

INTERNET SHUTDOWNS PLAGUE AND PARALYZE RIGHT OF THE CITIZENS- THE INDIAN SCENARIO

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ABSTRACT

There is a lack of clarity on the issue of internet rights in domestic as well as international legal systems. The rapid advancement in technology and the pivotal role internet has in today's world necessitates a conclusive determination to yield a mechanism for regulation, administration, and restriction. Unless defined, Internet continues to be an undefined space where the State enjoys unrestrained freedom to impose restrictions. Indian democracy is the largest democracy of the world and at the same time it has a highly developed IT sector. It is imperative for India to balance the two and instances have been there where judiciary was posed with such questions. Thus, determination of legal character is important to avoid confusion and curtailment of what might as well be protected under the constitution. Even if there's a protective cover, it's invisible yet and needs to be exposed.

Democratic setup makes a strong case in favor of internet rights and so does the chapter three of the Indian Constitution. It's however a matter of interpretation, both judicial and legislative intervention whether a separate right might be carved out or the right may well be found in the already existing edifice of Indian Constitution. Internet as a medium of communication, expression and as a source of earning livelihood seems to be very well within the fundamental rights but how far can the purport be extended to include it and what might be the conditions of such inclusion is a matter of debate. Validity and invalidity of internet bans is another issue which relies heavily on such determination and which can't be decided unless the very genesis of Internet Rights is settled in law.

INTRODUCTION

Before deliberating on the constitutional rights within which the Right to Internet can be accommodated, it is important to highlight a link that exists between Internet and the Democracy itself. While integrating a right within the constitutional framework is an upheaval task, and has to be analyzed with its pros and cons, an undeniable link has emerged in the recent years between democracy and Internet. The entire edifice of democracy rests on people, its they who wield power and not the State, it only serves their interests. Democracy should, at all levels reflect participation, followed by agreement or disagreement and thus, special importance may be attached to the genesis of participation. People can participate only when they have information, when there is a flow of idea, of course the flow can't be unrestricted, it has to be subject to limitations but the restrictions shouldn't defeat the essence of information in a democracy. Internet access is that it is inextricably intertwined with the basic capability to participate effectively in political choices and to practice free speech and association. Access can be constrained without damaging the rest. This is where democracy and dictatorship diverge apart, in the latter subjects are uninformed, they are kept in ignorance and hence, there is no participation. Democracy grows and flourishes through ideas. Internet is good for democracy.¹ It is opinions that set democratic setup in motion, else it is a carcass. Thus, the information and its mediums are to be secured for the successful functioning of a democracy. Information alone can't be guaranteed if access to its media is denied, that shall be a superficial and deceptive grant. Internet is crucial in the synthesis of ideas, opinions which are crucial to the functioning of a democracy. The fast and easy access to information on internet also facilitates public reactions which are feedbacks to the democratic set-up. The expression of dissent, disagreement and condemnation of exploitation is eased by access to internet. The Internet helps protect against human rights violations. Internet has redefined the public sphere as envisaged by Habermas and has in fact emerged as a habitat for public opinion to develop, thus the root of participation can be found in the soils of internet. Jurgen Habermas defines the public sphere as "a network for communicating information and points of view. Jurgen Habermas defines the public sphere as *"a network for communicating information and points of view. Internet is the new and most popular interface for mass media or press what is referred to as a pillar of democracy and the importance of media in a democracy can't be disputed. In his 1922 book, Public Opinion, American writer Walter Lippman asserted that the mass media plays a significant role in its formation. Lippman notes*

that in order for propaganda to be created, “there must be a barrier between the public and the event.” By enabling horizontal communication to an unparalleled extent, the Internet removes many of these barriers, facilitating the development of more objective public opinions, freer public discourse, and a less pliable electorate.

A. Right to freedom of speech and expression

The right to internet is most closely supported by the right to freedom of speech and expression. Internet has emerged as a platform for wide and effective transmission of ideas, sharing of opinions and discussions on events, it is a medium for exercising this right. The debate about the right to freedom of speech and expression began with the recognition of the value of free speech. Almost 400 years to the poet John Milton in the *Areopagitica*,ⁱⁱ argued passionately (and floridly) against limitations on the freedom of the press, while making one of the first cogent arguments for freedom of expression to be found in English literature. He claimed that free speech was valuable as a means for finding the truth, “a perfect shape most glorious to look on. “Two hundred years later, John Stuart Mill adopted Milton’s argument and took it a step further. In *On Liberty*ⁱⁱⁱ he asserted that we cannot be certain that suppressed speech does not in fact contain the truth. To suppress speech is to assume we have complete knowledge of the truth, and do not need to hear what is being suppressed. Mill then added a dynamic element to the argument, asserting that even though the speech we suppress may be generally false, it may yet contain some kernel of truth. Emerson derived four “*broad categories*” of values that underlie protection of free expression: The values sought by society in protecting the right to freedom of expression may be grouped into four broad categories. Maintenance of a system of free expression is necessary (1) as a means of assuring individual self-development, (2) as a means of attaining the truth, (3) as a method of securing participation by the members of society in social, including political, decision making, and (4) as a means of maintaining the balance between stability and change in the society.^{iv} This what is significant in the right to freedom of speech and expression is the object, the reason why the right came forth and not the medium through which it is exercised. The pursuit of truth, its clash with falsehood and the discourse which entails progress is possible only when man is free to express, respective of the medium, his views, opinions and ideas. On the relation between Internet and the Freedom of Speech and Expression, Directive 2002/22 of the European Parliament and the Council known as Universal service Directive reported; Internet is a “*key means*”, “*a catalyst*” and “*an important tool*” for the enjoyment of right to

