outage, lasting the same amount of days i.e. 552.² The increasing number of internet bans affects the public at large by restricting access to justice, the right to practice one's profession, and the freedom of speech and expression online.

These impositions are generally of the nature of Preventive shutdowns in which the government shut the internet in anticipation of an event that may trigger a situation in which the government feels that the internet should be shut down.³ However, in recent times, we observed that there are no clear legal requirements, transparency, or disclosure of how the Internet is being interfered with in India. For the biggest democracy in the world, this is a concerning trend. The current case involving Anuradha Bhasin tries to address this problem by introducing the test of necessity and proportionality. In this important ruling, the Supreme Court discusses the significance of the Internet as a part of fundamental rights and how its prohibition is only permitted in legitimate and essential circumstances.

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¹ 'India top offender in internet shutdown for fifth year in row': Report *Times of India* (1 March 2023)

² Internet Shutdown Tracker by SFLC.in <<https://internetshutdowns.in/>>

³ Internet Shutdowns India in 2022 <<https://sflc.in/internet-shutdowns-india-2022/>> accessed on 23 December 2022

FACTS OF THE CASE

The background for the case was set on 5th August 2019, when Jammu & Kashmir was scrapped off of its special status which allowed Jammu & Kashmir to have its own Constitution and restricted outsiders from purchasing land in Jammu & Kashmir, and the Constitution (Application to Jammu & Kashmir) Order, 2019 was passed. Although the issue arose when on August 4, 2019, Mobile Phone networks, Internet services, landline connectivity, etc. were shut down along with certain restrictions on movement. The District Magistrates implemented sec. 144 of CrPC.⁴ The government's order of internet shutdown was challenged on the grounds that it restricted Journalists' ability to publish media and press, the internet being an essential part of the modern press and it restricted Freedom of Speech and Expression under Article 19 of the Indian Constitution. The major claims by the petitioners were to quash the orders of the government.⁵

The writ petition was filed by Ms. Anuradha Bhasin, executive editor of Kashmir Times newspaper (Srinagar Edition). She contended that her business has come to a "grinding halt" due to restrictions imposed on the Internet and freedom of movement because the Internet forms an essential part of the modern press and that she's unable to publish her newspaper since August 6, 2019. She also argued that the government has failed to consider the reasonableness and the proportionality of the balance of citizens' rights and restrictions imposed. The government has mistaken public order for law & order.⁶

ISSUES INVOLVED

- Whether the freedom of speech and expression and freedom to practice any profession, or to carry on any occupation, trade, or business over the Internet has been given the status in Constitution as a part of Fundamental Rights.
- If there was a violation of the freedom of the press of the Petitioner?

⁴ Anuradha Bhasin v UOI by globalfreedomofexpression.columbia.edu

<<https://globalfreedomofexpression.columbia.edu/cases/bhasin-v-union-of-india/>> accessed on 22 April 2023

⁵ Bhanu Pratap Singh Sambyal, 'ANURADHA BHASIN & ANR. VS UNION OF INDIA & ORS., 2020 SCC ONLINE SC 25 VIS-A-VIS STRIKING A BALANCE BETWEEN STATES' POWERS AND CITIZENS RIGHTS: A CRITIQUE OF SUPREME COURT JUDGEMENT ON INTERNET SHUTDOWN IN J&K' (2022)

⁶ Supra note 4

- Was the issuance of an order of imposing sec. 144, CrPC reasonable? Whether the government is exempted from producing all orders produced under sec. 144 of CrPC or not?
- Whether the Government justified in prohibiting internet access.

CONTENTION

Arguments Advanced by Appellant

The petitioner, in this case, argued that there is no valid reason for this prolonged internet shutdown and it was based on mere apprehension of risk to the law and order in the country which was not the case. She contended that there should be a balance between preserving national security and the rights of the citizens. The petition also requests that the court create a set of rules to ensure that internet shutdowns are not unfairly carried out across the country, as well as recommendations to prevent governments and their agencies from misusing their authority to impose disproportionate and unjust internet shutdowns.⁷

Furthermore, a subsequent petition was filed by Mr. Ghulam Nabi Azad⁸, a Member of Parliament, who argued that for failing to produce such orders, the state cannot assert any form of privilege before the court. He also noted that only a small number of circumstances allow for the declaration of a national emergency since in this instance neither an internal nor foreign disruption existed, there was no reason to pass Section 144 of the CrPC.

