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INDIA UNPLUGGED

AS THE COUNTRY GRAPPLES WITH THE DUAL REALITIES OF DIGITAL INDIA AND BEING THE 'INTERNET SHUTDOWN CAPITAL OF THE WORLD', **AMAR SUNDRAM** ANALYSES A RECENT SUPREME COURT JUDGMENT CHALLENGING BLACKOUT ACTIONS IN KASHMIR

The Narendra Modi government has repeatedly emphasized the need for furthering the ease of doing business for India's business community. The efforts have yielded results as the latest Doing Business Report, 2020, released by the World Bank in October 2019, has India ranked 63rd out of 190 countries.

One of the key ways, as stated in the Digital India mission, is to let citizens and businesses apply for licences, certificates and permits online rather than visiting government offices. Digital India was launched in mid-2015 with much fanfare, and an ambitious goal of creating a digitally empowered society and knowledge economy.

While there has been a push to move government services online, the internet was shut down by authorities 106 times in 2019, citing public order concerns. A leading newspaper in India published an article in December 2019 headlined: "India is the internet shutdown capital of the world".

The impact on businesses has been felt, with a 2018 report by the Indian Council for Research on International Economic Relations estimating that, between 2012 and 2017, India lost about US\$3 billion due to mobile internet and broadband shutdowns. Similarly, a telecom industry association representative estimated that the losses had increased to ₹24.5 million (US\$340,000) per hour as at the end of 2019.

On the other hand, the e-commerce market in India is expected to grow to US\$200 billion by 2026, making it the fastest and most exciting channel for commercial transactions. One of the big push factors for the wide penetration of e-commerce is Digital India and the wide penetration of internet services in remote areas. Life today without the internet would be almost unthinkable. Not only are sectors like banking, tourism, education, healthcare, travel and online food services heavily



dependent on internet services, but socially our daily lives are increasingly linked to the internet.

This brings us to a problem – on the one hand there is a need to have internet services for the people and the development of the economy, while, on the other hand, there are frequent curbs on internet services impacting social and economic life.

Should we allow our use of internet services to be constrained? Is a curb on my right to use the internet a curb on my right to freedom of expression, which is enshrined in the constitution of India as a fundamental right? This article analyses what the Supreme Court had to say on the matter when it was recently given the opportunity to extensively deal with this subject.

In the case of *Anuradha Bhasin v Union of India*, the Supreme Court dealt with the matter of an internet shutdown in Jammu and Kashmir. Curbs on the internet have been most severe in Jammu and Kashmir, where a communication blackout has been imposed since August 2019 after the government abolished article 370 of the constitution and revoked the territory's constitutional autonomy.

The petitioners, Anuradha Bhasin, executive editor of the Kashmir Times, and opposition leader Ghulam Nabi Azad, approached the court seeking an order that would restore access to internet, mobile and fixed line communications in the region.

ANALYSIS OF THE JUDGMENT

The judgment observed that liberty and security have always been at loggerheads, taking into account Kashmir's history of militancy and violence. The court said a meaningful answer needed to be provided so that citizens had adequate security and sufficient liberty.

The court held that the law should absorb technological developments and accordingly mould rules to cater to the needs of society – not recognizing the role of technology within the sphere of

law is only a disservice. It categorically held that expression through the internet has gained contemporary relevance and is one of the major means of information diffusion. It also recognized the internet as a very important tool for trade and commerce, adding: "The freedom of trade and commerce through the medium of internet is also constitutionally protected under article 19(1)(g) [of the constitution], subject to the restrictions provided under article 19(6)."