freedom of expression and opinion as well as a “*facilitator*” for the realization of range of other human rights. French Court has ruled the Right to Access internet as being inclusive in the freedom of speech and expression. The Conseil Constitutionnel concluded: In the Current State of the means of communication and given the generalized development of public online communication services and the importance of the latter for the participation in democracy and the expression of ideas and opinions, this right (free communication of ideas and opinions) implies freedom to access such services.^vThe European Parliament conceived of Internet as a “key instrument” for exercising freedom of speech and expression, one that gives “full meaning” to this freedom, particularly in light of its “regardless of frontiers” dimension.

Jurisprudential analysis of the right-

- a) ***Living Document Theory***: Human life is in a constant evolution. The needs, interests and requirements of existence can't be static. From food, clothing and shelter, the concept of basic entitlements underwent a sea change. The concept of a dignified existence is no longer restricted to a state of being able to eat, in fact the scope has enlarged to include divergent paradigms of sustenance including work, health, education. This means that the rights as envisaged by the law-makers are never supposed to be static but are flexible enough to accommodate the changing notions of the object theory seek to achieve. Right to Life would earlier imply only right to food and shelter but now, it is interpreted to include all the conditions as are considered essential for the life nowadays. Rights can't be restricted in scope and purport only to their strict literal meanings, they have to be interpreted subject to the evolutionary tendencies of the individual which is their subject. This evolutionary interpretation has been judicially recognized, where it was held that meaning of treaties etc. is capable of evolving, not once fixed and for all, so as to make allowance for, among other things, developments in international law.^{vi}The Constitution being a living document, has been envisaged by the makers as an organic document, with evolving paradigms and aspects. Jefferson quoted, “As human mind becomes more developed, enlightened, as new discoveries are made, new truths discovered and manners and opinions change, with the change of circumstances, institutions must advance to keep pace with the times. “The living document is not only a premise for discussion but an interpretative rule. It implies that in the working of the constitution, there has to be flexibility of interpretation. In the case *Express Newspapers v Union of India*^{vii}, it was held that the right to freedom of speech and expression included

the freedom of press implying thereby that the right was interpreted to include the media of expression and speech. The right was not restricted to mean physical speech and expression but it was envisaged to be interpreted to include all media of expression and undeniably, Internet is the most potential source of expression nowadays.

- b) **Original Meaning:** There is a consensus among the legal theorists that provisions of the constitution are to be understood in the backdrop of original intent of the drafters. Originalists argue that Constitution had an objectively identifiable or public meaning at the time of founding, which has to be apprehended and appreciated. Some prominent scholars like Robert Bork has identified that in interpreting the constitution one should look for original object of the people who drafted, proposed, adopted or ratified the Constitution to determine what people wanted to convey through the text.^{viii}The object may be found in sources outside the Constitution. Prof K.T Shah, highlighting the usage of speech and expression in Article 13 of the Draft Constitution remarked, “*I thought speech and expression would run more or less parallel together. Perhaps, “expression” may be a wider term, including also expression by pictorial or other similar artistic devices which don’t consist merely in word or speech.*” Thus, the object has not been to only protect the right to speak, quite literally but all forms of expression have been protected.
- **A Qualified Right:** Rights or more accurately, human rights are the aspects of our life which are crucial determinants of our ability to pursue our conceptions of a worthwhile life. Thus, rights are not entitlements, rewards or reinforcements granted by the State. They in their very essence originate from the individual and are the dictations of what he considers essential for a worthwhile existence. Though this could lead to the emergence of an unrestricted sphere where there would be a constant clash of interests and will, State’s involvement is hence warranted but it may be noted that it is only to resolve the conflict and ensure the rights are not denied, the basic conditions are uniform, not to provide rights. The State is merely an enforcer and not the provider of rights and the rights being paramount, the State can’t encroach upon them, except under the mandate of law, hence, the restrictions.
 - **Restrictions:** Absoluteness is a misnomer, or if at all it exists, chaos and anarchy is the obvious outcome. Freedom, Rights though central to existence can’t be unfettered and

have to be necessarily limited by restrictions. However, the restriction can't erase the essence of the rights itself. It is the right which has to be upheld and not the restriction. It is merely a precaution; it doesn't operate to nullify the enforcement of the right itself. It is a condition, which is to be followed in the exercise of a right and shouldn't be interpreted as a tool for denying the rights. If it is so interpreted, then there's no rationale behind having a right in the first place. There can't be a grant of something which is denied in its very spirit, the grant can be conditional no doubt.