Lastly, the petitioner stated that the measures imposed by the state must be less restrictive because it affects the fundamental rights of freedom of speech and expression, and also the freedom to carry any trade, profession, and occupation. They also highlighted the importance of publishing order as a part of natural justice and it is also accessible to the general public. When considering the proportionality of measures, it is important to consider not only the legal and practical constraints but also the fear that these kinds of restrictions instill in the minds of the public.⁹

Arguments Advanced by Respondent

⁷ Anuradha Bhasin vs Union of India(2019) MANU/SC/0022/2020

⁸ Vaishnavi Sharma Anuradha Bhasin Versus Union of India (*IJLR E-Journal*, 2022)

⁹ Sarvjeet Singh, 'Supreme Court's order on Kashmir internet shutdown: Judicial abdication or judicial restraint?' *Times of India* (13 May 2020)

The Attorney General and the Solicitor General defended the case on behalf of the Union of India. Mr. K.K. Venugopal¹⁰ submitted that the restrictions were imposed as a measure to check the terrorist activities and the reasoning of the government is justified if one was to look into the history of the Cross-Border terrorism and internal militancy in Jammu & Kashmir. He claimed that similar orders have been passed in the past as well such as in 2016.¹¹

The Solicitor General added that the main objective of the government is to look into the security of citizens and to protect their lives. Regarding the petitioner's claim of specific restriction, he argued that it was impossible to separate and control troublemakers from ordinary citizens.¹² He further argued that the arguments advanced by the petitioners were false for the individual movement was never restricted and the restrictions were imposed only in certain areas. Moreover, all newspapers, television & radio channels were functioning and there were no restrictions in Jammu & Ladakh regions.

He contended that the restrictions were essential because the internet exaggerates a piece of news creating an issue out of it and the spread of false news in such turbulent times could disrupt public order. The restriction was also meant to stop the purchase of weapons through the “Dark Web.”

JUDGEMENT

A three-judge bench consisting of Hon'ble Justice N.V.S Ramana, Hon'ble Justice Subhash Reddy, and Hon'ble Justice B.R. Gavai delivered the judgment on the case on January 10, 2020.¹³

- The court on the issue of “*Whether the freedom of speech and expression and freedom to practice any profession, or to carry on any occupation, trade, or business over the Internet has been given the status of a Fundamental Right under Part III of the Constitution?*” which ruled that the freedom of speech and expression and to carry on any occupation, trade, or business over the Internet is protected by the constitution

¹⁰ Aisika Basu, ‘Anuradha Bhasin v Union of India’ 2022 2 (1) JLRJS <<https://jlrjs.com/wp-content/uploads/2022/12/8.-Aisika-Basu.pdf>> Accessed 22 April 2023

¹¹ Supra note 4

¹² Supra note 8

¹³ Sarwang Mathur, ‘Anuradha Bhasin v Union of India’ (*Law Insider*, 27 September 2021) <<https://www.lawinsider.in/judgment/anuradha-bhasin-vs-union-of-india-2>> accessed 23 April 2023

under Article 19(1)(a)¹⁴ and Article 19(1)(g), and hence any restrictions imposed must be in resonance with the Article 19(2) and Article 19(6). But while producing the order the court maintained that the Right to the Internet is not a Right in itself by quoting the argument of Mr. Vinton C. Gerf, “the Internet is very important, however, it cannot be elevated to the status of a human right.”¹⁵

- While answering the issue of the violation of the Freedom of the press of the petitioner, the court held that although the press is an essential feature of democracy and it has to be protected, the same cannot be held here by the petitioner since she could not justify that her freedom of the press was violated with evidence and she had already resumed her publication.¹⁶
- As stated above the government’s decision of imposing sec. 144 of CrPC wasn’t reasonable and the court held that the government needs to follow both substantive and procedural laws before imposing any restriction. The court pointed out that a ‘public emergency’ has to be of a serious nature and should be determined on a case-to-case basis.¹⁷ Mere disturbance of Law & Order does not amount to a threat to Public Order.¹⁸ The court ruled that the government indeed was under obligation to issue orders before imposing the restrictions under Sec. 144 and before implementing the Internet Shutdown. This was ruled keeping in light the maxim, *ubi jus ibi remedium*, i.e. there’s a right to remedy under Article 32 and that anyone can challenge the government’s order if they feel their rights are violated.¹⁹
- Furthermore, the court said that when the state refused to present the order to the court, then it was difficult to determine if the restriction had been imposed legally. The state is required to give any pertinent information that is required and it is not exempted from producing all orders produced under sec. 144 of CrPC. According to the interpretation of Article 19, the right to information is included in the freedom of speech and expression. Such laws cannot be passed by the state based solely on perceived danger. This rules out using it as a justification for withholding the order.

