

# RISE IN INTERNET SHUTDOWNS IN INDIA: A LEGAL ANALYSIS

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## I. INTRODUCTION

The central theme of this paper is to critically study the interplay of internet shutdowns with the right to freedom of speech and expression.<sup>1</sup> We use the phrase “internet shutdown” broadly to mean any intentional act on part of the State to disrupt – totally or partially – access to the Internet for people in a particular area.<sup>2</sup> In a *total* shutdown, the State completely cuts off all internet access in the area. In a *partial* shutdown, the State may adopt one (or a combination of) the following options: (i) blocking specific websites and content, (ii) disrupting internet access through specific mediums, such as mobile networks, while leaving other mediums such as wired broadband free to access the internet, and (iii) lowering the network speed, e.g. from 4G to 2G.

A study of this nature is necessitated by India’s abysmal record with internet shutdowns. Indeed, recourse to shutdowns has become quite routine in the country.<sup>3</sup> India has had at least 397 instances of internet shutdowns since 2010.<sup>4</sup> In 2019 alone there were at least 106 instances of which 55 were imposed in the erstwhile<sup>5</sup> State of Jammu & Kashmir.<sup>6</sup> Between 2012-17,

<sup>1</sup> The discussion in this paper is not to preclude the application of other rights. In addition to communication, a shutdown also directly impacts non-communicative online activities that are increasingly becoming essential to our everyday lives. For instance, a shutdown would prevent the reservation of train tickets out of a town in turmoil or booking a cab from the airport to a hotel. Some of these online activities are not only harmless but also potentially lifesaving in areas facing unrest. Indeed, during an epidemic and a nationwide lockdown, shutdowns could well mean a denial of education and health services. See Memorandum of Writ Petition, *Foundation for Media Professionals v UT of J&K*, (2020) 5 SCC 746, available at <[https://drive.google.com/file/d/1u8T6zldNXlabJA0igdXObA55fyX2\\_4Bz/view](https://drive.google.com/file/d/1u8T6zldNXlabJA0igdXObA55fyX2_4Bz/view)>, at pp. 33, 37. Further, in *Faheema Shirin R.K. v State of Kerala* 2019 SCC OnLine Ker 2976 [15], the Kerala High Court held that the right to access the internet forms part of the rights to education and privacy under Article 21 of the Constitution.

<sup>2</sup> A working group of participants at RightsCon, a popular event on the Internet and human rights organized by civil society, devised a crowd-sourced, working definition of an Internet shutdown as “*an intentional disruption of Internet or electronic communications, rendering them inaccessible or effectively unusable, for a specific population or within a location, often to exert control over the flow of information.*” See, ‘No more Internet shutdowns! Let’s #KeepItOn’ (*Access Now*, 30 March 2016) <<https://www.accessnow.org/no-internet-shutdowns-lets-keepiton/>> accessed February 1, 2017.

<sup>3</sup> See, e.g., Anuj Srivas, ‘Jammu & Kashmir has Lost 18 Days of Mobile Internet Access over Last Four Years’ *The Wire* (15 April 2016) <<http://thewire.in/2016/04/15/jammu-kashmir-has-lost-18-days-of-mobile-internet-access-over-last-four-years-29857/>> accessed 1 February 2017.

<sup>4</sup> Sarvjeet, Singh, “Incidents of Internet Shutdowns in India (2010 onwards)”, Centre for Communication Governance at National Law University, Delhi, <[https://drive.google.com/file/d/0BycAZd9M5\\_7NOExCRnQ3Q1pqcm8/view](https://drive.google.com/file/d/0BycAZd9M5_7NOExCRnQ3Q1pqcm8/view)>; Software Freedom Law Centre, ‘Internet Shutdown Tracker’, <<https://internetshutdowns.in/>>.

<sup>5</sup> With effect from 7.8.2019, the State stands bifurcated into two Union Territories.

<sup>6</sup> Software Freedom Law Centre, ‘Internet Shutdown Tracker’ <<https://internetshutdowns.in/>> accessed 3 May 2020). See also ‘Launching STOP: the #KeepItOn Internet

Internet shutdowns cost the economy at least \$3.04 billion.<sup>7</sup> India's positions at the international stage with respect to Internet shutdowns inspire no hope. In 2016, the United Nations Human Rights Committee passed a resolution calling states to desist and refrain from "measures to intentionally prevent or disrupt access to or dissemination of information online" including measures to shut down the Internet or part of the Internet at any time, particularly at times where access to information is critical, such as during an election, or in the aftermath of a terrorist attack.<sup>8</sup> The Committee further urged for the adoption of a "human rights-based approach" to provide and expand access to the Internet, with particular regard to addressing the gender digital divide, and to promote Internet access for persons with disabilities.<sup>9</sup> Perhaps unsurprisingly, India favored an amendment to the Resolution seeking removal of the clause containing a call for "a human rights based approach" to the internet.<sup>10</sup>

We must hence begin examining Internet shutdowns seriously within the Indian constitutional framework. This paper begins that project with an analysis centered on the freedom of expression under Article 19(1)(a). For two reasons, internet shutdowns whether total or partial always implicate the freedom of expression. *First*, the internet is a vital medium for speech and expression in this age, and a restriction on the medium necessarily implies a restriction on the right itself.<sup>11</sup> *Second*, the freedom of speech and expression has been consistently interpreted by the Supreme Court as including the right

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Shutdown Tracker' (*Access Now*, 16 November 2017) <<https://www.accessnow.org/keepiton-shutdown-tracker/>> accessed 1 June 2019. The country was also the most hurt economically, losing US\$3.04 billion for the 16315 hours of internet shutdowns during the period 2012-2017. See Indian Council for Research on International Economic Relations, 'The Anatomy of Internet Blackout: Measuring the Economic Impact of Internet Shutdowns in India' (April 2018), <[https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=2ahUKew-jorrC7\\_oXhAhUJ7XMBHV3qCOYQFjAAegQICRAC&url=http%3A%2F%2Ficier.org%2Fpdf%2FAnatomy\\_of\\_an\\_Internet\\_Blackout\\_ppt.pdf&usg=AOvVaw3pgnN-ST2CKlyJwCChRI0cg](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=2ahUKew-jorrC7_oXhAhUJ7XMBHV3qCOYQFjAAegQICRAC&url=http%3A%2F%2Ficier.org%2Fpdf%2FAnatomy_of_an_Internet_Blackout_ppt.pdf&usg=AOvVaw3pgnN-ST2CKlyJwCChRI0cg)> accessed 10 March 2019.

<sup>7</sup> See, Indian Council for Research on International Economic Relations, 'The Anatomy of Internet Blackout: Measuring the Economic Impact of Internet Shutdowns in India' (April 2018), <[https://icier.org/pdf/Anatomy\\_of\\_an\\_Internet\\_Blackout.pdf](https://icier.org/pdf/Anatomy_of_an_Internet_Blackout.pdf)>.

<sup>8</sup> United Nations Human Rights Council, 'Resolution on the Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development' (A/HRC/32/L.20) June 27, 2016, <[https://www.article19.org/data/files/Internet\\_Statement\\_Adopted.pdf](https://www.article19.org/data/files/Internet_Statement_Adopted.pdf)>.

<sup>9</sup> *ibid.*

<sup>10</sup> Article 19, 'Significant Resolution Reaffirming Human Rights Online Adopted' (1 July 2016) <<https://www.article19.org/resources.php/resource/38429/en/unhrc-significant-resolution-reaffirming-human-rights-online-adopted>>. The resolutions of the HRC are not binding and is *opinio juris*.

<sup>11</sup> *Anuradha Bhasin v Union of India* (2020) 3 SCC 637 : 2020 SCC OnLine SC 25 [29].

to receive information;<sup>12</sup> given that the internet is the chief source of all kinds of information today, this informational right is directly affected by internet shutdowns. In the recent judgment of *Anuradha Bhasin*,<sup>13</sup> the Supreme Court has accepted that Article 19(1)(a) protects the right to disseminate and receive information through the internet.<sup>14</sup>

Therefore, the constitutional validity of every internet shutdown would have to be tested (at least) against the standards ordinarily applied to test restrictions on the freedom of speech. These standards are exhaustively<sup>15</sup> contained in Article 19(2) of the Constitution and can be stated in the form of a three-part test as follows:<sup>16</sup>

- i The restriction should be imposed by “law”.
- ii It should be in pursuance of one of the nine standards listed in Article 19(2).
- iii It should be “reasonable”.

Accordingly, this paper sequentially analyzes internet shutdowns against these three requirements. Part I of this paper addresses the lawfulness prong by studying the statutory regime that is used by the executive to impose internet shutdowns. The Telegraph Act, 1885 (and the rules framed thereunder), the Code of Criminal Procedure, 1973, and the Information Technology (Amendment) Act, 2008 (and the rules framed thereunder) are studied and compared. The requirement of publication of shutdown orders – another component of lawfulness – is also discussed. Part II explores the meaning of public order, which is the most relevant<sup>17</sup> ground from the list given in Article 19(2) in the context of internet shutdowns. The principles governing the permissible invocation of this ground are also discussed. Part III explains the concept of reasonableness, which is the final requirement of Article 19(2), and lays out the factors that must be examined to determine whether an internet shutdown is reasonable. Part IV examines judgments in which the Indian Supreme Court and various High Courts have considered the validity

<sup>12</sup> *Ministry of Information & Broadcasting v Cricket Assn. of Bengal* (1995) 2 SCC 161 [36]; *Union of India v Assn. for Democratic Reforms* (2002) 5 SCC 294 [38]; *Namit Sharma v Union of India* (2013) 1 SCC 745 [2].

<sup>13</sup> *Anuradha Bhasin* (n 11).

<sup>14</sup> *ibid* [31].

<sup>15</sup> *Sakal Papers (P) Ltd. v Union of India* AIR 1962 SC 305 : (1962) 3 SCR 842 [34]; *State of Karnataka v Associated Management of English Medium Primary and Secondary Schools* (2014) 9 SCC 485 [41].

<sup>16</sup> Constitution of India, art 19(2).

<sup>17</sup> We say “relevant” not because other grounds can never be invoked, but because in practice the State mostly invokes this ground rather than the others.

of internet shutdowns and applied (or failed to apply) the relevant constitutional principles. To conclude, we outline questions that should be considered in future research on this subject in order to mitigate the ill-effects of shutdown orders.

## II. THE FIRST PRONG: LAWFULNESS

The first requirement of Article 19(2) is that a restriction on the freedom of speech must be provided by a “law”.<sup>18</sup> This requirement of lawfulness further entails at least two broad principles. First, there should be a statute i.e., a primary legislation, to which the restriction is traceable. Second, the executive order which imposes the restriction should be published. This part of the paper first sets out, with a critical eye, the laws which the executive relies on to impose internet shutdowns. It then discusses the requirement of transparency that is critical to the substantive validity of executive orders.

### A. Statutory Basis

The word “law” in Article 19(2) implies that any restriction on speech should be traceable to a statute.<sup>19</sup> In other words, a mere departmental instruction which is not traceable to any law would not furnish an adequate legal basis for the imposition of the restriction on free speech.<sup>20</sup> Broadly speaking, three statutory provisions are used by governments to impose internet shutdowns:<sup>21</sup>(i) Section 144 of the Code of Criminal Procedure, 1973 (“CrPC”); (ii) Section 69A of the Information Technology (Amendment) Act, 2008 (“IT Act”) read with the Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules, 2009 (“Blocking Rules”); and (iii) Section 5(2) of the Telegraph Act, 1885 read with the Temporary Suspension of Telecom Services (Public Emergency or Public Safety) Rules, 2017 (“Suspension Rules”).

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<sup>18</sup> Constitution of India 1950, art 19(2).