The right to freedom of speech and expression is subject to certain restrictions about which also, a heated debate had ensued in the Constituent Assembly which saw certain members promoting the idea that the restrictions set were too vague to defeat the rights easily and thus, the guarantee would be rendered meaningless while others believed they were justified. Prof K.T Shah expressed his concern over the vastness of these restrictions and the danger they cast upon the exercise of the legitimate right. He remarked, "If all the freedoms in this article are to be in accordance with the provisions of this article, or are to be guaranteed subject to provisions of this Article only, then they would amount more to a negation of freedom than the promise or assurance of freedom because in every one of these clauses the exceptions are much more emphasized than the positive provision. In fact, what is given the right hand seems to be taken away by three or four left hands. To ward off this challenge between balancing the rights and restrictions, the word "reasonable" was introduced. Thus, though if recognized as inherent in the right to freedom of speech and expression, Internet will be subject to restrictions but the restrictions must be reasonable, which is for the State to prove. Further the restrictions shouldn't defeat the right itself.

International Treaties and Covenants the right to freedom of speech and expression has been acclaimed and acknowledged as a fundamental human right. The right has the mandate of the most significant international treaties and covenants. A scope for inclusion of internet in the guarantee of freedom of speech and expression is available as the UN Human Rights Committee outlined its views in the General Comment No. 34 with: There is now a global network for exchanging ideas and opinions that doesn't necessary rely on the traditional mass media intermediaries. States parties should take all the necessary steps to foster the independence of these new media and to ensure access of individuals thereto. Thus, the comment marked a departure from the conventional modes of exercising freedom of speech and expression and paved a way for accommodation of the "new" media within the purview

of the right. The pioneer legislation on human rights, the charter of Human Rights, The Universal Declaration of Human Rights enunciates under Article 19; Everyone has the right to freedom of opinion and expression, this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers. An important observation in this regard is that the right includes a freedom to hold opinion and to seek receive and impart information which implies scope has been left for the exchange of information through various media. The right is not restricted in application but has a wide purport and includes within its scope the complete process of information exchange. The preamble to ICCPR, gives protection to human dignity and civil and political freedoms, while the former is not necessarily affected by the Internet latter includes freedom of speech and expression, for which Internet has emerged as a potential medium. ICCPR makes a similar provision with improved technicalities in Article 19 wherein it states that Everyone shall have right to hold opinions without interference. Everyone shall have right to freedom of expression and this right shall include freedom to seek receive and impart information and ideas of all kinds regardless of frontiers either orally, in writing or in print in the form of art or through any media of choice. An idea that can be derived from an analysis of the two legislations is that what is central to freedom of speech and expression is the flow of idea, the exchange of information and the object of these provisions is to secure any media for the purpose of disseminating information. Thus, the scope can't be confined to the literal implications. Another significant observation that can be made is the figurative use of the phrase any media of choice, implying thereby that the right to seek, receive and impart information is protected irrespective of the media used to seek, receive and impart such information. What is protected is the right to have an opinion, and share it. The right however is not absolute and the restrictions are permissible but only under certain heads-(a) a limitation prescribed by law, (b) it pursues a legitimate aim and (c) it is necessary in a democratic society.^{ix}The requirement of these interferences can be found in the jurisprudence of various Human Rights bodies and international courts. Any deviation from international treaty obligations has to be assessed according to the margin of appreciation. The doctrine attempts at a balance between protection of individual rights and community interest.^x It is thus necessary to determine whether a restriction falls within the margin of appreciation. It reflects a degree of domestic discretion on permissible interferences with civil and political rights. Restrictions within the margin of appreciation are consistent with the provisions of ICCPR. Article 15 of the ICESR has been interpreted wide enough for defining a right to

internet access. The right to benefit from scientific progress and its applications is held to be including the right to access the internet and rightly so. Internet is undoubtedly an off shoot of scientific progress and to benefit from it is therefore, a right. Though Internet is guaranteed under International Instruments as a medium to access human rights, it is not absolute but is subject to permissible interferences in face of necessity. An interference with Human Rights should be a 'necessity' in a true meaning of the word.^{xi} Even if a country won't have ratified the above instruments, it still had to honor them, if it was a signatory as held under the Vienna Convention on Law of Treaties (1969) the state must "*not breach the object and purpose of the treaty.*"^{xii} Having ratified both UDHR and ICCPR, India is bound to interpret freedom of speech and expression regardless of the medium and hence inclusive of the Right to Internet

