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THE LEGALITY OF INTERNET SHUTDOWNS IN A DEMOCRACY

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“Hand in hand with the freedom of speech goes the power to be heard, to share in the decisions of the government which shape men’s lives.”

Robert Kennedy

ABSTRACT

In the past few years, the use of the internet has surged drastically making it an indispensable part of our everyday lives. Even the simplest activities such as communication and entertainment are excessively dependent on the accessibility of internet services. It not only serves the purpose of connecting two computers in two different places of the world but is also now a platform to acquire information, conduct businesses and express one’s ideology, talent and criticism. However, in recent times, it has come to the wide attention that the internet shutdowns are imposed very rapidly in our country in the garb of public order and national security. The aim of this research article is to explicate the legality and constitutional validity of the recurring internet blockades in India. Moreover, it also endeavours to throw light on the consequences faced by the masses and the economy due to such shutdowns.

Keywords - Internet Shutdowns, Freedom of Speech, Public Order, Democratic Government, Fundamental Rights

INTRODUCTION

In this day and age, it is quite unimaginable to think of a world without the internet. It is often claimed that the internet serves a purpose like that of oxygen for the tech world. It bestows numerous advantages upon us and has undoubtedly made our lives much easier.

Accessing the internet furnishes the opportunity to exercise one’s freedom of speech and expression, freedom to associate and assemble online, right to livelihood and right to information among many other benefits. It also proves to be helpful for students who make use of the internet for online education and learning. In addition to this, it has also changed the transactions related to business and banking by introducing online shopping, online degrees and internet banking and so on.

In India, the number of internet users is rapidly increasing with each passing year. According to the report published by the Internet and Mobile Association of India, there were about 451

monthly active internet users in the year 2019, which is the second-largest population of internet users after China.¹

Albeit, the internet has now become an integral part of our everyday lives yet the freedom to access it is subject to government restrictions. Internet Shutdown simply means partial or absolute restrictions imposed by the government on the usage of internet or electronic communications, for a specific population or within a location, to avert the social conflicts or disturbances due to the overflow of misinformation or disinformation.²

Off late, it has come to the realisation that there have been quite a few instances of indiscriminate internet blockades by the Indian government under the façade of either national emergency or for the protection of national security. This has resulted not only in public inconvenience and restriction of individual rights but at times has also caused huge financial and commercial losses throughout the country.

This article aims to throw light on the constitutional validity and legality of the recurring and indiscriminate internet shutdowns by the Government of India and how they leave a deplorable impact on the individuals and the economy of the country.

NATIONAL LEGAL AND REGULATORY FRAMEWORK

Under the Constitution of India, Article 19 (1) (a) & (b) provide freedom of speech and expression and freedom to assemble respectively.³ Simultaneously, Article 19 (2) imposes reasonable restrictions on the abovementioned freedoms in the interest of public order, national security, incitement to offence and so on.⁴

Secondly, under the Indian Telegraph Act, 1885, S. 5 (1) empowers the State to temporarily take possession of the ‘telegraph’ established and maintained or worked on by any person authorised under the act, if there is a public emergency or in the interest of public safety.⁵ Similarly, S. 5 (2) empowers the State to detain or intercept messages.⁶

¹Internet Size and Penetration, Internet and Mobile Association of India, (Apr 20, 2020, 8:24 PM), <https://cms.iamai.in/Content/ResearchPapers/d3654bcc-002f-4fc7-ab39-e1fbeb00005d.pdf>

²The State of Internet Shutdowns around the world, Keep it on 2018 Report, (Apr 23, 2020, 2:01 PM), <https://www.accessnow.org/cms/assets/uploads/2019/07/KeepItOn-2018-Report.pdf>

³Indian Const, art. 19, cl. (1) (a) & (b)

⁴Indian Const, art 19, cl. (2)

⁵Indian Telegraph Act, 1885, S. 5 (1), (13 of 1885)

⁶Indian Telegraph Act, 1885, S. 5 (2), (13 of 1885)

In addition to this, S. 144 of the Code of Criminal Procedure, 1973 provides that the district magistrate or any other executive magistrate authorised by the state government is empowered to impose a temporary ban on internet connectivity. S. 144 can be invoked only if there is:

- a) A sufficient ground
- b) A requirement for speedy remedy and immediate prevention of a likely obstruction, annoyance, danger or injury to human life and safety or disturbance of the public tranquillity or riot or affray.⁷

It is important to note that the said provision is enacted to be invoked in urgent and life-threatening circumstances. However, the terms ‘likely’ and ‘tends’ used in the provision provide an opportunity for wider interpretation and exercising of arbitrary power by the concerned authorities even if the circumstances are not exactly dangerous enough. Another noteworthy lacuna is that the terms ‘obstruction’, ‘annoyance’, ‘riot’ or ‘affray’ u/S. 144 CrPC are incongruous with reasonable restrictions u/Article 19 (2), (3) and (4). This implies that the invocation of S. 144 CrPC for internet bans is certainly violative of the fundamental rights Under Article 19 (1) (a) & (b).

Moreover, S.69A (1) of the Information Technology Act, 2000 which is a more specific provision than S. 144 CrPC empowers the central government or any of its authorised officers to direct the Telecom and Internet Service Providers to block public access to any information generated, stored, etc. in any computer in the interest of protecting sovereignty and integrity of the country, the security of the state and public order, maintaining friendly relations with foreign states and preventing incitement to the commission of any cognizable offence.⁸

However, the said act nowhere mentions the extent to which the government authorities can interfere with the provision of public services to control the situation of unrest. It also does not specify how the TSPs and ISPs can claim compensation for the revenue loss during the internet shutdowns.

In 2017, Temporary Suspension of Telecom Services (Public Emergency and Public Safety) Rules were notified under S.7 of the Indian Telegraph Act, 1885.⁹ Under this, the secretary to the Home Ministry/Home Department is competent to issue an order of internet ban due to

⁷Code of Criminal Procedure, 1973, S. 144, (2 of 1974)

⁸Information Technology Act, 2000, S. 69A (1), (21 of 2000)

⁹Temporary Suspension of Telecom Services (Public Emergency and Public Safety) Rules, Aug 7, 2017, Ministry of Communications and Information Technology, (Apr 24, 2020, 10:20 PM), <https://dot.gov.in/sites/default/files/Suspension%20Rules.pdf>

public emergency or public safety. Further, in unavoidable circumstances, the order may also be issued by an officer of the rank of joint secretary to the Union or the State government or above. However, the joint secretary is required to obtain the confirmation of the suspension orders from the competent authority within 24 hours of the imposition of the shutdown.¹⁰

Nonetheless, the newly established Suspension rules bear several shortcomings that ought to be mentioned. Firstly, the rules serve no real purpose apart from formalizing the administration of internet shutdowns. The abovementioned rules derive their authority from the Indian Telegraph Act, 1885¹¹ but neither the parent act nor the suspension rules define the terms ‘public emergency’ or ‘public safety’ on the basis of which the internet services can be suspended. This dispenses wide powers at the hands of authorities to direct suspension of the internet anytime in the name of public order.

Secondly, the review mechanism mentioned under the rules is flawed as well. Albeit, the order of the competent authority regarding the internet suspension is to be forwarded to a review committee constituted by central or state government along with appropriate reasons¹² but the review committee is given five days to hold a meeting and find out if the orders of the competent authority regarding the internet suspension are in accordance with S.5 (2) of the Indian Telegraph Act, 1885.¹³ This implies that an invalid or illegal order of internet ban may exist for a period of five days causing inconvenience to the masses. Moreover, the committee has no authority to take suitable measures if the shutdown is found to be illegal.

IMPACT OF THE INTERNET SHUTDOWNS ON THE CITIZENS AND THE ECONOMY

Despite being an intrinsic necessity of our daily lives and working as a catalyst for economic activity, over the past few years, there has been an upsurge in the number of internet shutdowns across the country. According to the data published by the internet shutdown tracker, in India

¹⁰Temporary Suspension of Telecom Services (Public Emergency and Public Safety), 2017, Rules, Rule 2, cl.1

¹¹Supra note 12

¹²Temporary Suspension of Telecom Services (Public Emergency and Public Safety) Rules, 2017, Rule 2, cl.2

¹³Temporary Suspension of Telecom Services (Public Emergency and Public Safety) Rules, 2017, Rule 6

the number of times the Internet was shutdown was 106 in the year 2019 and 134 in the year 2018.¹⁴

With the increasing usage of social media platforms, democratic participation by the masses became easier. Thus, the ban on internet services violates citizens' freedom of speech and expression as they are unable to express their views and disseminate valuable information regarding government policies and other political and social developments. This also proves to be detrimental for the students as they are denied access to online educational resources.