<sup>19</sup> *Kharak Singh v State of U.P.* AIR 1963 SC 1295 : (1964) 1 SCR 332 [5]; *Bijoe Emmanuel v State of Kerala* (1986) 3 SCC 615 [16].

<sup>20</sup> *ibid.*

<sup>21</sup> For a brief overview of the available legal bases and their applicability, see Siddharth Narrain, ‘Internet Shutdowns: Background and Use of Section 144, Code of Criminal Procedure, 1973’ (*Socio-Legal Review*, 11 March 2018) <<https://www.sociolegalreview.com/post/internet-shutdowns-background-and-use-of-section-144-code-of-criminal-procedure-1973>> accessed 31 May 2020; and Siddharth Narrain, ‘Internet Shutdowns: Amendment to the Telegraph Act and Mobile Company Licenses’ (*Socio-Legal Review*, 28 March 2018) <<https://www.sociolegalreview.com/post/internet-shutdowns-amendment-to-the-telegraph-act-and-mobile-company-licenses>> accessed 31 May 2020.

In the first three sections below, we sequentially analyze the framework under the CrPC, the IT Act & the Blocking Rules, and the Telegraph Act & the Suspension Rules. The fourth section compares the three regimes and suggests that internet shutdowns cannot be imposed under the CrPC at all.

## i. The CrPC

Section 144 of the CrPC empowers the District Magistrate to “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”.<sup>22</sup> This broadly worded power is circumscribed by two key safeguards contained in the text of the provision itself.

*First*, the power may be exercised only in cases of urgency i.e. when “immediate prevention or speedy remedy is desirable”.<sup>23</sup> Section 144 occurs in a Chapter titled “Urgent Cases of Nuisance or Apprehended Danger”,<sup>24</sup> and its marginal note describes it as a “[p]ower to issue order in urgent cases of nuisance or apprehended danger”.<sup>25</sup> These requirements must be read with the specific aims stated in Section 144 in furtherance of which the District Magistrate may issue directions under that provision:

- i “obstruction, annoyance or injury to any person lawfully employed”,<sup>26</sup>
- ii “danger to human life, health or safety”,<sup>27</sup> or
- iii “a disturbance of the public tranquillity, or a riot, or an affray”.<sup>28</sup>

This narrow reading of Section 144 is supported by the Supreme Court’s judgment in *Madhu Limaye*.<sup>29</sup> While upholding the *vires* of Section 144 against Article 19(1)(a), the Court held that the provision can be invoked only when there is an emergency *and* the consequences of the speech involved are sufficiently grave.<sup>30</sup> The “annoyance” contemplated in Section 144 “must assume sufficiently grave proportions to bring the matters within interests of public order” for the power to be held to have been validly exercised.<sup>31</sup>

<sup>22</sup> CrPC, s 144(1). The *vires* of Section 144 was unsuccessfully challenged in *Babulal Parate v State of Maharashtra* AIR 1961 SC 884 and *Madhu Limaye v Sub-Divisional Magistrate, Monghyr* (1970) 3 SCC 746.

<sup>23</sup> CrPC, s 144(1).

<sup>24</sup> CrPC, ch X-C.

<sup>25</sup> CrPC, s 144 Marginal Note.

<sup>26</sup> *ibid.*

<sup>27</sup> *ibid.*

<sup>28</sup> *ibid.*

<sup>29</sup> *Madhu Limaye v Sub-Divisional Magistrate, Monghyr* (1970) 3 SCC 746.

<sup>30</sup> *ibid* [24].

<sup>31</sup> *ibid* [24].

This reading of Section 144 – which ties the validity of exercise of power to an “emergency” – was recently approved by the Supreme Court in the context of the restrictions placed upon the movement of persons in Jammu & Kashmir.<sup>32</sup>

*Second*, Section 144 requires the Magistrate to pass “a written order stating the material facts of the case”.<sup>33</sup> Written orders act as the first check for the existence of a good cause for exercising extraordinary powers;<sup>34</sup> stating the material facts enables judicial scrutiny of the order.<sup>35</sup> Further, the material facts stated in the order must be such that they indicate proper application of mind on part of the Magistrate:

*“Proper reasoning links the application of mind of the officer concerned, to the controversy involved and the conclusion reached. Orders passed mechanically or in a cryptic manner cannot be said to be orders passed in accordance with law.”*<sup>36</sup>

Besides these textual safeguards, two other important safeguards have been read into Section 144 by the Supreme Court. *First*, a repeated issuance of Section 144 orders would amount to an abuse of the provision.<sup>37</sup> *Second*, any orders under Section 144 must be published to enable affected persons to challenge them.<sup>38</sup> The safeguards are often breached – e.g., in some states including Rajasthan,<sup>39</sup> Gujarat<sup>40</sup> and Arunachal Pradesh,<sup>41</sup> internet services have been suspended to prevent malpractices and ensure fair conduct of

<sup>32</sup> *Anuradha Bhasin* (n 11) [128].

<sup>33</sup> *See*, s 144(1) of the CrPC.

<sup>34</sup> *See P.T. Chandra v Crown* 1942 SCC OnLine Lah 23 : AIR 1942 Lah 171 [5].

<sup>35</sup> *Anuradha Bhasin* (n 11) [142].

<sup>36</sup> *ibid* [144].

<sup>37</sup> *ibid* [124] (citing *Acharya Jagdishwaranand Avadhuta v Commr. of Police* (1983) 4 SCC 522, [16]).

<sup>38</sup> *ibid* [163(a)].

<sup>39</sup> ‘Rajasthan to Suspend Internet during Constable Recruitment Examinations on 14th and 15th July’ (*MediaNama*, 13 July 2018) <<https://www.medianama.com/2018/07/223-rajasthan-to-suspend-internet-during-constable-recruitment-examinations-on-14-15-july/>>; *See also*: ‘Rajasthan to Suspend Mobile Internet Services Tomorrow from 9 am to 1 pm’ (*The Financial Express*, 4 August 2018) <<https://www.financialexpress.com/india-news/rajasthan-to-suspend-mobile-internet-services-tomorrow-from-9-am-to-1-pm/1269716/>>.

<sup>40</sup> ‘4-Hour Ban on Mobile Internet in State Today’ (*The Times of India*, 28 February 2016) <<http://timesofindia.indiatimes.com/tech/mobiles/4-hour-ban-on-mobile-internet-in-state-today/articleshow/51175590.cms>>; ‘To Beat Exam Cheats, Gujarat to Block Mobile Internet Today’ (*The Times of India*, 28 February 2016) <<http://timesofindia.indiatimes.com/india/to-beat-exam-cheats-gujarat-to-block-mobile-internet-today/article-show/51173461.cms?from=mdr.>>.

<sup>41</sup> ‘Arunachal Govt Orders Suspension of Internet across State for APPSC Exam’ (19th July 2018) <<https://thenewsmill.com/arunachal-govt-orders-suspension-of-internet-across-state-for-appsc-exam/>>.

competitive examinations, which corresponds neither to the kind of urgency that Section 144 contemplates nor to the aims it lists. Likewise, the requirement of stating material facts has also been breached.<sup>42</sup> Nonetheless, the presence of these safeguards within the text of the CrPC and in case law ought to be valued.

## ii. The IT Act and Blocking Rules

Section 69A of the IT Act empowers the Central Government to “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”.<sup>43</sup> Two important safeguards are embedded in this provision: (i) the Government must record its reasons in writing;<sup>44</sup> and (ii) the exercise of this power is “subject to”<sup>45</sup> any other procedure and safeguards that may be prescribed through rules.<sup>46</sup>

The Blocking Rules were framed by the Government under Section 69A. The Rules specify a Designated Officer (a high-level officer in the Central Government) responsible for ordering the blocking of information,<sup>47</sup> provide a detailed procedure to be adopted before the order can be made (involving written communication at each step),<sup>48</sup> mandate a periodic review (at least once in two months) of the orders passed under these rules,<sup>49</sup> and require the designated authority to maintain written records of those orders.<sup>50</sup>

An important safeguard in the Rules is the multi-layered scrutiny that every blocking request must go through. Individual persons can send requests for blocking websites to the Nodal Officer of the relevant government department (central or state).<sup>51</sup> If the department finds the request to be meritorious, its Nodal Officer must forward it to the Designated Officer,<sup>52</sup> who then forwards it to a Committee headed by herself along with “... representative

<sup>42</sup> See, e.g., Order of the District Magistrate, Jammu (5 June 2015) <<http://sikhsiyasat.net/2015/06/05/information-blackout-govt-orders-ban-on-internet-services-in-jammu-district-situation-tense-after-sikh-youths-killed-in-police-firing/>>.

<sup>43</sup> IT Act, s 69A(1).

<sup>44</sup> *ibid.*

<sup>45</sup> *ibid.*

<sup>46</sup> *ibid* s 69A(2).

<sup>47</sup> Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules 2009, r 3.

<sup>48</sup> *ibid* rr 6, 7, 8 and 9. See also *ibid* Form-A.

<sup>49</sup> *ibid* r 14.

<sup>50</sup> *ibid* r 15.

<sup>51</sup> *ibid* r 6(1).

<sup>52</sup> *ibid* r 6(2).



not below the rank of Joint Secretary in Ministries of Law and Justice, Home Affairs, Information and Broadcasting and the Indian Computer Emergency Response Team...”<sup>53</sup> After hearing representations from the intermediaries<sup>54</sup> (or not, in case of an emergency),<sup>55</sup> the Committee submits its recommendations to the Secretary in the Department of Information Technology under the Ministry of Communications and Information Technology.<sup>56</sup> Finally, the Secretary of the Department of Information Technology must give her approval to the request.<sup>57</sup> There is a review mechanism under the Rules that operates after the shutdown order has been issued. A Review Committee constituted under the Indian Telegraph Rules, 1951<sup>58</sup> is to meet at least once every two months to verify the various blocking directions issued in the said duration.<sup>59</sup>

There is some doubt with respect to the scope of the powers under Section 69A. In *Anuradha Bhasin*,<sup>60</sup> the Supreme Court observed that this provision cannot be invoked to “restrict the internet generally”, for the aim of this section is to “block access to particular websites on the internet”.<sup>61</sup> This view is not baseless. The design of the Blocking Rules – which require the government to specify the websites to be blocked and hear the affected intermediaries – does suggest that the rules are intended for a narrower purpose than a full shutdown. Yet, the Supreme Court’s view is not an *obvious* one. Section 69A empowers the Central Government, *inter alia*, to direct “any... intermediary” to block or cause to be blocked “any information... in any computer resource”.<sup>62</sup> The word “intermediary” is defined under Section 2(w) of the IT Act as including telecom service providers,<sup>63</sup> who can effect a total internet shutdown. It would be plausible to argue that the word “any”, especially in light of its repeated use in the provision, must be read as including “all” or “every” because of the broad wording of the statute.<sup>64</sup>

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<sup>53</sup> *ibid* r 7.

<sup>54</sup> *ibid* r 8(1).

<sup>55</sup> In cases of emergency, the Designated Officer is permitted to bypass the requirements to place the request before a Committee and to give a hearing to the affected parties. *See ibid* r 9.

<sup>56</sup> *ibid* r 8(5).

<sup>57</sup> *ibid* r 8(6).

<sup>58</sup> The Indian Telegraph Rules 1951, r 419A.

<sup>59</sup> Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules 2009, r 14.

<sup>60</sup> *Anuradha Bhasin* (n 11).

<sup>61</sup> *ibid* [88].

<sup>62</sup> IT Act, s 69A.

<sup>63</sup> IT Act, s 2(w).