B. Internet and the right to access information

Monarchies are extinct, factually they are. Whether it be a democracy or an authoritarian govt., information is not an entitlement a democracy can give or an authoritarian ruler can take. It is as much vested in human beings as are other inherent rights. Though democracies attach more significance and value to informed citizens, authoritarian regimes don't. Thus, a stronger premise in favor of the right to access information arises in democracies. It is through information, opportunities are created, resources are accessed and participation in social, economic and cultural activities is ensured. Information and its spread help mobilization, and ideas are generated, both favoring and disregarding an opinion. Facebook Revolution is not a myth. Information spreads like fire through internet and mass mobilization is created. Mohamed Bouazizi's case established the significance of information to revolution and internet to information. Khalid Said's case is yet another example of how a piece of information, spread through the medium of internet created waves of revolution worldwide. What is significant to note is that the spread of information of internet is neither limited by amount, nor restricted by territory and as such a tremendous reach enables a global mobilization towards an issue. This can be termed as "*information explosion*". Compared with radio, television, and newspapers controlled by editors and broadcasters, the internet creates unlimited communication one to one (via e-mail), one to many (via a personal homepage, blog, or Twitter), many to one (such as Wikipedia), and, perhaps most importantly, many to many (as in online chat rooms or social networking sites such as Facebook or LinkedIn).^{xiii} This highlights the role internet plays in providing wider, cheaper and effective access to information, with lesser interferences and reduced cost of creating,

transmitting, processing and accessing information. In the case before European Court^{xiv} it was noted that “the internet has now become one of the principals means by which individuals exercise their right to freedom of expression and information, providing as it does essential tools for participation in activities and discussions concerning political issues and issues of general interest. “*The Court cited the relevant provision of European Convention for the Protection of human rights and fundamental freedoms, Article 10;*” Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. In *Times Newspapers Ltd. V., the United Kingdom*^{xv} the Court held that in light of it accessibility and its capacity to store and communicate vast amounts of information, the internet plays an important role in enhancing the public’s access to news and facilitating the dissemination of information generally.

C. Internet and the Right to Life

Right to life is one of the broadest guarantees of law. It is not restricted in scope and has been widely interpreted to include all such conditions of a dignified life. It doesn’t only imply an animal existence but the right to a dignified life and thus, it has included in its purview a plethora of rights, essential to secure the dignified life it seeks to provide. It has been held to have a close nexus with the right to livelihood, the latter being essential to life. In a case before the Supreme Court of India^{xvi}, it was ruled that right to life includes right to livelihood. It was recognized that right to life is ineffectual without the means by which that right can be meaningfully exercised. The Court reasoned that if the right to livelihood is not treated as a part of the constitutional right to life, the easiest way of depriving a person his right to life would be to deprive him (or her) of his (or her) means of livelihood to the point of abrogation. Given the right to livelihood is essentially an off-shoot of the right to life and is equally protected as the right to life, the relation of internet and livelihood is essentially one to be probed. Information technology has revolutionized all fields of life and livelihood. It has translated into progress and development. Internet has emerged as a means to secure livelihood. Information supports livelihood in a number of ways. The multiple uses for information correspond to the diverse needs of different users, their assets and their opportunities. Information has an impact on livelihood assets in the following ways-

- **Human Capital-** Access to education and training through internet improves the quality

and efficiency of human capital. It imparts necessary knowledge and skills for securing a livelihood. Access to internet thus serves as an efficient and effective medium of skilled and educated human capital which is a significant livelihood asset.

- **Natural Capital:** Internet provides improved access to resources dealing in natural capital. Institutions relating to natural resource management rely heavily on information technology.
- **Financial Capital:** Financial institutions, which are a significant livelihood asset are dependent for operations on internet. Internet facilitates the development of a strong network which supports the financial capital. It introduces transparency and equity in finances. Community based financial systems are the outcome of information technology and internet.
- **Social Capital:** Social networking and social organizations receive a fillip due to internet. Reduced costs and increased efficiency enables broad networking.
- **Physical Capital:** Market and market –related information serves the cause of physical trades, improves sales, promotes competition and regulates prices. New techniques of production, distribution is accessed to, through the medium of internet. Internet has emerged as an interface which is a market in itself, though not physical but its virtuality is ultimately transformed into physical trade.

Given the contemporary economic scenario, it is an undisputed fact that internet has multiplied the means of livelihood, improved and skilled the population making them better equipped for securing a livelihood. Can then, the people deprived of this technology be placed on an equal footing with those who have an access to it? Does this deprivation amount to a violation of right to life?