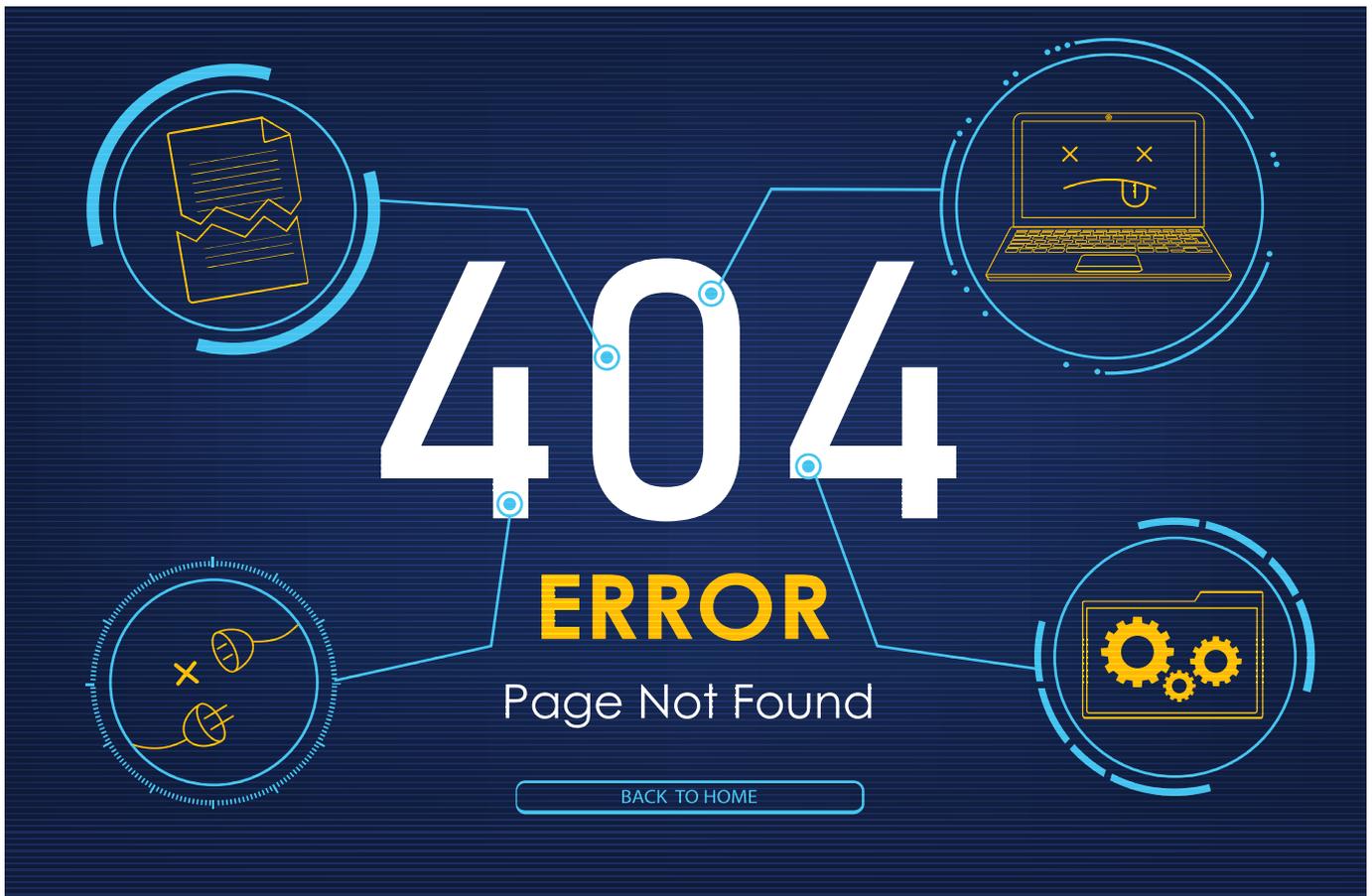
The court declared that freedom of speech and expression, and the freedom to practise any profession or carry on any trade, business or occupation over the medium of the internet, enjoys constitutional protection under article 19(1)(a) and article 19(1)(g). It added that the restrictions on such fundamental rights should be in consonance with the mandate under article 19(2) and (6) of the constitution.

However, it pointed out that fundamental rights guaranteed by article 19(1) were not absolute, and these rights have certain exceptions that empower the state to impose reasonable restrictions in appropriate cases. The caveats of article 19(2) are that: (1) the action must be sanctioned by law; (2) the proposed action must be a reasonable restriction; and (3) such restriction must be in furtherance of interests of the sovereignty and integrity of India, the security of the state, friendly relations with foreign states, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.