<sup>64</sup> The Supreme Court has held that the meaning of the word “any” would depend on the context in which it occurs. Depending on the context, it could either mean “all”/“every”

One could argue that the presence of other laws on the same subject – such as the Telegraph Act and the Suspension Rules– would have the effect of narrowing the scope of Section 69A. But such a claim would be defeated by Section 81 of the IT Act which says:

*“The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force.”*

Given the wide amplitude of Section 69A read with Section 81, a compelling argument would be required to hold that the scope of the Blocking Rules, which are framed under Section 69A, is significantly narrower than that of the parent statute and extends only to the selective blocking of a few websites. Equally, the Blocking Rules do not place a cap on the number of websites that may be blocked at once. Hence, while the Supreme Court’s position is not implausible, it is far from obvious. The Court ought to have engaged more with the issue in holding what it did.

### iii. The Telegraph Act and Suspension Rules

Section 5(2) of the Telegraph Act, 1885 permits the issuance of an order directing, *inter alia*, that “any message or class of messages to or from any person or class of persons... brought for transmission by or transmitted or received by any telegraph... shall not be transmitted”.<sup>65</sup> The words “telegraph” and “message” are given wide definitions under the Telegraph Act which makes Section 5(2) a source of power for imposing Internet shutdowns. While “telegraph” means “any appliance, instrument, material or apparatus used or capable of use for transmission or reception of signs, signals, writing, images and sounds or intelligence of any nature by wire, visual or other electro-magnetic emissions, Radio waves or Hertzian waves, galvanic, electric or magnetic means”,<sup>66</sup> the word “message” implies “any communication sent by telegraph, or given to a telegraph officer to be sent by telegraph or to be delivered”.<sup>67</sup> Viewing Section 5(2) in this light, insofar as contents on the internet are “communication”<sup>68</sup> sent using instruments capable of signal

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or “either”. *Shri Balaganesan Metals v M.N. Shanmugham Chetty* (1987) 2 SCC 707 [18] (citing *Black’s Law Dictionary*, 5th edn).

<sup>65</sup> Telegraph Act 1885, s 5(2). Readers will note that like Section 69A of the IT Act, the language of Section 5(2) of the Telegraph Act language is also expansive, the word “any” having been used repeatedly.

<sup>66</sup> *ibid* s 3(1AA).

<sup>67</sup> *ibid* s 3(3).

<sup>68</sup> The word “communication” is generally understood broadly to include any exchange of information. E.g., the *Black’s Law Dictionary* defines it as: “1. The expression or exchange of information by speech, writing, gestures, or conduct; the process of bringing an idea

transmission and reception, they are covered within the ambit of Section 5(2). Because the definition of “telegraph” under the Act is wide enough to encompass web servers as well as the technical apparatuses of telecom service providers,<sup>69</sup> internet shutdown orders issued to such service providers fall within Section 5(2).

A suspension order under Section 5(2) may be issued only by the Central Government, the State Government or any officer specifically authorized in this behalf by either government, for reasons recorded in writing.<sup>70</sup> It may only be issued “[o]n the occurrence of any public emergency” or “in the interest of the public safety” and if the issuing authority is satisfied that the order is required “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”.<sup>71</sup>

Section 7 of the Telegraph Act confers power on the Central Government to make rules.<sup>72</sup> The Suspension Rules<sup>73</sup> were enacted in exercise of this power.<sup>74</sup> They provide that directions to suspend telecom services may be issued only through a reasoned order<sup>75</sup> and only<sup>76</sup> by the Union Home Secretary (for the Central Government) or the State Home Secretary (for a State Government).<sup>77</sup> By the next working day, the order must be placed before a three-member Review Committee which must decide, within five days, whether the order is in consonance with Section 5(2) of the Telegraph Act.<sup>78</sup> In *Anuradha Bhasin*,<sup>79</sup> the Supreme Court read into the Rules a further requirement of periodic review every seven days from the date of the

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to another’s perception. 2. The information so expressed or exchanged.” *Black’s Law Dictionary* (9th edn, 2009) 316.

<sup>69</sup> *ibid* s 3(1AA).

<sup>70</sup> *ibid* s 5(2).

<sup>71</sup> *ibid*.

<sup>72</sup> *ibid* s 7(1).

<sup>73</sup> Department of Telecommunications, Ministry of Communications, Government of India, Temporary Suspension of Telecom Services (Public Emergency or Public Safety) Rules, 2017, G.S.R. 998(E) dated 7th August 2017.

<sup>74</sup> *ibid* Preamble.

<sup>75</sup> *ibid* r 2(2).

<sup>76</sup> *ibid* r 2(1). Readers will note that this Rule may be contrary to Section 5(2) of the Telegraph Act insofar as it takes away the State Government’s power to authorize any officer for the purposes of suspension of services.

<sup>77</sup> *ibid*. In unavoidable circumstances where prior directions cannot be obtained from the said competent authority, suspension orders can be passed by officers holding the post of Joint Secretary or above in the Central Government who have been empowered to do so by the relevant Home Secretary. Such orders must then be confirmed by the relevant Home Secretary within 24 hours.

<sup>78</sup> *ibid* r 2(6).

<sup>79</sup> *Anuradha Bhasin* (n 11).

previous review.<sup>80</sup> We submit, however, that the Suspension Rules are defective for four reasons.

*First*, the Review Committee is empowered under the Suspension Rules only to “record its findings” but not set aside an illegal suspension order.<sup>81</sup> This makes it a toothless committee. *Second*, as has been argued elsewhere, allowing a five-day period for the review is not reasonable.<sup>82</sup> Since most internet shutdowns run for less than five days continuously,<sup>83</sup> the review exercise – otherwise an important procedural check – is reduced to a purely academic and unactionable *post-mortem*. *Third*, the Rules do not provide for publication of either the suspension orders or the Review Committee’s findings. They set up an opaque procedure capable of cloaking the executive’s misuses of its sweeping power to blackout a vital medium of communication, while affording Indian citizens no right to remedy. Avoiding public notification of the suspension causes more harm than it prevents, considering that the public would be left in a state of surprise and under-preparedness to tackle with a lack of much-needed network facilities.<sup>84</sup> As Apar Gupta puts it, “[f]rom the creation of the rules to their implementation, there is secrecy. And secrecy is the hallmark of an autocracy, not a democracy”.<sup>85</sup> (It was only in January 2020 that the Supreme Court held that the requirement of publication is inherent in any piece of legislation, and hence also in the Suspension Rules.<sup>86</sup>)

#### iv. Choosing among the three laws

Internet shutdowns have continued to be imposed under the CrPC despite enactment of the Blocking Rules in 2009 and Suspension Rules in 2017.<sup>87</sup> The reasons could be speculated. The fact that Section 144 can be exercised by states without any advertence to the Central Government makes it – from the states’ perspective – pragmatically superior to the IT Act under which the Designated Officer, who is the sole authority authorized to issue

<sup>80</sup> *ibid* [109].

<sup>81</sup> *ibid*. r 2(6).

<sup>82</sup> Nakul Nayak, ‘The Legal Disconnect: An Analysis of India’s Internet Shutdown Laws’ (2018) Working Paper No. 1, Internet Freedom Foundation, 13.

<sup>83</sup> *ibid*.

<sup>84</sup> *ibid*.

<sup>85</sup> ‘IETHinc: Is Internet Shutdown the New Order for Law and Order?’ (*The Indian Express*, 7th September 2018) <<https://indianexpress.com/article/business/market/iethinc-is-internet-shutdown-the-new-order-for-law-and-order-5344069/>>.

<sup>86</sup> *Anuradha Bhasin* (n 11) [19].

<sup>87</sup> Arunabh Saikia, ‘India’s Internet Shutdown: Most States Block Services without Following Centre’s New Rules’ (*Scroll.in*, 7th April 2018) <<https://scroll.in/article/874565/internet-shutdown-most-states-continue-to-block-services-without-adhering-to-the-centres-new-rules>>.

shutdown orders, is a Central Government officer and must seek the Union IT Ministry's approval before issuing any shutdown orders. Section 144 holds a clear preference over the Telegraph Act & Rules as well, because it does not even remotely contain the kind of procedural safeguards that the said Act and Rules provide for – decisions under Section 144 are taken at the District Magistrate level rather than the Home Secretary level, no review committee is required to examine the validity of the order in a time-bound manner, and no periodic review is provided for. The same comparison holds true between the CrPC and the IT Act and Rules as well.

This raises an important question: is it legally permissible for governments to resort to Section 144 of the CrPC – a general law providing for maintenance of public order – despite the availability of legal regimes which specifically deal with internet shutdowns? In February 2016, the Chief Justice of India reportedly labelled the powers conferred by the CrPC and the IT Act as “concurrent”.<sup>88</sup> Some government officials<sup>89</sup> and writers<sup>90</sup> also hold this view. We disagree.

According to the well-known legal maxim *generalia specialibus non derogant*, “if a special provision has been made on a certain matter, that matter is excluded from the general provisions”.<sup>91</sup> The Supreme Court has applied this principle to exclude general statutes from fields covered by special statutes. For example, the Bihar Finance Act, 1981 which provided for the levying of “all commercial taxes generally” stood ousted by the Bihar Sugarcane Act, 1981 which provided specifically for the levy only of purchase tax on sugarcane.<sup>92</sup> Likewise, the summoning powers of a trial judge under the CrPC stood excluded by the more specific provisions of the Prevention of Corruption Act, 1988.<sup>93</sup> The test in applying this maxim is whether the legislative intent in enacting the special law was to provide “special treatment” to the subject regulated.<sup>94</sup> Applying this test would reveal that the provisions of both the IT Act & Rules as well as the Telegraph Act & Rules are special

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<sup>88</sup> ‘Mobile Internet can be Banned under S. 144 CrPC, Says Supreme Court’ (*Bar and Bench*, 11th February 2016) <<http://barandbench.com/mobile-Internet-can-be-banned-under-s-144-crpc-for-law-and-order-says-supreme-court/>>.

<sup>89</sup> Arunabh Saikia (n 87).

<sup>90</sup> Shikhar Goel, ‘Internet Shutdowns: Strategy to Maintain Law and Order or Muzzle Dissent?’ (2018) vol 53(42) *Economic and Political Weekly*.

<sup>91</sup> *Dilawar Singh v Parvinder Singh* (2005) 12 SCC 709 [8].

<sup>92</sup> *Gobind Sugar Mills Ltd. v State of Bihar* (1999) 7 SCC 76 [10].

<sup>93</sup> *Dilawar Singh v Parvinder Singh* (2005) 12 SCC 709 [8].

<sup>94</sup> *Gobind Sugar Mills Ltd* (n 92) [10].

vis-à-vis the CrPC.<sup>95</sup> The sequitur is that internet shutdowns cannot permissibly be imposed under Section 144 of the CrPC.<sup>96</sup>

But what about choosing between the Telegraph Act & Suspension Rules on the one hand and the IT Act & Blocking Rules on the other? Notably, Section 81 of the IT Act which provides that the provisions of that Act shall have effect notwithstanding anything contained in any other law in force.<sup>97</sup> Even if the Telegraph Act & Rules were imagined as a “special” regime, therefore, the IT Act & Rules would continue to operate. On the other hand, if the IT Act & Rules are special (in terms of blocking individual websites, say) vis-à-vis the Telegraph Act and the Suspension Rules, the former would oust the application of the latter. But since both regimes specifically contemplate the imposition of internet shutdowns,<sup>98</sup> and both provide for blocking of access to particular pieces of information – “messages” in case of the Telegraph Act and “information” in case of the IT Act,<sup>99</sup> it is not possible to say that either regime is more special than the other. Hence both regimes will continue to operate in their own stead.