D. Internet and the Equality of Opportunity

The principles of equality and non-discrimination are part of the foundations of rule of law. In political theory, the idea implies that people ought to be able to compete on equal terms or on a level playing field. It requires that no one faces irrelevant obstacles on arbitrary basis. Philosopher Peter Westen has explained the idea. Westen explains that there is a three-way

relationship between a person, some obstacles and a desired goal. In order to for opportunities to be equal within a group, each member of the group must face the same relevant obstacles, none insurmountable with respect to achieving the same desirable goal. The concept of equality has been in fact interpreted as a state where people are expected to have equal human dignity.^{xvii}The equality of opportunity in the context of internet can be analyzed for academic and vocational prospects. In general, the concept of equality of opportunity is considered as the equality of being able to reach wide range of resources and being able to utilize them. Brookover and Lezotte (1981) described the concept of equality as “access”, “participation” and “result”. Equality of educational opportunity can hence be interpreted as giving individuals the chance to develop their talents and intelligence at optimum levels. This is not to ensure that the outcomes are homogenous but it upholds the basic bedrock concept of equality. A research indicates that equality in delivering education to everyone does not necessarily ensure that outcomes or benefits are equalized. The concept of equality of educational opportunity evolved from an understanding of input towards outputs. Educational technology has been proved through several lines of theoretical and empirical researches to enhance student’s ability to learn a subject fully through technological instructions and visual aids. This has given them an opportunity to better understand the concepts and has facilitated learning. Also, internet or the cyberspace has emerged into a vast library with huge reserves of information which undoubtedly enhance the knowledge of the users and opens up new avenues of research. The use of technology in education helps increase educational opportunities and quality. Internet has the potential to equalize educational opportunities by making information resources available. It also increases the possibilities of distance education and web-based training. The opportunities internet offers for education and learning are unlimited and vast. It has opened a new avenue of digital learning as well as teaching. It has taken the place or if not taken, provided an efficient alternative to libraries, schools and training centres. 1.5 million students participated in online learning in 2010.^{xviii} Access to internet and virtual instruction mode has opened up new opportunities for both teachers and students. It has reduced the discrepancies in the quality and quantity of information available to the students, it has made the competition global and equitable through equal access. It has a very broad reach and is not limited by space, time or boundaries. It has integrated the educational opportunities into a ubiquitous interface, which is uniform, efficient and non-discriminatory. However, if the access to internet is denied, the whole structure of educational opportunities, equal resources come crumbling to rubble. This affects

a very crucial section of the society, the children in the learning group, the seekers of knowledge and as Pip says in Charles Dickens Great Expectations, “*In the little world in which children have their existence, there is nothing so firmly and fiercely felt as injustice.*”

INTERNET SHUTDOWNS IN INDIA

The internet shutdowns in India are not in the nature of specific or particular restriction but two key features are to be appreciated in the context of Internet shutdowns in India. Firstly, the internet shutdowns are imposed by the government through orders issues to the Internet Service Providers (ISPs). Secondly, they are “blanket bans “which means they are not partial or limited but deny access to internet altogether. Hence the term “Shutdown”. Pertinent to bear in mind is that globally internet bans have different meanings and have been defined as the restriction to use certain websites or apps. But in case of the internet bans in India, experience suggests they are “blanket bans” and deny the access, altogether.

A. Backdrop

Social media is the interface where information spreads like fire, without verification. This creates the problem of spread of rumors, false news and this is aggravated in face of a disturbance in the country or any part of it. With this objective, internet is snapped though the often-quoted reason is not always true and the real reason is actual blocking of any sort of information, prevention of any mobilization and thus manipulation of public opinion. They spark and fuel unrest, which is detrimental to public order, safety and at times casts a threat upon the security and integrity of the country. In August 2012, the unrest in Bengaluru was fueled by rumors circulating online and offline.^{xix} An atmosphere of mistrust, fear and panic was aggravated by the rumors and resultantly, people rush to railway stations to move to their respective towns and stampeded were reported across the city. The city otherwise known to be peaceful was allegedly thrown into chaos under a propaganda run over SMS and social media where a spur of rumors was circulated. This was reported by several newspapers and media houses.^{xx} The first instance of internet shutdown in India was on September 21, 2012. This was the first reported case when internet services were suspended, not the broadband services. The reasons behind the action were not expressly stated in the order, but it was

executed under Section 5(2) of the Indian telegraph Act, 1885, “in the interest of public safety and for maintaining public order”.^{xxi} Three more shutdowns were reported in Jammu and Kashmir in the same year, not counting the regular Independence Day and republic day clampdowns.