While the court agreed that the internet could be used to propagate terrorism, it rejected the argument of the government that, since there is no technology to ban selective usage of the internet, internet services need to be curbed entirely. The court said if such a contention was accepted, then the government would have a free pass to issue a complete ban every time: "Such complete blocking/prohibition perpetually cannot be accepted by this court."

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Information Technology Act, 2000 (IT Act), the Criminal Procedure Code, 1973 (CRPC), and the Telegraph Act, 1885. Section 69A of the IT Act read with the Information Technology (Procedures and Safeguards for Blocking for Access of Information by Public) Rules, 2009, does allow for the blocking of access to information. Section 69A of the IT Act gives power to the central government, or any of its officers specially authorized by it, to direct any agency of the government or intermediary to block access by the public, or cause to be blocked, any information generated, transmitted, received, stored or hosted in any computer.

The Supreme Court in the *Anuradha Bhasin* case, while making reference to section 69A, held that: “The aim of the section is not to restrict/block the internet as a whole, but only to block access to particular websites on the internet. Recourse cannot, therefore, be made by the government to restrict the internet generally under this section.”

CHAIN OF COMMAND

The government in 2017 laid down, under section 7 of the Telegraph Act, an important rule to regulate the temporary suspension of telecom services due to public emergency or public safety, and called these rules the Temporary Suspension of Telecom Services (Public Emergency or Public Safety) Rules, 2017, which came into effect from 7 August 2017.

Rule 2(1) of the suspension rules categorically stated who could order the suspension of the telecoms services and what would happen in case of any emergent unavoidable circumstances. It provided that the direction to suspend telecoms services shall be issued by way of an order to be made: (1) in the case of a central government, by the secretary to the government of India in the Ministry of Home Affairs; or (2) in the case of a state government, by the secretary to the state government in charge of the home department.

Both above-mentioned authorities were referred to as the “competent authority” under the suspension rules.



Rule 2(2) provides that any order issued by the competent authority under sub-rule (1) shall contain reasons for such direction, and a copy of such order shall be forwarded to the concerned review committee at the latest by the next working day. A look at the composition of the review committee reflects the seriousness of such orders of suspension.

In the case of a central government, the review committee shall consist of a chairman (cabinet secretary) and two members who shall be the secretary to the government of India in charge of legal affairs, and secretary to the government for the department of telecommunications. In the case of a state government, the review committee shall consist of a chairman (chief secretary) and two

members who shall be a secretary of law or legal remembrancer in charge of legal affairs, and secretary to the state government (other than the home secretary).

Rule 2(6) provides that the review committee shall meet within five working days of the issue of directions for suspension of services due to public emergency or public safety, and record its findings of whether the directions issued under sub-rule (1) are in accordance with the provisions of sub-section (2) of section 5 of the Telegraph Act. Section 5(2) of the act deals with the power of the government to take possession of licensed telegraphs and to order the interception of messages. The prerequisite for an order to be passed under section 5, and therefore the suspension rules, is the occurrence of a “public emergency”, or for it to be “in the interest of public safety”.

SMART THINKING?

RACHIKA SAHAY AND AAKASH SHARMA ARGUE THAT IMPOSING REGULAR SHUTDOWNS OF THE INTERNET SIGNIFICANTLY IMPACTS THE DAY-TO-DAY LIFE OF ORDINARY PEOPLE IN A DIGITALLY CONNECTED SOCIETY

The Smart Cities Mission was launched by the government in 2015, with an aim to develop infrastructure in cities qualified to support digitization and IT connectivity plans for ordinary civic life. According to the 2011 census, cities accommodate nearly 31% of India's population and contribute to 63% of GDP.

These figures are predicted to rise further as urban areas are expected to house 40% of India's population and contribute to 75% of GDP by 2030. In order to sustain this growth, comprehensive advancement of physical, institutional, social and economic infrastructure is required.

While the mission included only 100 cities initially, the government, buoyed by the success of their efforts in the past four years, announced plans to expand the mission to 4,000 cities around the country. This mission, coupled with the Digital India initiative of the government, signifies a forward-looking perspective that is bound to reap benefits for society and the economy. Though the significance of the mission for the country's

urban future is obvious, less known is the key role that the internet and technology plays in its execution.