## B. Publication and Transparency

A publication requirement is stated neither in the IT Act & Blocking Rules nor the Telegraph Act & Suspension Rules. In fact, the Blocking Rules actively mandate strict confidentiality of all complaints that seek shutdowns, and also of the actions taken on those complaints.<sup>100</sup> Yet, the Supreme Court has treated publication of orders as an imperative requirement for any piece of legislation, whether primary or secondary, to have substantive validity.<sup>101</sup> Indeed, publication is a requirement of natural justice:

<sup>95</sup> See e.g. Long Title of the IT Act (“An Act to provide legal recognition for transactions carried out by means of electronic data interchange and other means of electronic communication ...”); Short Title of the Blocking Rules (“...Procedure and Safeguards for Blocking of Access of Information by Public”); Preamble to the Telegraph Act (“[w]hereas it is expedient to amend the law relating to telegraphs in India...”); and Preamble to the Suspension Rules (“...[T]he Central Government hereby makes the following rules to regulate the temporary suspension of telecom services due to public emergency or public safety...”).

<sup>96</sup> A similar argument has been made earlier. See Geetha Hariharan and Padmini Baruah, ‘The Legal Validity of Internet Bans: Part II’ (*Centre for Internet and Society*, October 8 2015) <<http://cis-india.org/Internet-governance/blog/the-legal-validity-of-internet-bans-part-ii>>.

<sup>97</sup> IT Act, s 81.

<sup>98</sup> Why the power under the IT Act contemplates a total internet shutdown is discussed in Section (ii) above.

<sup>99</sup> Contrast Telegraph Act, s 5(2) with IT Act s 69A(1).

<sup>100</sup> Information Technology (Procedure and Safeguards for Blocking Access of Information by Public) Rules 2009, r 16.

<sup>101</sup> *B.K. Srinivasan v State of Karnataka* (1987) 1 SCC 658; *Gulf Goans Hotels Co Ltd v Union of India* (2014) 10 SCC 673.

*“Natural justice requires that before a law can become operative it must be promulgated or published.... The thought that a decision reached in the secret recesses of a chamber to which the public have no access and to which even their accredited representatives have no access and of which they can normally know nothing, can nevertheless affect their lives, liberty and property by the mere passing of a resolution without anything more, is abhorrent to civilised man.”*<sup>102</sup>

The Court reiterated this in the specific context of internet shutdowns in *Anuradha Bhasin*:<sup>103</sup>

*“It must be noted that although the Suspension Rules does [sic.] not provide for publication or notification of the orders, a settled principle of law, and of natural justice, is that an order, particularly one that affects lives, liberty and property of people, must be made available. Any law which demands compliance of the people requires to be notified directly and reliably.”*<sup>104</sup>

Hence, it is now well-settled that internet shutdown orders cannot satisfy the ‘lawfulness’ requirement of Article 19(2) unless they are duly promulgated and brought to the notice of citizens. This is an inherent requirement of the rule of law and need not be expressly stated in the legislation under question.

Yet, there has been a trend of internet shutdown orders not being published online. Information about shutdowns is available, if it is available at all, only *ex post facto* through secondary sources like newspapers. This information asymmetry is borne out by the facts and arguments narrated in some judgments. E.g., in a 2016 PIL in the Gujarat High Court, the State argued that the Court had not been presented with accurate information about the shutdown as the Petitioner would not have this information available.<sup>105</sup> More recently in *Anuradha Bhasin*,<sup>106</sup> the Court noted that the Petitioners had challenged the internet shutdown orders without annexing them because they did not have access to them.<sup>107</sup> In a brazen statement, even the Government refused to produce the orders before the Court, citing a vague “difficulty”.<sup>108</sup> Given such attitude on part of the government,

<sup>102</sup> *Harla v State of Rajasthan* AIR 1951 SC 467 : 1952 SCR 110.

<sup>103</sup> *Anuradha Bhasin* (n 11).

<sup>104</sup> *ibid* [96].

<sup>105</sup> *See Gaurav Sureshbhai Vyas v State of Gujarat* 2015 SCC OnLine Guj 6491 [4].

<sup>106</sup> *Anuradha Bhasin* (n 11).

<sup>107</sup> *ibid* [14].

<sup>108</sup> *ibid* [15].

examining the scope, duration, and stated reason of each shutdown is often difficult.

### III. THE SECOND PRONG: “LEGITIMACY” AND “PUBLIC ORDER”

To recap, restrictions may be placed on the freedom of speech and expression only for one of the nine reasons stated in Article 19(2).<sup>109</sup> Governments usually claim that internet shutdowns are being imposed in the interests of public order. Therefore, this part of the paper presents an analysis of “public order” under Article 19(2) and its application to internet shutdowns. Specifically, it addresses two facets of the public order clause on which the Supreme Court has commented repeatedly: (i) the meaning of “public order” and (ii) the degree of proximity or closeness that the restriction in question must have with public order so that it can be said to fall within Article 19(2).

#### A. Defining “Public Order”

In *Lohia-I*,<sup>110</sup> the *vires* of Section 3 of the Uttar Pradesh Special Powers Act, 1932, which penalized the instigation of people to not pay taxes, was challenged. Attempting to define public order, the Court held that “[i]t implies the orderly state of society or community in which citizens can peacefully pursue their normal activities of life.”<sup>111</sup> The Court also held that “public order is synonymous with public peace, safety and tranquility.”<sup>112</sup> In other words, public order “is the absence of disorder involving breaches of local significance in contradistinction to national upheavals, such as revolution, civil strife, war, affecting the security of the State.”<sup>113</sup> In *Lohia-II*,<sup>114</sup> the Court speaking through Hidayatullah, J. famously conceptualized national security, public order, and law and order as part of a scheme of concentric circles:

*“One has to imagine three concentric circles. Law and order represents the largest circle within which is the next circle representing public order and the smallest circle represents security of State. It is then easy to see that an act may affect law and order but not public*

<sup>109</sup> See *Romesh Thappar v State of Madras* AIR 1950 SC 124 : 1950 SCR 594 [10].

<sup>110</sup> *Supt., Central Prison v Ram Manohar Lohia* AIR 1960 SC 633.

<sup>111</sup> *ibid.*

<sup>112</sup> *ibid* [11].

<sup>113</sup> *ibid* [18].

<sup>114</sup> *Ram Manohar Lohia v State of Bihar* AIR 1966 SC 740 : (1966) 1 SCR 709.



*order just as an act may affect public order but not security of the State.*<sup>115</sup>

Later, in *Madhu Limaye*,<sup>116</sup> a seven-judge bench of the Court held that *Lohia-II*'s conception of the three concentric circles was rendered in the context of preventive detention and it “*need not always apply*”.<sup>117</sup> In contexts other than preventive detention, public order would carry a broader meaning – it would refer to “*a state of law abidingness vis-à-vis the safety of others*”, such that even “*small local disturbances of the even tempo of life*” and “*certain acts which disturb public tranquility or are breaches of the peace*” would implicate public order.<sup>118</sup> More recently, in *Anuradha Bhasin*,<sup>119</sup> the Court explained the distinction between “public order” and “law and order” in the following words:

*“If two families quarrel over irrigation water, it might breach law and order, but in a situation where two communities fight over the same, the situation might transcend into a public order situation.”*<sup>120</sup>

Thus, what appears consistently in the Court's decisions is a focus on violence in understanding public disorder. It would be fair to say that public order has broadly been understood as a violence-centric notion which does not cover every minor infraction of the law.<sup>121</sup> Accordingly, any internet shutdowns that purport to be issued for the preservation of public order must be linked to this understanding of public order. Yet, states have not abided by these principles in imposing shutdowns. For instance, on two occasions

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<sup>115</sup> *ibid* [55].

<sup>116</sup> *Madhu Limaye v Sub-Divisional Magistrate, Monghyr* (1970) 3 SCC 746.

<sup>117</sup> *ibid* [20].

<sup>118</sup> *ibid*.

<sup>119</sup> *Anuradha Bhasin* (n 11).

<sup>120</sup> *ibid* [123].

<sup>121</sup> *Jaya Mala v Govt. of J&K*, (1982) 2 SCC 538 [7]; *Ramlila Maidan Incident, In re*, (2012) 5 SCC 1 [238]. However, one aberration is worth noting from the Supreme Court's case law. In *Devendrappa*, the Appellant was dismissed from service in a public corporation after publicly pointing out maladministration in the affairs of the corporation. He was dismissed under a rule that prohibited employees from undertaking actions detrimental to the “interests or prestige of the corporation.” The Court upheld the rule, noting that “[a]ny action detrimental to the interests of prestige of the employer clearly undermines discipline within the organisation and also the efficient functioning of that organisation. Such a rule could be construed as falling under ‘public order’”. *M.H. Devendrappa v Karnataka State Small Industries Development Corp* (1998) 3 SCC 732 [14]. We submit that this judgment ignores previous binding precedent and consequently misunderstands “public order” under Article 19(2).

in Rajasthan,<sup>122</sup> and on one occasion each in Gujarat<sup>123</sup> and Arunachal Pradesh,<sup>124</sup> internet services were suspended in parts of these states in order to prevent malpractices and ensure fair conduct of public competitive and entrance examinations. These measures corresponded neither to “public order” nor to any other ground in Article 19(2).

## B. Nexus between the Restriction and “Public Order”

Article 19(2) requires that the restriction be “in the interests of” public order. In the earlier years, the Supreme Court interpreted the words “in the interests of” expansively and held that they make the ambit of public order “very wide”, such that a law “may not be designed to directly maintain public order and yet it may have been enacted in the interests of public order.”<sup>125</sup> Through subsequent judgments, however, the nexus requirement of Article 19(2) was interpreted more tightly.

*Lobia-I*<sup>126</sup> laid down the principles that would authoritatively guide the interpretation of Article 19(2) in the years to come.<sup>127</sup> The Court held that “any remote or fanciful connection” between the restriction and public order is not sufficient for the purposes of Article 19(2).<sup>128</sup> Rather, the restriction “should be one which has a proximate connection or nexus with public order....”<sup>129</sup> This understanding was carried forward in *Rangarajan*,<sup>130</sup> where the Court held:

<sup>122</sup> Rana, ‘Rajasthan to Suspend Internet during Constable Recruitment Examinations on 14th and 15th July’ (*MediaNama*, 13th July 2018) <<https://www.medianama.com/2018/07/223-rajasthan-to-suspend-internet-during-constable-recruitment-examinations-on-14-15-july/>>-----; See also: PTI, ‘Rajasthan to Suspend Mobile Internet Services Tomorrow from 9 am to 1 pm’ (*The Financial Express*, 4th August 2018) <<https://www.financialexpress.com/india-news/rajasthan-to-suspend-mobile-internet-services-tomorrow-from-9-am-to-1-pm/1269716/>> -----.

<sup>123</sup> TNN, ‘4-Hour Ban on Mobile Internet in State Today’ (*The Times of India*, 28 February 2016) <<http://timesofindia.indiatimes.com/tech/mobiles/4-hour-ban-on-mobile-internet-in-state-today/articleshow/51175590.cms>> -----.

<sup>124</sup> TNM NewsDesk, ‘Arunachal Govt Orders Suspension of Internet across State for APPSC Exam’ (*NewsMill*, 19th July 2018) <<https://thenewsmill.com/arunachal-govt-orders-suspension-of-internet-across-state-for-appsc-exam/>>

<sup>125</sup> *Ramji Lal Modi v State of U.P.*, AIR 1957 SC 620 : 1957 SCR 860 [7].

<sup>126</sup> *Supt.*, *Central Prison* (n 110).

<sup>127</sup> An aberration may be noted at this juncture. In *Dalbir*, a provision penalizing spreading disaffection towards the Government among police forces was challenged. The Court held that “[a]ny breach in the discipline by its [police force] members must necessarily reflect in a threat to public order and tranquillity. If the police force itself were undisciplined they could hardly serve as instruments for the maintenance of public order.” *Dalbir Singh v State of Punjab* AIR 1962 SC 1106 : 1962 Supp (3) SCR 25 [9].

<sup>128</sup> *ibid* [12].