B. Legislations

In India, the shutdowns are imposed under-Section 144 of the Criminal Procedure Code, 1973, Section 5(2) of the Indian Telegraph Act, 1885 and the Temporary Suspension of Telecom Services (Public Emergency and Public Safety) Rules, 2017.

SECTION 144, CRIMINAL PROCEDURE CODE, 1973-Until the Temporary Suspension of Telecom Services (Public Emergency and Public Safety) Rules, 2017, Section 144 of CrPC was used for imposing internet bans. Section 144 is an isolated provision in the CrPC under the heading, “*temporary measures to maintain public tranquility*” and gives State Governments “*the power to issue orders for immediate remedy in urgent cases of nuisance or apprehended danger.*”

Following features of the Section are pertinent to note concerning the authority and procedure of shutdowns-

1. The authority to issue orders under this Section lies with the District Magistrate, a sub divisional magistrate or any other Executive Magistrate specially empowered by the State Government in his behalf.
2. The order under this Section can only be issued at the satisfaction of the issuing authority that sufficient grounds exist for the Section to operate and such grounds require speedy and immediate remedy.
3. An order under Section 144 has to be in writing, stating the material facts of the case and served in accordance to applicable legal procedure.
4. The order can pertain to direction towards an act or omission with regards to a property a person possesses or manages.
5. The order must be, in the eyes of the issuing authority, “*likely to prevent or tend*

to prevent obstruction, annoyance or injury to any person lawfully employed or danger to human life, health or safety, or a disturbance of the public tranquility or a riot or an affray.”

The efficacy of the said provision to impose internet bans is disputed. Being an archaic provision, with a different legislative intent, the provision has been held to be inappropriate for enforcing internet bans. This was even brought before a court of law in a PIL, *Gaurav Suresh- bhai Vyas v. State of Gujarat*.^{xxii} It was argued in the case that the appropriate provisions for imposing internet bans are embodied in the Information Technology Act, 2005 and the State is not empowered to ban internet under Section 144 of CrPC. It was held that the State Government is a competent authority duly authorized to exercise the aforesaid powers with prudence, keeping in mind public duty and sufficiency of action. The Court maintained that scope of operation of Section 69A of Information Technology Act, 2005 and Section 144 of CrPC, 1973 are different. A Special Leave Petition (SLP) for the same was also dismissed by the Supreme Court.

SECTION 5(2) INDIAN TELEGRAPH ACT, 1855^{xxiii}-The applicability of the Act in the imposition of internet bans prima facie depends on the inclusion of internet within the meaning of the word “telegraph” which determines the applicability of the Act. The definition of the term Telegraph as provided under Section 3(1AA) of the Telegraph Act goes far beyond actual telegraphs, and includes “any appliance, instrument, material or apparatus used or capable of use for transmission or reception of signs, signals, writings, 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. “This definition has a wide purport and draws into its purview any means of communication, including the internet. As per Section 5(2), Central/State Governments or their authorized officers can, among other things, prevent the transmission of any telegraphic message or class of messages during a public emergency or in the interest of public safety, if it considered necessary or expedient in the interest of (1) sovereignty and integrity of India, (2) security of State, (3) friendly relations with foreign States, (4) public order and (5) preventing incitement to the commission of an offence. Though the terms “public emergency” and “public safety” have not been defined by the Act, they were defined but the Supreme Court in the matter of *People’s Union for Civil liberties v. Union of India*^{xxiv} to mean the prevalence of a sudden condition or state of affairs affecting people at large calling for immediate action. And “the state or condition of freedom from

danger or risk for the people at large” respectively.

TEMPORARY SUSPENSION OF TELECOM SERVICES (PUBLIC EMERGENCY OR PUBLIC SAFETY ACT) RULES, 2017^{xxv}-Though substantive law for the suspension of internet services could be derived from CrPC and the Telegraph Act, the procedure for the same was a lacuna in the law which was finally removed in 2017. A comprehensive procedure was laid down in the rules;

Competent Authority under the rules is-

1. In case of Govt of India, the Secretary in the minister of Home Affairs. 2. In case of a State Government, the Secretary

According to the rules, the order can't be made except by a competent authority. The procedure laid down under the rules shall be strictly complied with. However, 'in unavoidable circumstances' such an order might be issued by an officer who has the rank of joint Secretary or above who has been duly authorized by the Union Home Secretary or State Home Secretary. But the term 'unavoidable circumstances' has not been defined in the rules.

The rules further mandate that the order passed by the competent authority must contain "reasons for such direction" and a copy of the order shall be forwarded to the review committee by the next working day. The Review Committee shall comprise of

- a) Where it is constituted by the Central Government-Cabinet Secretary, and Secretaries of Legal Affairs and Department of Telecommunication.
- b) Where it is constituted by the State Government –Chief Secretary, Secretary Law or Legal Remembrance-in-charge, Legal Affairs and Secretary to the State Government (other than the Home Secretary).