Although, most of the internet shutdowns are imposed in the name of public order and security yet people find it difficult to communicate with their friends and family and assure their well being in times of emergency. This also increases the chances of health emergencies as it interrupts access to medical services through telecom. Suspension of internet services not only causes inconvenience to the masses but also has a grave impact on the economy of the affected area. Businessmen who operate their entire businesses over the internet are unable to carry on their work and suffer huge losses.

After the abrogation of Article 370 of the Constitution of India in Jammu & Kashmir that entitled a special status to the state, internet services were suspended for a period of 7 months – the longest on record in any democracy. This prolonged internet blockade took a toll on the economic condition of the state and its citizens. Reports state that businesses in the valley have suffered a loss of almost Rs 18,000 crore since the internet suspension and more than 5 lacs people have lost their jobs.¹⁵

In **Anuradha Bhasin v. Union of India and Ors.**¹⁶ the Supreme Court of India has declared that access to the internet is an integral part of the right to freedom of speech and expression u/article 19(1)(a) of the Constitution of India. It further ruled that the communications restriction imposed by the central government in Jammu & Kashmir needs to be reviewed and that any suspension of internet services for an indefinite period would be subject to judicial scrutiny. The above-mentioned judgment is built upon the judgment delivered in the case of **Faheema Shirin v. State of Kerela**¹⁷ wherein the Kerela High Court has declared the right to

¹⁴Internet Shutdowns, Software Freedom Law Centre, India (Apr 25, 2020, 8:29 PM), <https://internetsutdowns.in/>

¹⁵Abid Bashir Wani, Communication Blockade in Kashmir, Citizen Matters, (Apr 27, 2020, 4:19 PM), <https://citizenmatters.in/kashmir-business-impact-internet-suspended-post-article-370-15069>

¹⁶Writ Petition (Civil) no. 1031 of 2019, SC, Ghulam Nabi Azad v. Union of India and Anr. (Writ Petition (Civil) no 1164 of 2019, SC)

¹⁷ 2019(2) KHC 220

internet access as a fundamental right and the part of right to privacy and right to education under Article 21 of the Constitution of India. Further, the United Nations has also condemned the indiscriminate and indefinite internet suspension in the region¹⁸ stating that it violates Article 19 of the Universal Declaration of Human Rights which guarantees everyone a right to freedom of expression.¹⁹ In 2016, UNHRC adopted a resolution which states that “the same human rights that people have offline must be protected online.”²⁰

CONCLUSION

The balance between state power and the rights of citizens is a symbol of democracy. There is no doubt that a democratic government ought to take all the necessary measures in order to protect national security and public tranquillity. However, this in no way implies that such measures should violate the fundamental rights of the citizens. Internet blockades not only infringe the basic rights of humans but also have adverse and far-reaching economic and social implications.

There is an urgent need to devise alternative ways of making emergency services accessible to the people during times of disruption. Secondly, the laws governing the internet shutdowns need to be made more transparent and should be modified in accordance with the fundamental rights mentioned under the Constitution of India. Lastly, the telecom and internet services operators should also be compensated for the loss incurred by them during the period of internet shutdowns.

¹⁸Bansari Kamdar, Democracy in Digital Darkness: Internet Shutdowns, New Indian Normal?, The Diplomat, (Apr 27, 2020, 11:01 PM), <https://thediplomat.com/2019/12/democracy-in-digital-darkness-internet-shutdowns-new-indian-normal/>

¹⁹Universal Declaration of Human Rights, art 19, (Apr 27, 2020, 11:06 PM), https://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf

²⁰The Promotion, Protection and Enjoyment of Human Rights on the Internet, 32nd Session, Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development, United Nations General Assembly, (A/HRC/32/L.20), (Apr 27, 2020, 11:17 PM), file:///C:/Users/GMR/Downloads/A_HRC_32_L-20-EN.pdf