<sup>129</sup> *ibid* [13].

<sup>130</sup> *S. Rangarajan v P. Jagjivan Ram* (1989) 2 SCC 574.

“In other words, the expression should be inseparably locked up with the action contemplated like the equivalent of a “spark in a powder keg”.”<sup>131</sup>

(emphasis supplied)

These principles would equally apply in the context of internet shutdowns. Therefore, a shutdown may be imposed only when the government apprehends an *imminent* threat of violence and breach of public peace, as opposed to situations where the apprehended danger is either remote in time or simply farfetched and conjectural. For example, in a 2019 order, the Gauhati High Court refused to accept the government’s contention that there was a threat to public order in the State of Assam on account of anticipated protests in respect of the Citizenship Amendment Act, and that such a threat justified the shutting down of mobile internet services. The Court demanded that the State produce concrete material to make good its claim of apprehension of violence, and when the State failed to do so, the Court ordered the restoration of mobile internet services.<sup>132</sup>

#### IV. THE THIRD PRONG: “REASONABLENESS”

Besides being lawful and legitimate, restrictions must also be “reasonable”.<sup>133</sup> Reasonableness under Article 19 is a rigorous and contextual standard of review. A determination of reasonableness must take into account “[t]he nature of the right alleged to have been infringed, the underlying purpose of the restriction imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, [and] the prevailing conditions at the time...”<sup>134</sup> Reasonableness, therefore, refers to the necessity and proportionality of the measure in light of the nature of the right and the purpose sought to be achieved by the State.<sup>135</sup>

One key aspect of the proportionality inquiry – overbreadth – is worth noting because of its relevance to internet shutdowns. This implies that

<sup>131</sup> *ibid* [45].

<sup>132</sup> *Banashree Gogoi v Union of India* 2019 SCC OnLine Gau 5584 [7]. The judgment is discussed in greater detail in Section IV(C) below.

<sup>133</sup> The “reasonableness” criterion was inserted into Article 19(2) *vide* the First Amendment to the Constitution. *See*, The Constitution (First Amendment) Act 1951, s 3(1)(a).

<sup>134</sup> *State of Madras v V.G. Row* AIR 1952 SC 196 [16].

<sup>135</sup> The ideas of “reasonableness” and “proportionality” are overlapping but not necessarily interchangeable. For a recent analysis of this intersection, see Aparna Chandra, ‘Proportionality in India: A Bridge to Nowhere?’ (2020) vol 3(2) University of Oxford Human Rights Journal 55, 55-86.

restrictions should be “narrowly tailored”<sup>136</sup> to the aim sought to be achieved by the State; their ambit must be limited to what is necessary to achieve the aim and must go no further. In *Kameshwar Prasad*,<sup>137</sup> the Court struck down a blanket rule prohibiting government servants from taking part in demonstrations, and held:

*“The vice of the rule, in our opinion, consists in this- that it lays a ban on every type of demonstration — be the same however innocent and however incapable of causing a breach of public tranquility and does not confine itself to those forms of demonstrations which might lead to that result”.*<sup>138</sup>

Of course, the rule against overbreadth does not demand the State to do the impossible. In *Babulal Parate*,<sup>139</sup> the Court rejected the argument that the impugned Section 144 order was unconstitutional for the reason that it was directed against the entire public:

*“it would be extremely difficult for those who are in charge of law and order to differentiate between members of the public and members of the two textile unions [i.e. the alleged perpetrators of public disorder] and, therefore, the only practical way in which the particular activities referred to in the order could be restrained or restricted would be by making those restrictions applicable to the public generally.”*<sup>140</sup>

Both *Babulal Parate* and *Kameshwar Prasad* are judgments rendered by five-judge benches of the Supreme Court. While the two judgments seem to conflict at first blush, reading them harmoniously yields the principle that the overbreadth of a rule is a ground to strike down the given speech restriction as unreasonable unless there is no other practical way to formulate the rule effectively.

The Court has stated the same requirement differently in subsequent cases. Under one such reformulation, the State has an obligation to apply its mind to “less restrictive but equally effective alternatives”<sup>141</sup>— measures that would achieve the desired aim without restricting the freedom of speech as much – before imposing the restriction. Recently, in *Anuradha Bhasin*,<sup>142</sup> the

<sup>136</sup> *Shreya Singhal v Union of India* (2015) 5 SCC 1 [17].

<sup>137</sup> *Kameshwar Prasad v State of Bihar* AIR 1962 SC 1166.

<sup>138</sup> *ibid* [16].

<sup>139</sup> *Babulal Parate v State of Maharashtra* AIR 1961 SC 884 : (1961) 3 SCR 423.

<sup>140</sup> *ibid* [29].

<sup>141</sup> *K.S. Puttaswamy v Union of India* (2019) 1 SCC 1 [157-58] (Sikri, J).

<sup>142</sup> *Anuradha Bhasin* (n 11).

Court affirmed this principle in context of internet shutdowns by holding that “only the least restrictive measure” can be adopted by the State.<sup>143</sup>

To comply with constitutional norms, therefore, shutdowns must not go beyond what is necessary to maintain public order. A shutdown that covers within its fold *every* type of speech and action, irrespective of its connection with a breach of public order, is overbroad and unconstitutional. An analogy can be drawn with *Kameshwar Prasad*, where the Court had held that it is unconstitutional to place a ban on “every type of demonstration... however innocent and however incapable of causing a breach of public tranquility”.<sup>144</sup> Keeping these principles in mind, we can draw an indicative list of factors which should be considered in deciding the proportionality of internet shutdowns:<sup>145</sup>

- i. Extent: Is the shutdown total or partial? Three aspects may be considered:
  - a. Has access been blocked to all websites or only to select websites that are most closely linked to the public order apprehension? While *some* Internet websites and applications are indeed used to spread hatred<sup>146</sup> and coordinate attacks<sup>147</sup> during times of strife, not all websites are capable of being such platforms. In *Anuradha Bhasin*,<sup>148</sup> in the context of the internet shutdowns imposed in Jammu & Kashmir, the Court specifically noted that the State is obligated to “attempt to determine the feasibility” of blocking access to only social media services which pose a threat, before imposing cutting off access to the entire internet.<sup>149</sup>

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<sup>143</sup> *ibid* [77].

<sup>144</sup> *Kameshwar Prasad v State of Bihar* AIR 1962 SC 1166 [16].

<sup>145</sup> Some of these can be found mentioned in *Anuradha Bhasin v Union of India* (2020) 3 SCC 637 : 2020 SCC OnLine SC 25 [79].

<sup>146</sup> See, for instance, Smita Nair, ‘In Nagaland Lynch Mob: Airline Staffer, Ex-Sepoy, Auto Driver and Teachers’ (*The Indian Express*, 12 March 2015) <<http://indianexpress.com/article/india/india-others/in-lynch-mob-airline-staffer-ex-sepoy-auto-driver-and-teachers/#sthash.e0Db0VYz.7E6blKuj.dpuf>> ----. For a more gripping account, see Durga M. Sengupta, ‘Supporters of Dadri “Beef” Murder Use Social Media to Wield Their Weapons’, (*Catch News*, 1 October 2015), <<http://www.catchnews.com/national-news/supporters-of-dadri-beef-murder-use-social-media-to-wield-their-weapons-1443717569.html>> ----.

<sup>147</sup> See, for example, Josh Halliday, ‘London Riots: How BlackBerry Messenger Played a Key Role’, *The Guardian*, 8 August 2011), <<http://www.theguardian.com/media/2011/aug/08/london-riots-facebook-twitter-blackberry>>. ----.

<sup>148</sup> *Anuradha Bhasin* (n 11).

<sup>149</sup> *ibid* [111].

- b. Has internet access been blocked across all platforms or only some platforms (such as mobile phones)? If access is suspended only on one platform, that may point towards greater acceptability of the restriction.<sup>150</sup> However, it is simultaneously important to be cognizant of the disproportionate impact that mobile internet shutdowns have on the economically poor. As per a report by Kantar IMRB, as of December 2018, 97% of India's internet users (total 566 million) are mobile internet users.<sup>151</sup> As per estimates of the Internet and Mobile Association of India, 99% of India's total 451 million internet users use mobile internet.<sup>152</sup> The latter report also suggests that this high percentage is the result the cheap and affordable access offered by mobile platforms.<sup>153</sup> Broadband internet is indeed a luxury, and these compelling numbers prove that disruption of Internet access through shutdowns most affects people who arguably need it the most. Indeed,<sup>154</sup> it may be that an otherwise *partial* ban that only disrupts mobile internet services might effectively be a *total* ban in respect of the economically poor.
- c. Does the shutdown involve a complete disruption of internet access or a mere reduction in network bandwidth (from 4G to 2G, e.g.)?
- ii. Area: In determining the proportionality of a shutdown, it may be relevant to look at the geographical area over which the shutdown has been imposed vis-à-vis the area where the risk to public order is reasonably apprehended. This “territorial” aspect of proportionality was highlighted in *Anuradha Bhasin*.<sup>155</sup>
- iii. Gravity: Proportionality must be judged considering the gravity of the apprehended danger. If great danger to lives is anticipated, such as in a terrorism-prone region, severer restrictions may be placed.<sup>156</sup>
- iv. Duration: Finally, the duration of the shutdown vis-à-vis the duration of the apprehended danger is a crucial consideration in determining

<sup>150</sup> *Foundation for Media Professionals v UT of J&K*, (2020) 5 SCC 746 [20].

<sup>151</sup> Nandita Mathur, ‘India’s Internet Base Crosses 500 Million Mark, Driven by Rural India’ (*LiveMint*, 11 March, 2019) <<https://www.livemint.com/industry/telecom/internet-users-exceed-500-million-rural-india-driving-growth-report-1552300847307.html>> -----.

<sup>152</sup> Nielsen, Internet and Mobile Association of India (2019) 10.

<sup>153</sup> *ibid.*

<sup>154</sup> We are grateful to an anonymous reviewer for this insightful formulation.

<sup>155</sup> *Anuradha Bhasin* (n 11) [78].

<sup>156</sup> *Foundation for Media Professionals v UT of J&K*, (2020) 5 SCC 746 [19].

the reasonableness of an internet shutdown. This “temporal” aspect of proportionality was also highlighted in *Anuradha Bhasin*.<sup>157</sup>

Every instance of an internet shutdown will therefore have to be analyzed on its own facts and circumstances to determine its constitutional validity. Having outlined the basic constitutional principles, let us now look at how Indian constitutional courts have applied them while adjudicating challenges to the constitutionality of shutdowns.

## V. JUDICIAL APPROACH TO INTERNET SHUTDOWNS

Of the five challenges we chronologically outline below, three were decided by the High Courts of Gujarat, Manipur and Assam respectively, and the other two – both pertaining to internet shutdowns imposed in Jammu & Kashmir – were decided by the Supreme Court.

### A. *Gaurav Vyas v. State of Gujarat* (Gujarat High Court)

In 2015, Gujarat witnessed mass agitations by the Patidar community demanding reservations in public sector jobs and education.<sup>158</sup> When the state government started to lose grip over the law and order situation, it decided to impose a mobile phone internet shutdown in some parts of the state.<sup>159</sup> This lasted for about a week or so, with access being restored in different parts of the state at different times.<sup>160</sup> In this backdrop, law student Gaurav Vyas filed a public interest litigation in the Gujarat High Court arguing that the shutdowns were unconstitutional.<sup>161</sup> He contended that:<sup>162</sup>

<sup>157</sup> *Anuradha Bhasin* (n 11) [78].

<sup>158</sup> Nidhi Sinha, ‘Patel Agitation Turns Gujarat into a Battlefield’ (*LiveMint*, August 27 2015), <<http://www.livemint.com/Politics/bYe8fFBsGvJNJXpUmo9M3L/Patel-agitation-turns-Gujarat-into-a-battlefield.html>> -----.