The Review Committee will have to meet within five working days of issuance of order and record its findings on the suspension order whether it is in accordance with the provisions of sub-section (2) of Section 5 of the Indian Telegraph Act.

C. A Brief History of Internet Shutdowns in India

Between Jan 2012 and April 2018, 172 shutdowns were recorded across 19 Indian States. Of

the 172 shutdowns, 124 were targeted at mobile internet services, 17 targeted both mobile and fixed-line internet services while 2 targeted fixed landline services alone. This is based upon the rationale that the majority of internet users in India (95.13%) access internet over mobile. Of these shutdowns, 47 lasted less than 24 hours, 37 lasted for over 72 hours, while the duration of the remaining was not recorded.^{xxvi} The most frequent case of internet ban or shutdown in India is found in the State of Jammu and Kashmir. The figures reveal that India has not attached as much importance to Internet as to regard it as right, or close to one. It has more often than not deemed as an entitlement citizens enjoy at the pleasure of the State. The Internet bans and shutdowns are launched at the behest of objectives of security and integrity of the nation and as such have vitiated the debate over violation of rights, and the consequences of internet shutdown. Neither does internet enjoy the status of an inalienable right in India nor are the rights it forms a corollary to, unfettered. The balance to be struck is thus to be at the focal points of neither the rights nor the restrictions but not even farther from either, where the two are equidistant, a case may arise for harmonizing both. This had been the challenge before the framers of Constitution at the inception of nation building but neither national security was given primacy over rights of the citizen, nor was the reverse done. The challenge has surfaced yet again in wake of technological advances but has its genesis in the already discussed and answered questions addressing the clash between liberty of an individual, his rights and the national security.

ANALYSING INTERNET SHUTDOWNS-THE BALANCE OF INTEREST

The right to Internet and Internet Shutdowns is at cross roads when viewed against each other. While the former recognizes the preponderance of internet in enjoyment of fundamental rights, the latter enables the State to block access to Internet. The genesis of the conflict can be found in the popular liberty-security, the right and the restriction conflict, where a balance can be discovered between the two.

1. The conflict of Liberty and Security; In political rhetoric, liberty has been juxtaposed with security and the two have come at loggerheads when the threats to security are as grave as terrorism. In practicality, though the conflict is not as rife as theory has it, yet

it's an undeniable truth that some liberties, when conferred lessen security. Neither end of the spectrum is plausible, a balance has to be harmoniously struck.

Problems towards achieving a balance between the two- 1) It is to be determined whether the restriction on liberty increases security. 2) Commensurability is tough to establish, there is no single currency to measure x units of liberty as against y units of security.

The debate gained much importance after the 9/11 attacks, when USA came with responsive measures which hit liberty at its roots. The provisions of PATRIOT Act for example compromised liberty straightaway. It was justified as a reasonable response to the threat of terrorism. But the compromise on liberties was found to be disproportionate and excessive.

Though there's no debate about the fact that liberties can and have to be compromised for security but the extent is to be determined. The question is how much liberty is worth how much security. If the costs of security are higher than those incurred by its absence, the costs are not justified. Security is to be justified against the whole of its costs. Further can liberty be compromised for the objective security or the psychological notion of it. With a known fact that terrorism kills lesser people than accidents, yet it is perceived as a major threat and not unsafe roads and thus at times, for the psychological notion of being secure, Govt takes steps which may not necessarily enhance security but merely create such a notion. Can liberty be sacrificed for the bare notion of security without actually enhancing actual security. If a small infringement in liberty brings a large gain in security can be justified but vice-versa, it can't be justified.

The approach thus is to balance the loss in liberty against the gain in security. The approach is opposed by the right theorists who argue that liberties are liberties because they can't be compromised, when pitted against other social goods, they ought to win.

Robert Nozick championed the priority of rights but was against about their prominence in cases of moral horror which implies cases of threat to security, terrorism etc. Thus, though the extent is a matter of debate, scope for compromise within liberties is not challenged. The balancing approach has to be found wanting by Jeremy Waldron on the following grounds;

1. The calculus isn't infallible, the weighing if liberty and security is not worth

skepticism.

2. The distribution of the burdens on liberty may lead to harm, if differentially absorbed.
3. Restrictions on liberty may adversely affect security.
4. He considers symbolic threats to security inadequate to warrant a curtailment of liberty.