¹⁴ Constitution of India 1950, art 19(a)

¹⁵ Supra note 7

¹⁶ Supra note 9

¹⁷ Supra note 7

¹⁸ Supra note 9

¹⁹ Supra note 8

- Lastly, as the issue of the government's justification for prohibiting internet access is concerned, the Court ruled that it wasn't justified on the part of the government to restrict internet access because as per the Temporary Suspension of Telecom Services (Public Emergency or Public Service) Rules, 2017, any order of suspension of internet services must be temporary and it must be in accordance with the rules of proportionality. The court also ordered the government to allow government websites, e-banking facilities, and hospital services to resume functioning in the areas where internet facilities were suspended.

CRITICAL ANALYSIS

The right to access the Internet and the national interest/security of the country has been a subject of debate and that is why even after this landmark judgment, we still witness many cases of Internet shutdowns due to the apprehension of exam paper leaks, elections, protests, etc. At first glance, the judgment seems very fitting but when looked at closely, it reveals many flaws. Such internet bans place a strong focus on some of the principles like necessity, proportionality, and reasonableness in light of the recent surge in internet shutdowns. However, there are some important concerns that need immediate attention including the test of proportionality and the exceptions of national security. The test of proportionality and national security is deemed as exceptions for restricting Internet access. But, the government has not clearly defined what the test of proportionality is? or what it should include as the parameters for measuring the proportionality? The court has vaguely defined that the test of proportionality should give way for the balance between the restrictions imposed and the rights of individuals hampered. But who is to see whether the balance is being maintained or not? These questions need to be answered!

Another flaw of the judgement arises from the exception of national security. The government is free to impose restrictions as long as the security of the nation is at stake but nowhere in the judgement is it defined to what extent should the security be hampered for the restrictions to be imposed or the circumstances that can lead to threatened national security because a mere exam paper leaking does not amount to any visible national threat it might be causing to the national security. The mere disruption of law and order does not constitute a threat to public order or national security, which is another aspect to keep in mind.

The Internet shutdown is also prevalent because of the limited purview of the Right to the Internet. The court in its decision on the Faheema Shirin case²⁰ stood one step away from declaring the Right to the Internet as a separate fundamental right, and instead, held that the Internet is a medium through which other fundamental rights are exercised. It held: “the right to freedom of speech and expression under Article 19(1)(a), and the right to carry on any trade or business under 19(1)(g), using the medium of internet is constitutionally protected”. Its lack of a proper legal basis and basic significance makes it a target for abuse by the government. The likelihood of the government restricting internet use is essentially nonexistent in nations where the freedom to access the internet is guaranteed by their constitution and laws, such as Estonia, Greece, France, Finland, Costa Rica, etc.

CONCLUSION

Nowadays, the Internet is a necessary component of daily life, especially since the 1990s, when the majority of enterprises began doing business online. It has also developed into a significant tool for news and information dissemination. These frequent shutdowns sparked objections from outrageous individuals because governments will continue to use internet shutdowns as a tool to further their objectives and exert arbitrary public control as long as the terms, national security, and test of proportionality are left unexplained. Time and time again, India witnesses protests and fury from citizens against governments’ outrageous decisions to restrict internet services. These acts of resistance from people nationwide compel one to think whether the rights relating to the internet are sufficient or not. The government should contemplate revising its laws and for that, it should look to other nations as models for their own internet regulations. Even if the laws aren’t revised, a committee or an expert that would look into the legality of the restrictions should be formed so that we can rest assured that at least the shutdowns implemented are legitimate.

²⁰ Zayaan Roup, ‘The need for a separate Fundamental Right to Internet in India’ <https://www.barandbench.com/apprentice-lawyer/the-need-for-a-separate-fundamental-right-to-internet-in-india#amp_tf=From%20%251%24s&aoh=16820583908257&referrer=https%3A%2F%2Fwww.google.com&share=https%3A%2F%2Fwww.barandbench.com%2Fapprentice-lawyer%2Fthe-need-for-a-separate-fundamental-right-to-internet-in-india> accessed 5 June 2021