<sup>159</sup> Mugdha Variyar, ‘Gujarat Bandh: WhatsApp and Mobile Internet Suspended as Hardik Patel Rally Turns Violent’ (*International Business Times*, 26 August 2015) <<http://www.ibtimes.co.in/gujarat-bandh-whatsapp-mobile-internet-suspended-hardik-patel-rally-turns-violent-644221>> accessed -----.

<sup>160</sup> See, Express News Service, ‘Mobile Internet Ban Ends; Ahmedabad, Surat Last Out’ (*The Indian Express*, 2 September 2015) <<http://indianexpress.com/article/india/india-others/mobile-internet-ban-ends-ahmedabad-surat-last-out>> -----.

<sup>161</sup> *Gaurav Sureshbhai Vyas v State of Gujarat*, 2015 SCC OnLine Guj 6491.

<sup>162</sup> It is important to note that the structure of the petitioner’s arguments precluded the High Court from assessing any other potential applicable law governing Internet bans, like the Unified Access License between the State and the telecom companies or Section 5(2) of the Telegraph Act. See Nakul Nayak, ‘The Anatomy of Internet Shutdowns – I (Of Kill Switches and Legal Vacuums)’, (*Centre for Communication Governance Blog*, 29 August 2015) <<https://ccgnludelhi.wordpress.com/2015/08/29/the-anatomy-of-Internet-shutdowns-i-of-kill-switches-and-legal-vacuums/>>.

- i. The applicable law for an internet shutdown is Section 69A of the Information Technology Act, 2000 (“IT Act”) and not Section 144 of the CrPC which had been resorted to by the state government.
- ii. A total mobile phone internet ban is not narrowly tailored, as blocking only social media websites could have achieved the needed outcome.

The High Court’s judgment<sup>163</sup> was disappointing in its lack of reasoning and callous approach towards respecting fundamental rights. In response to the first argument, the Court held that the fields of operation of the two provisions were different. According to the Court, “Section 69A may in a given case also be exercised for blocking certain websites, whereas under Section 144 of the Code, directions may be issued to certain persons who may be the source for extending the facility of Internet access.”<sup>164</sup> The Court seemed to suggest that while Section 69A grants powers to the State to block access either to particular websites or the web as a whole, the powers under Section 144 only allow the Executive Magistrate to block access to the web entirely. But the Court does not explain why a reading of the broadly-worded Section 144 does not include disabling access to specific websites. As we have suggested earlier in this paper, both Section 69A of the IT Act and Section 144 of the CrPC empower the respective authorities to suspend access to the entire internet *or* to selectively block access to certain websites; and hence, Section 69A being a special law would totally exclude the applicability of S.144.

Further, the High Court’s response to the second argument pertaining to overbreadth reflects its conservative approach towards the right to free speech. The Court rejected the argument for two (shaky) reasons:

*“...one is that normally, it should be left to the authority to find out its own mechanism for controlling the situation and the second is that there are number of social media sites which may not be required to be blocked independently or completely. But if Internet access through mobiles is blocked by issuing directions to the mobile companies, such may possibly be more effective approach found by the competent authority.”<sup>165</sup> (emphasis supplied)*

The Court’s first reason is no reason at all. It is axiomatic that the District Magistrate has a wide discretion in choosing her course of action. But that is neither here nor there, for equally axiomatic is the rule that her decision

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<sup>163</sup> *ibid.*

<sup>164</sup> *Gaurav Sureshbhai Vyas v State of Gujarat*, 2015 SCC OnLine Guj 6491 [9].

<sup>165</sup> *Gaurav Sureshbhai Vyas v State of Gujarat*, 2015 SCC OnLine Guj 6491 [11].



must not be unconstitutional. The Court's second argument is essentially a strawman; it was nobody's case that instead of a total mobile internet shutdown, all social media websites should have been banned across mobile phone platforms as well as broadband connections. Indeed, the petitioner's argument had nothing to do with broadband connections. The limited contention was that even as far as mobile phone internet was concerned, there was no need to suspend all websites and only those websites could be suspended which posed a risk to public order. The Court does not consider whether it was warranted to ban non-communication websites such as news sites or e-commerce sites, disabling access to vital information and damaging business interests.<sup>166</sup>

The Court goes on to characterize the shutdown as "minimal" in nature by pointing out that "*access to Internet through broadband and wi-fi facility was permitted or rather was not blocked.*"<sup>167</sup> This betrays the Court's conservative attitude towards the freedom of speech and expression. Instead of finding the ban on mobile Internet as a complete prohibition of access to all smart phone users, the Court assures itself of narrowly tailored restrictions by highlighting the continued provision of broadband and Wi-Fi Internet access. In doing so, the Court settles for a comparatively speech-restrictive standard, almost treating the right to Internet access through mobile phones as a privilege. The corollary to the High Court's "minimal damage" reasoning, of course, is that if access to both mobile *and* broadband/Wi-Fi Internet is blocked, there may be grounds for unconstitutionality. The Court says so expressly.<sup>168</sup> However, this allowance had little concrete meaning in that case, and in any event overlooked the fact that mobile internet suspension disproportionately and adversely affects the poor.

In February 2016, Gaurav Vyas filed a special leave petition ("SLP") in the Supreme Court against the High Court's judgment.<sup>169</sup> However, a two-judge bench of the Supreme Court dismissed the SLP at the admission stage itself, thereby conferring finality on the High Court judgment.<sup>170</sup>

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<sup>166</sup> See generally, SFLC, Legality of Internet Shutdowns under Section 144 CrPC, (*Software Freedom Law Centre*, 10 February 2016), <<http://sflc.in/legality-of-Internet-shutdowns-under-section-144-crpc/>>. ---; Also see 'Gujarat Mobile Internet Ban: Business Takes a Hit' (*The Indian Express*, August 29 2015) <<http://indianexpress.com/article/cities/ahmedabad/mobile-Internet-ban-business-takes-a-hit-2/>> ----.

<sup>167</sup> *Gaurav Sureshbhai Vyas v State of Gujarat*, 2015 SCC OnLine Guj 6491 [11].

<sup>168</sup> *ibid.*

<sup>169</sup> *Gaurav Sureshbhai Vyas v State of Gujarat*, 2016 SCC OnLine SC 1866.

<sup>170</sup> 'Mobile Internet can be Banned under S. 144 CrPC, Says Supreme Court' (*Bar and Bench*, 11 February 2016) <<http://barandbench.com/mobile-Internet-can-be-banned-under-s-144-crpc-for-law-and-order-says-supreme-court/>>-----.

## B. Paojel Chaoba v. State of Manipur (Manipur High Court)

In 2018, widespread protests took place in Manipur seeking the suspension of the then Vice Chancellor of Manipur University on allegations of financial irregularities.<sup>171</sup> Several organizations mobilized support for the protests and agitations.<sup>172</sup> In light of the same, internet services were suspended across the State of Manipur for five days.<sup>173</sup> Within a month of resumption of internet services, they were again suspended for six days by a second order.<sup>174</sup> Paojel Chaoba, a journalist, challenged both suspension orders in the Manipur High Court.

When the second shutdown was in effect, the High Court passed the first preliminary order in the case, ordering the government to restore broadband and Wi-Fi internet facility services for the remainder of the shutdown.<sup>175</sup> Before passing a substantive order, the Court heard all parties and also took the expert guidance of a system analyst and a computer programmer who found it “technically feasible” to selectively block only certain internet applications “without disturbing the entire mobile internet as a whole”.<sup>176</sup> Accordingly, rejecting the state’s contention that mobile internet services were suspended in order to prevent misuse of social media networks such as Facebook, WhatsApp etc. on mobile phones, the Court observed that “*other applications of day to day use, such as Paytm etc., are also used widely by the citizens of this country*”,<sup>177</sup> thus implying overbreadth in the state’s measure.<sup>178</sup> Noting the vitality of internet services for human life, the Court also held that is an “*undeniable fact that mobile internet/data services have become a part and parcel of everyday life of the citizens of this country, irrespective of location and residence and as such, suspension of mobile*

<sup>171</sup> Prasanta Mazumdar, ‘Manipur University Vice Chancellor Placed under Suspension by President’ (*The New Indian Express* 18 September 2018) <<http://www.newindianexpress.com/nation/2018/sep/18/manipur-university-vice-chancellor-placed-under-suspension-by-president-1873884.html>> ----.

<sup>172</sup> *ibid.*

<sup>173</sup> ‘Manipur Suspends Internet Services for 5 Days over MUSU Strike’ (*India Today*, 21 June 2018) <<https://www.indiatoday.in/india/story/manipur-suspends-internet-services-for-5-days-over-musu-strike-1292293-2018-07-21>> ----.

<sup>174</sup> Trisha Jalan, ‘Internet Shutdown: Mobile Internet Suspended for 6 Days in Manipur’ (*MediaNama*, 24th September 2018) <<https://www.medianama.com/2018/09/223-internet-shutdown-6-days-manipur-university/>> ----.

<sup>175</sup> *Aribam Dhananjoy Sharma v State of Manipur*, PIL No. 47 of 2018, decided on 17th November 2018 (available at <[https://services.ecourts.gov.in/ecourtindiaHC/cases/display\\_pdf.php?filename=/orders/2018/203600000472018\\_4.pdf&caseno=PIL/47/2018&cCode=1&appFlag=>](https://services.ecourts.gov.in/ecourtindiaHC/cases/display_pdf.php?filename=/orders/2018/203600000472018_4.pdf&caseno=PIL/47/2018&cCode=1&appFlag=>)>.

<sup>176</sup> *ibid* [8].

<sup>177</sup> *Aribam Dhananjoy Sharma* (n 175).

<sup>178</sup> *ibid* [9].

*internet even for a day causes immense inconvenience apart from causing huge dislocation to everyday transactions being carried out by the individuals and organisations across the country*".<sup>179</sup> The Court called upon the Government of Manipur to give their opinion on blocking only such online applications like WhatsApp and Facebook and by not suspending mobile internet services in entirety.<sup>180</sup> Subsequently, however, since internet services were not suspended again, the petition was disposed of.<sup>181</sup>

### C. Banashree Gogoi v. Union of India & Ors. (Gauhati High Court)

In December 2019, in response to widespread protests against the Citizenship Amendment Bill, 2019 in the State of Assam, the state government suspended – through repeated notifications issued daily – mobile internet services across the state by invoking provisions of the Suspension Rules.<sup>182</sup> Several public interest petitions were filed against this shutdown. On 17<sup>th</sup> December, the Gauhati High Court noted that no incidents of violence had taken place in the past few days, and passed an order directing the state government to place on record "*the entire material that weighed with the respondents in continuing suspension of internet/mobile data service*".<sup>183</sup> The Court also directed the government to take a considered decision regarding restoring internet services considering the "*improvement in the situation*".<sup>184</sup>

Vide an affidavit dated 19 December, the state government responded by citing intelligence information and submitting that it had taken a considered decision to continue the shutdown.<sup>185</sup> A message from the Director of the Intelligence Bureau was also placed before the Court for its perusal. This message, in the Court's words, was "*in the nature of an advisory to alert the officers and to marshal their resources and ensure maintenance of law and order in their areas as intensification of protests is anticipated and the scale of protest programmes may increase in the days to come.*"<sup>186</sup> This general advisory was the sole reason stated in the government's affidavit for the continuance of the shutdown.

<sup>179</sup> Ibid [7].

<sup>180</sup> Ibid [110].