With the motto of people first, smart cities rely heavily on fast-paced internet to put in place a holistic ecosystem to cope with urban challenges by providing basic wellness and easy access to public resources. Fast-paced internet helps track usage trends and gain insights into urban living, allowing governing bodies to enable effective e-governance.

Strikingly, it is the integrated command and control centre (ICCC) that forms one of the indispensable cogs of the mission. This is because it symbolizes the brain of the mission, responsible for delivering an efficient response following information gathering undertaken by diverse systems within the ambit of the ICCC. An effective functioning of the ICCC in any smart city results in better traffic management, lower crime rates, higher levels of sanitation, briefer disruptions to civic services like power and water, and a reduction in response time for crisis management.

INTERNET PARADOX

Furthermore, via a tweet dated 4 December 2019, the mission has conveyed its intention for the widespread engagement of 4G technologies such as drones and blockchain in smart cities throughout India, as it will help create solutions for traffic, sanitation and security. The successful implementation of such programmes requires a seamless supply chain including both logistics and manpower.

However, paradoxically, we witnessed the antithesis of the mission's values in events that unfolded in the union territory of Jammu and Kashmir, with a complete internet shutdown. Taking cognizance of the shutdown and applying the rule of proportionality in order to restore justice, the Supreme Court, in the case of *Anuradha Bhasin v Union of India*, observed: “We think it necessary to reiterate that complete broad suspension of telecom services, be it the internet or otherwise, being a drastic measure, must be considered by the state only if ‘necessary’ and ‘unavoidable.’”

SOME RESPITE

While the Supreme Court did not reverse the suspension orders of the government, it offered respite on some points. The court noticed the gap in the usage of the word “temporary” in the title of the suspension rules. The court held that despite the word “temporary”, there was no indication of the maximum duration for which a suspension order can be in operation. It held that in view of the rationale behind proportionality, an order suspending the telecoms services indefinitely is impermissible.

The court suggested some procedural safeguards until the above gap is corrected through appropriate legislation. It accordingly directed that the review committee constituted under rule 2(5) of the suspension rules must conduct a periodic review within

seven working days of the previous review. It required the review committee to look into whether the restrictions were in compliance with the requirements of section 5(2) of the Telegraph Act, and whether they were still proportionate.

With regard to orders under section 144 of the CRPC, which relate to unlawful assembly and suspension of telecoms services, the court left the door open for them to be challenged in high courts by aggrieved persons. It directed central and state governments to publish all current and future orders for this purpose. The government’s counsel had cited difficulty in producing the suspension orders, and the court said this reason was not a valid one.

The three components of the government’s ambitious Digital India programme are: (1) universal digital literacy; (2) delivering all

The Supreme Court was of the opinion that an order suspending the internet services indefinitely was impermissible. Consequently, the government, in January 2020, unblocked 301 approved websites in the region and permitted the use of 2G mobile data, thereby bringing a tentative end to the world’s longest internet shutdown witnessed in a democracy.

The twofold procedural mechanism – contractual and statutory, required to be undertaken by the government in order to restrict the internet in a given area, was also opined by the Supreme Court in its recent ruling.

Alarming, the Software Freedom Law Centre – a Delhi-based not-for-profit, which tracks internet shutdowns nationally – found that there were 240 reported internet shutdowns in the years 2018 and 2019. Such internet shutdowns have been witnessed not just in Jammu and Kashmir, but unfortunately across India, with similar suspension orders being passed in states such as Uttar Pradesh, Karnataka and Gujarat.

While the Supreme Court declared the internet shutdown in Jammu and Kashmir to be intrusive and indeterminate, the Karnataka High Court vehemently termed the internet shutdown in Bengaluru as “illegal and unsustainable”.

On that account, the ruling of the Supreme Court has far-reaching social consequences for the democratic spirit of India. Even though neither of the counsel in the case argued for declaring the right to internet access as a fundamental right, the Supreme Court proactively declared that right to freedom of speech and expression, as well as the right to carry on any trade or business using the medium of the internet as constitutionally protected under article 19(1)(a) and 19(1)(g) of the constitution, respectively.