<sup>181</sup> *Aribam Dhananjay Sharma v State of Manipur*, PIL No. 47 of 2018, decided on 17th November 2018, available at <[https://services.ecourts.gov.in/ecourtindiaHC/cases/display\\_pdf.php?filename=rC8SUFuyEFsvB5V61cXUrJV8JyTXijQO1CjKgQ0nSu-h%2F9aivpB%2FkNE921cQeXhkc&caseno=PIL/47/2018&cCode=1&appFlag=>](https://services.ecourts.gov.in/ecourtindiaHC/cases/display_pdf.php?filename=rC8SUFuyEFsvB5V61cXUrJV8JyTXijQO1CjKgQ0nSu-h%2F9aivpB%2FkNE921cQeXhkc&caseno=PIL/47/2018&cCode=1&appFlag=>)>.

<sup>182</sup> *Banashree Gogoi v Union of India* 2019 SCC OnLine Gau 5584 [3].

<sup>183</sup> Ibid [4].

<sup>184</sup> Ibid.

<sup>185</sup> Ibid [5].

<sup>186</sup> Ibid.

In deciding the issue whether the continuance of internet shutdowns in the state was justified, the Court acknowledged the significance of the internet in everyday life by observing that its suspension “*virtually amounts to bringing life to a grinding halt*”.<sup>187</sup> Noting that internet shutdowns must be imposed only when necessary in the given circumstances, the Court held that the said necessity had not been shown by the State:

*“Very importantly, no material is placed by the State to demonstrate and satisfy this Court that there exists, as on date, disruptions on the life of the citizens of the State with incidents of violence or deteriorating law and order situation which would not permit relaxation of mobile internet services.”*<sup>188</sup>

The Court’s insistence on *contemporaneous* material is a progressive step. The Court noted that there had been a return to normalcy in the lives of the residents of the State since the day the internet shutdowns were imposed. Many sit-in protests were going on in the state but there had been no reports of violent incidents. These factors together led the Court to conclude that “*the period of acute public emergency which had necessitated suspension of mobile internet services*” had now diminished.<sup>189</sup> Therefore, the Court ordered the state government to “*restore the mobile internet services of all Mobile Service Providers in the State of Assam, commencing 1700 Hrs (5 P.M.) today i.e. 19.12.2019*”.<sup>190</sup>

This judgment is an example of tight and principled constitutional reasoning, one that should be emulated in the future. The Court applied the doctrine of proportionality in its truest sense by questioning the government’s statements about the need to continue the shutdown. By demanding material from the government, and by declaring that the nexus between the emergency and the restriction had snapped in view of recent events, the Court responsibly exercised its powers of review without adopting an unnecessarily deferential attitude to the government’s assessment of the situation.

#### D. Anuradha Bhasin v. Union of India (Supreme Court)

In August 2019, following the de-operationalization of Article 370 of the Indian Constitution and the consequent revocation of the special status earlier given to the State of Jammu & Kashmir, the central government suspended all modes of communication including internet, mobile and fixed

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<sup>187</sup> *ibid* [8].

<sup>188</sup> *ibid* [7].

<sup>189</sup> *ibid* [8].

<sup>190</sup> *ibid* [10].

line telecommunication services throughout the state.<sup>191</sup> This suspension was challenged in the Supreme Court. In October, the Court was informed by the government that mobile and landline services had more or less been restored in the state, thus rendering the petition moot to that extent.<sup>192</sup> However, internet services remained suspended. Consequently, the judgment extensively addressed the problem of internet shutdowns and their interplay with the freedom of speech.

### **i. A fundamental right to internet?**

The Court made it clear that it was not deciding the question as to whether there was a distinct, free-standing fundamental right to internet in Part III of the Constitution, because no such argument was made before it.<sup>193</sup> But it did answer a different question, i.e. whether the freedom of speech includes the freedom to communicate over the internet. “*There is no dispute*”, says the Court, “*that freedom of speech and expression includes the right to disseminate information to as wide a section of the population as is possible.*”<sup>194</sup> The Court notes the crucial role of technology and the internet in shaping everyday life in present times – both in terms of sharing information<sup>195</sup> and trade and commerce.<sup>196</sup> “*There is no gainsaying that in today’s world the internet stands as the most utilized and accessible medium for exchange of information.*”<sup>197</sup> Since the freedom of speech is protected over various media of expression,<sup>198</sup> and since the law must evolve with and adapt to technology,<sup>199</sup> the Court held that Article 19(1)(a) protects the right to speak and express through the medium of the internet.<sup>200</sup>

### **ii. Production of Suspension Orders in Court**

The petitioners before the Court were unable to produce the impugned internet shutdown orders passed under the Suspension Rules since the same were “*not available*”.<sup>201</sup> With candour, the respondent government admitted the

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<sup>191</sup> *Anuradha Bhasin* (n 11), [6].

<sup>192</sup> *ibid* [10].

<sup>193</sup> *ibid* [31]. It may be noted that the Kerala High Court has already answered this question in *Faheema Shirin R.K. v State of Kerala*, 2019 SCC OnLine Ker 2976 [15], holding the right to access the internet as part of the rights to education and privacy under Article 21 of the Constitution.

<sup>194</sup> *Anuradha Bhasin* (n 11), [28].

<sup>195</sup> *ibid*. [25].

<sup>196</sup> *ibid* [30].

<sup>197</sup> *ibid* [25].

<sup>198</sup> *ibid* [29].

<sup>199</sup> *ibid* [27].

<sup>200</sup> *ibid* [29].

<sup>201</sup> *ibid* [14].

unavailability of the orders.<sup>202</sup> Yet it did not produce the orders itself, “*citing difficulty in producing the numerous orders which were being withdrawn and modified on a day-to-day basis*”. Instead, the Government produced “*sample orders*” for the Court’s perusal.<sup>203</sup>

The Court held that for many reasons the government was obliged to place all orders on record. First, as held in *Ram Jethmalani*,<sup>204</sup> in order for the guarantee contained in Article 32 of the Constitution to be meaningful, it is essential that the petitioners are supplied the information they need to articulate their case effectively, “*especially where such information is in the possession of the State*”.<sup>205</sup> Second, the freedom of speech under Article 19(1) (a) also includes the right to receive information – a right crucial to a democracy that is “*sworn to transparency and accountability*” – which entitles the citizen to see the orders.<sup>206</sup> Third, even natural law requires that laws are not passed clandestinely.<sup>207</sup> Therefore, while the government could claim privilege in respect of sensitive matters in some cases, it must ordinarily take proactive steps to produce the orders which are challenged as violative of fundamental rights;<sup>208</sup> mere difficulty in production of orders, the Court held, is not a valid ground to refuse production.<sup>209</sup>

### iii. The Legal Framework

The Court noted the three different legal regimes which exist under the IT Act, the CrPC and the Telegraph Act.<sup>210</sup> First, giving “*cursory*” observations on Section 69A of the IT Act (which was not directly involved in this case), the Court held that the government cannot take recourse to this provision to “*restrict the internet generally*”, for the aim of this section is to “*block access to particular websites on the internet*”.<sup>211</sup> As suggested earlier in this paper,<sup>212</sup> this reading is not an obvious one and the wide language of Section 69A could be plausibly understood as conferring a wide power on the Central Government to direct a total internet shutdown.

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<sup>202</sup> *ibid* [15]

<sup>203</sup> *ibid*.

<sup>204</sup> *Ram Jethmalani v Union of India* (2011) 8 SCC 1.

<sup>205</sup> *ibid* [75].

<sup>206</sup> *Anuradha Bhasin* (n 11) [18].

<sup>207</sup> *ibid* [19].

<sup>208</sup> *ibid* [20].

<sup>209</sup> *ibid* [21].

<sup>210</sup> *ibid* [87].

<sup>211</sup> *ibid* [88].

<sup>212</sup> See text to note 62 onwards.

Next, noting that the position stands changed since 2017, as states now invoke the Suspension Rules to impose shutdowns,<sup>213</sup> the Court proceeded to discuss their width and scope. The Court read two safeguards into the provision in the process. First, interpreting the Suspension Rules in light of Section 5(2) of the Telegraph Act, the Court held that the existence of a “public emergency” is *sine qua non* for the invocation of the Rules.<sup>214</sup> Second, even though the Rules do not expressly mandate the publication of the orders passed thereunder, the Court read this requirement into the Rules by holding that all such orders must be “*made freely available... through some suitable mechanism.*”<sup>215</sup>

#### iv. Reasonableness of the Restriction

In addition to recounting the well-settled principles against which the reasonableness, proportionality and least intrusiveness of a restriction should be measured,<sup>216</sup> the Court acknowledged the serious security problems that have plagued the State of Jammu & Kashmir,<sup>217</sup> and also the fact that the internet is a ready tool for modern terrorism.<sup>218</sup> The ultimate question which would hence need to be answered in determining the validity of a restriction is “*whether there exists a clear and present danger*” that justifies the restriction.<sup>219</sup> Certain factors are useful in conducting this inquiry: “*the territorial extent of the restriction, the stage of emergency, nature of urgency, duration of such restrictive measure and nature of such restriction.*”<sup>220</sup> Applying these principles, the Court held that the government must analyse the precise “stage” of the public emergency before invoking the Suspension Rules. It is only in light of the stage of the emergency that the proportionality of the impugned measure can be ascertained.<sup>221</sup> Shutdown orders may be passed only when it is “*necessary*” and “*unavoidable*” to do so, i.e. when no “*less intrusive remedy*” exists.<sup>222</sup> Specifically, the State must explore the alternative of blocking access only to social media web sites rather than to the entire internet.<sup>223</sup>

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<sup>213</sup> *ibid* [91].

<sup>214</sup> *ibid* [100].

<sup>215</sup> *ibid* [104].

<sup>216</sup> *ibid* [34]-[37], [77].

<sup>217</sup> *ibid* [38].

<sup>218</sup> *ibid* [39].

<sup>219</sup> *ibid* [38].

<sup>220</sup> *ibid* [79].

<sup>221</sup> *ibid* [102].

<sup>222</sup> *ibid* [108].

<sup>223</sup> *ibid* [111].

Equally, shutdown orders under the Suspension Rules must have a specified duration. Holding that indefinite orders are simply “*impermissible*” and noting that the Suspension Rules do not specify the maximum time period for which a suspension order may be in operation, the Court recommended that the legislature fill this gap.<sup>224</sup> In the meanwhile, the Court laid down an important procedural safeguard: the Court directed the Review Committee constituted under the Rules to conduct a periodic review of the suspension order every seven days.<sup>225</sup> In conducting this review, the Committee had to not only check whether the suspension complied with the requirements contained in Section 5(2) the Telegraph Act, but also whether it was proportionate and necessary.<sup>226</sup>

## v. Relief Granted and Implications

In line with the above principles, the Court directed the government to: (i) publish all orders presently in force passed under Section 144 of the CrPC for suspension of telecom or internet services, and (ii) forthwith review all orders suspending internet or telecom services, revoking those contrary to this judgment. It is curious that despite the non-publication and non-production of the orders, the Court did not strike them down. Nevertheless, the Court instituted a strict and meaningful review mechanism, thereby filling up the lacunae in the Suspension Rules. This development should, therefore, be welcomed.

The judgment has practically not yielded results commensurate with its potential. *Anuradha Bhasin* was decided on 10 January 2020. It was almost two months later – on 4 March 2020 – that the people of Jammu & Kashmir first regained access to 2G internet.<sup>227</sup> Till date,<sup>228</sup> 4G internet has not been restored in the region. This is despite the fact that the country is facing the pandemic of COVID-19. To add to the misery, the Supreme Court delivered a highly unfortunate judgment on 11 May 2020 (discussed below), where, despite clear violations of *Anuradha Bhasin* having been pointed out by the Petitioners in that case, the Court refused to interfere with the government’s unconstitutional actions.

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<sup>224</sup> *ibid* [108]-[109].

<sup>225</sup> *ibid* [109].

<sup>226</sup> *ibid*.