STRIVING FOR BALANCE

It can only be an equilibrium between the ideals of liberty and the necessity of security that can help assist in evolving a society where the rule of proportionality is appreciated. Embodying a lighthouse in this respect, the judiciary has upheld an internet shutdown that was reasonably administered for a brief period on one hand, but denounced erratic and long-standing shutdowns on the other.

In this dynamic age of frequent innovation and progression, a fast-paced internet forms a quintessential aspect of the mission as it enables optimum access and utilization of public resources such as

transport, water, power, waste collection and efficient maintenance of public areas.

The objective is to lend a spotlight to cities that provide core infrastructure, warrant an optimal quality of life to its citizens, offer a clean and sustainable environment, and most significantly, an application of “smart” solutions.

On the flip side, regular curtailment of internet services would render the progression being made towards fulfilment of the aim of having smart cities redundant. While smart cities would make accessing, transforming and utilizing data easy in real time, the heavy dependence on a complex internet-driven system could significantly impact the day-to-day life of the common man, if it were to be brought to an abrupt halt time and again.

It has become imperative for the government to revisit the drawing board and align the measures taken by it to maintain security and harmony in the country with coveted and highly applauded initiatives such as the mission.

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Content developers, web designers, photographers, and sales and marketing professionals are all dependent on e-commerce, which in turn is heavily dependent on continuous uninterrupted internet services. The internet has also organized many hitherto unorganized sectors like cab services and other technology aggregators. Frequent bans on internet services, therefore, create a roadblock to the digital growth and ambitions of India

government services to citizens digitally; and (3) development of a secure and stable digital infrastructure. Various schemes including BharatNet, Bharatmala, Startup India, Standup India, Make in India, Sagarmala, industrial corridors, UDAN-RCS, dedicated freight corridors and E-Kranti are all interconnected with Digital India.

Further, the growth of e-commerce and technology-based sectors are creating a new job ecosystem in India. The nation is already seeing tremendous employment opportunities in the e-commerce retail segment, with the emergence of Indian and international companies such as Amazon, Flipkart, Paytm, Google Pay and MakeMyTrip that are providing market linkage platforms to small and medium-sized entrepreneurs, as well to logistics sectors including drivers, delivery boys and warehouse assistants.

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The Supreme Court quoted the lines of British judge Lord Diplock: “You must not use a steam hammer to crack a nut, if a nutcracker will do.” Hence, the need for the government is to find a solution to deal with law and order situations and terrorism, rather than resort to frequently banning internet services for long periods of time.

The clear finding of the Supreme Court in the Anuradha Bhasin case was that a complete broad suspension of telecom services, be it the internet or otherwise, being a drastic measure, must be considered by the state only if “necessary” and “unavoidable”. This will go a long way to protecting the rights of citizens in exercising their fundamental right to carry on any trade or business using the internet.

Any order suspending the internet must adhere to the principle of proportionality, and must not extend beyond necessary

duration. On the test of proportionality, the court said the purpose of imposing restrictions must be legitimate, take into consideration alternative mechanisms, and be of a least restrictive nature.

The court in this case accordingly directed the state or concerned authorities to consider allowing government websites, localized/limited e-banking facilities, hospital services and other essential services in those regions where internet services are unlikely to be restored immediately.

The Supreme Court has on many occasions intervened to interpret the constitutional provisions in a manner that is in line with modern development – be it declaring the right to privacy a fundamental right (Puttaswamy judgment) or decriminalizing homosexual sex (*Navtej Singh Johar v Union of India*), or as recently as 17 February, when it ruled in favour of equal rights in the armed forces, ordering the government to grant permanent commission and command positions to women officers on a par with men.

None of the counsel in the Anuradha Bhasin case argued for declaring the right to access the internet as a fundamental right. Neither did the counsel challenge the constitutionality of the suspension rules, and hence the Supreme Court did not rule on these two important points.

But some day, as technology further develops, the author looks forward to the Supreme Court developing laws around these two critical points – of course after balancing between the proportionality and reasonability of the situation in each case. ▲

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