<sup>227</sup> ‘Social Media Ban Lifted in J&K, can Access Internet on 2G’, (*India Today*, 4th March 2020) <<https://www.indiatoday.in/india/story/social-media-mobile-internet-access-2g-jammu-kashmir-1652376-2020-03-04>>.

<sup>228</sup> This paper was finalized on 15 May 2020.



## E. Foundation for Media Professionals v. UT of J&K (Supreme Court)

On 30 March 2020, a non-governmental organisation called Foundation for Media Professionals filed a public interest petition in the Supreme Court challenging the restriction of internet services in Jammu & Kashmir to 2G bandwidth.<sup>229</sup> The petition further prayed for a direction that 4G services be restored in the region with immediate effect.<sup>230</sup> Given the unique times in which the petition was filed, the grounds raised in the petition reflected various fundamental rights in addition to the freedom of speech, including the right to health,<sup>231</sup> education,<sup>232</sup> access to justice,<sup>233</sup> trade,<sup>234</sup> and livelihood.<sup>235</sup> Additionally, the petition raised the broad argument that the restriction on 4G internet is disproportionate given the special circumstances posed by COVID-19<sup>236</sup> and for breaching the imperative requirements of stating the material facts,<sup>237</sup> being the least intrusive measure<sup>238</sup> and being temporally limited<sup>239</sup> as laid down in *Anuradha Bhasin*.

### i. The Government's Response

The government of Jammu & Kashmir filed its counter-affidavit on 28 April 2020. Their case, in brief, was as follows: there exists no fundamental right to the internet, and the internet can hence be restricted as a medium of communication.<sup>240</sup> As far as proportionality is concerned, the region is engaged in a war against terrorism which warrants restrictions to be placed on the internet,<sup>241</sup> as there are chance that social media will be misused by terror groups.<sup>242</sup> There are also chances of fake news spreading through social media.<sup>243</sup> Despite this, restrictions are gradually being lifted in the state step-

<sup>229</sup> Memorandum of Writ Petition, *Foundation for Media Professionals v UT of J&K*, (2020) 5 SCC 746, <[https://drive.google.com/file/d/1u8T6zldNXlabjA0igdXObA55fyX2\\_4Bz/view](https://drive.google.com/file/d/1u8T6zldNXlabjA0igdXObA55fyX2_4Bz/view)>.

<sup>230</sup> *ibid*, 28, 32-33, 36, 57.

<sup>231</sup> *ibid*, 28.

<sup>232</sup> *ibid*, 37.

<sup>233</sup> *ibid*, 39.

<sup>234</sup> *ibid*, 38.

<sup>235</sup> *ibid*.

<sup>236</sup> *ibid*, 45.

<sup>237</sup> *ibid*, 52.

<sup>238</sup> *ibid*, 45-47.

<sup>239</sup> *ibid*, 49.

<sup>240</sup> Counter-Affidavit, *Foundation for Media Professionals v UT of J&K*, (2020) 5 SCC 746, 8 <[https://images.assettype.com/barandbench/2020-04/179854fd-1307-41a9-8169-e78c-ca9e726c/J\\_K\\_Govt\\_Reply\\_2G\\_Restriction\\_compressed.pdf](https://images.assettype.com/barandbench/2020-04/179854fd-1307-41a9-8169-e78c-ca9e726c/J_K_Govt_Reply_2G_Restriction_compressed.pdf)>.

<sup>241</sup> *ibid*, 9, 18.

<sup>242</sup> *ibid*, 11.

<sup>243</sup> *ibid*, 18.

by-step,<sup>244</sup> and the only present restriction on internet services is reduced speed for mobile internet<sup>245</sup> while fixed-line internet services remain available.<sup>246</sup> In addition, to avert any harm to people's health and education etc., they are being reached physically as well as through television, radio, and phone calls etc.<sup>247</sup>

## ii. Violation of settled law

The Court observed that the suspension order “*does not provide any reasons to reflect that all the districts of the Union Territory of Jammu and Kashmir require the imposition of such restrictions.*”<sup>248</sup> Despite this, blanket shutdown orders had been imposed throughout Jammu & Kashmir.<sup>249</sup> This is an implicit acknowledgement that the State did not abide by the law laid down in *Anuradha Bhasin* on two counts. *Anuradha Bhasin* had held, firstly, that internet shutdown orders passed under the Suspension Rules must contain reasons (as a legality requirement flowing from the text of Section 5 of the Telegraph Act),<sup>250</sup> and secondly, that in order to be narrowly tailored and least intrusive, the restrictions must be territorially limited.<sup>251</sup> Despite this clear acknowledgement, however, the Court did not declare the restrictions unconstitutional.

## iii. The Court's Abdication

Despite noting the above violations, the Court termed these violations on the one hand and the prevalent militancy in Jammu & Kashmir on the other as “competing considerations”.<sup>252</sup> It noted that the petitioners' contentions would merit consideration in “*normal circumstances*”.<sup>253</sup> But cross-border terrorism in Jammu & Kashmir amounts to a “*compelling*” circumstance, according to the Court, which “*cannot be ignored*”.<sup>254</sup> Further, the Court considered it relevant that the Government had been gradually lifting restrictions in the region and taking various steps to ensure that the rights of the people in context of COVID-19 are safeguarded.<sup>255</sup> For these reasons, the

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<sup>244</sup> *ibid*, 7.

<sup>245</sup> *ibid*, 9.

<sup>246</sup> *ibid*, 17.

<sup>247</sup> *ibid*, 20-24.

<sup>248</sup> *Foundation for Media Professionals v UT of J&K*, (2020) 5 SCC 746 [16].

<sup>249</sup> *ibid*, [18].

<sup>250</sup> *Anuradha Bhasin* (n 11) [102].

<sup>251</sup> *ibid* [78]-[79], [143].

<sup>252</sup> *Foundation for Media Professionals* (n 248) [16].

<sup>253</sup> *ibid* [19].

<sup>254</sup> *ibid*.

<sup>255</sup> *ibid* [20].

Court refused to interfere with the internet shutdown orders. However, in an apparent attempt to provide some remedy to those whose rights are continuously being affected, the Court directed a “Special Committee” comprising of the Union Home Secretary, the Union Communications Secretary, and the Chief Secretary of Jammu and Kashmir to “immediately” determine the necessity of the restrictions in place.<sup>256</sup> We submit that this judgment is problematic for at least four reasons.

*First*, the Court forgets that lawfulness and reasonableness are distinct requirements under Article 19(2), both of which must be independently satisfied by the restriction in question.<sup>257</sup> While the situation of militancy in Jammu & Kashmir might weigh heavily in judging the *proportionality* (reasonableness) of the internet shutdown, it has no relevance in determining the *legality* which must be judged solely with reference to the statute under which the orders have been issued. Hence, once the Court had acknowledged that the unreasoned suspension orders were illegal for being in contravention of Section 5(2) of the Telegraph Act and the corresponding legal principles laid down in *Anuradha Bhasin*, there was no question of balancing this illegality with the security risks plaguing Jammu & Kashmir, for the two are not “competing considerations”.<sup>258</sup> The suspension orders deserved to be struck down as unlawful without further discussion.

*Second*, *Anuradha Bhasin* is clear on the point that the State must consider less restrictive alternatives before resorting to a total shutdown.<sup>259</sup> Specifically, the State must apply its mind to the possibility of disrupting access only to specific websites rather than the entire internet.<sup>260</sup> It was hence imperative for the Court to demand justifications from the Government as to whether it considered allowing selective 4G access to websites that did not pose any threat to public order. Yet, this aspect is not dealt with anywhere in the judgment.

*Third*, as has been argued,<sup>261</sup> the Court’s approach amounts to abdication of the constitutional responsibility vested in it. Article 32 of the Constitution, under which the right to move the Supreme Court for redressal of rights

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<sup>256</sup> *ibid* [23].

<sup>257</sup> Constitution of India 1950, art 19(2).

<sup>258</sup> See Sarvjeet Singh, ‘Supreme Court’s Order on Kashmir Internet Shutdown: Judicial Abdication or Judicial Restraint?’ (*Times of India*, 12 May 2020) <<https://timesofindia.indiatimes.com/blogs/voices/supreme-courts-order-on-kashmir-internet-shutdown-judicial-abdication-or-judicial-restraint/>> accessed on 15 May 2020.

<sup>259</sup> *Anuradha Bhasin* (n 11) 77.

<sup>260</sup> *ibid* [111].

<sup>261</sup> Shrutanjaya Bhardwaj, ‘Supreme Court Verdict on 4G in Jammu and Kashmir Undermines the Rule of Law’ (*The Wire*, 14 May 2020) < May 2020.

violations is “guaranteed”,<sup>262</sup> has been held as implying that the Court has the role of a “sentinel on the *qui vive*” and a “solemn duty to protect... fundamental rights zealously and vigilantly”.<sup>263</sup> The Court does not even have the option to direct the petitioners before it to approach the relevant High Court,<sup>264</sup> let alone a committee comprising only of executive members.

*Fourth*, all three members of the Special Committee function under the control of the Central Government. Two of them (Union Home Secretary and the Chief Secretary of Jammu and Kashmir) were respondents before the Court in this very case. Directing all issues to be decided by a committee of this nature amounts to making the executive a judge in its own cause, thus breaching the principles of checks and balances as well as separation of powers that are central to the Indian Constitution.<sup>265</sup>

This problematic approach adopted by the Supreme Court demonstrates that rights adjudication is as much about judicial attitudes as it is about strong legal principles. The Court should have been stricter in its approach and taken the Government to task for its failure to abide by settled legal principles. Allowing the Government to get away with these violations undermines the rule of law. It sends the message that the security problems in Jammu & Kashmir are a license to overlook constitutional requirements.<sup>266</sup>

## VI. CONCLUSION: THE WAY AHEAD

This paper has attempted to sketch the legal and constitutional framework that governs internet shutdowns in India. We discussed the three-pronged test of Article 19(2) which requires that any restrictions on the freedom of speech be lawful, legitimate and reasonable. We elaborately discussed the meanings of these three concepts and how they would apply in context of internet shutdowns. We also saw examples from case law where Indian constitutional courts have applied these principles to concrete facts, some in more satisfying ways than others.

Two issues that would require further research can briefly be stated here. First, *Anuradha Bhasin* mandates periodic review of suspension orders issued under the Suspension Rules. An analysis of how this safeguard plays out in practice might be useful. Is the periodic review meaningful? Do the process

<sup>262</sup> Constitution of India 1950, art 32.

<sup>263</sup> *Prem Chand Garg v Excise Commr.*, AIR 1963 SC 996 : 1963 Supp (1) SCR 885 [2].

<sup>264</sup> See e.g. *Romesh Thappar v State of Madras*, AIR 1950 SC 124 : 1950 SCR 594 [3].

<sup>265</sup> *Bhardwaj* (n 261).

<sup>266</sup> *ibid.*

and the Committee's orders reflect due application of mind? Empirically, how often does the review committee declare the imposition or/and continuance of the shutdown illegal and unnecessary? Second, it is important to examine the options offered by technology in terms of narrowing censorship to only those websites, regions and communication platforms where it is necessary. The judgment in *Anuradha Bhasin* reveals that the Court had put a specific query to the Solicitor General as to the feasibility of blocking only social media websites, to which he had responded by saying that the same was not feasible.<sup>267</sup> On the other hand, when the Manipur High Court sought expert help in determining whether partial blocks were technologically possible, it was told that they are possible.<sup>268</sup> This is a technical question which concerns information technology, and is best answered through research by competent professionals from the field.

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<sup>267</sup> *Anuradha Bhasin* (n 11) [111].

<sup>268</sup> *Aribam Dhananjoy Sharma v State of Manipur*, PIL No. 47 of 2018, decided on 17th November 2018 <ode=1&cappFlag=>.