A SUITABLE CASE OF BALANCE-A PRUDENT APPROACH-THE ECHR

Acknowledging that a rift exists between liberty and security. Attempts have been made at a reconciliation, some of which have passed, some failed, there is no such yardstick as to determine the exact extent of liberty which may be compromised for enhanced security. Anti-terrorist measures have been specifically discussed for compromising the rights and liberties. Civil rights, are freedoms against the State and conceptualize no room for state intervention. Thus, it requires an abstention on the part of the State however, State has a positive obligation in preventing the violation of these rights and liberties. Terrorism, on the other hand also poses threat to core human rights and therefore an obligation arises upon the state to protect its citizens. Thus, the State is held in conflicting obligations, and has to adopt a conciliatory approach `by compromising on either to promote the other. Based on ECHR, the ECHR had adopted a harmonious approach to balance rights and security. It has classified rights as absolute and relative for this purpose, while nothing can just compromise with the absolute rights, relative rights can be compromised for providing greater security. However, the interferences in relative rights should be provided by law, pursuing a legitimate aim and necessary for a democratic society. The interferences should be proportionate in view of relation between interest at stake and degree of severity /degree of interference.

ECHR has maintained the following guidelines in ensuring the fair balance, they aim at is achieved;

1. Interferences must be conducted on the basis of a law which is predictable, sufficiently precise and accessible.
2. Appropriate mechanisms should be available against the arbitrary interference with human rights.
3. There has to be an investigation to look into the violation of rights. The ECHR doesn't only examine whether the State has investigation into the violations but also whether it has investigation into the allegations of negligence and misconduct. In case there is no investigation, the case is held as a violation of rights.

This indicates that the extent to which liberty is compromised for security, is determined by the extent to which a state follows the rule of law. The proportionate, reasonable interventions are justified but the power to compromise rights or liberties should be used sparingly, with caution and should be amenable to review, in accordance with the rule of law so that arbitrariness is ruled out. Undoubtedly, absolute liberty is a misnomer and liberty always come with restrictions however rights of absolute nature have been made immune from intervention and the interference in relative or restricted rights is not supposed to be unfettered. In compliance with the rule of law, the interference must be made as guaranteed by the procedure sanctioned by law and should be amenable to review. At any cost, a complete vindication of liberties and rights is not plausible. The object sought to be achieved i.e.: security should have a rational nexus with the right or liberty infringed and the infringement should be proportional to the threat to security posed by the continuance of the liberty or right. Disproportionate intervention or excessive compromises on rights or liberty even when it has little or no impact on security is nothing but an abuse of constitutional provisions and leads to undermining the spirit of the constitution. The threat to security, further must be objective, for the mere psychological notion of security, the rights of individuals shouldn't be curtailed. Interference with rights should be the subject of close scrutiny and it should be analyzed if the purported object of interference is a false, vexatious claim having no link with the right compromised, and whether the interference is proportional to the threat posed, if its grater and excessive, it can't be justified, but if it brings enhanced security, it can be justified as a reasonable restriction.

CONCLUSION

Though the *Anuradha Bhasin* judgement^{xxvii} has come as a ray of hope, it is significant to note that the Apex Court even after deliberating on the access to internet within the ambit of freedom of speech and expression didn't conclusively determine the legal status of Internet rights in India. The uncertainty at the international level about the legal status of Internet has further augmented the delay in a conclusive determination. Resultantly, internet shutdowns continue to be imposed, without considerations for violations of rights or the balance of proportionality. The delay is coming at the heavy costs of violation of human rights, and thus necessitates a determination of the matter so that the legal implications that follow may be specified and dealt, accordingly by the State and reviewed by law. The constitution calls for a live interpretation in favor of the right to internet which can't be neglected in interpreting most of the fundamental rights in today's age. The need thus is to enlarge the canvass of interpretation and draw a bold stroke of internet to accommodate the technological advancements of the present times.

ENDNOTES

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ⁱⁱ John Milton, *Areopagitica* (Bandana Books, California, 6th ed., 1894).

ⁱⁱⁱ John Stuart Mill, *On Liberty* (West Strand, Harvard, 18th ed. 1859).

^{iv} Thomas I. Emerson, *Toward a General Theory of the First Amendment* (Random House, New York, 1966).

^v Conseil Constitutionnel. Decision Number 2009-580, available at: <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/download/cc-2009580dc.pdf> (in French), http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/anglais/2009_580dc.pdf. (In English)

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^{viii} Robert H Bork, *Tradition and Morality in Constitutional Law, The Francis Boyer Lecture on Public Policy* 10 (American Enterprise Institute for Public Policy Research, 1984).

^{ix} ICCPR, Article 19.

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^{xi} *The Sunday Times v The United Kingdom*, App No. 6539/74 (ECHR 26 of April 1979).

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^{xiv} *Ahmet Yildirim v. Turkey*, available at: <https://www.justiceinitiative.org/litigation/yildirim-v-turkey>.

^{xv} Re: App No. 3002/03; (2009) EMLR 14.

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^{xvii} Fernando Reimers, "Educational Chances of the Poor At the end of Twentieth Century," 29 *Prospects*, 480-491 (1999).

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^{xxi} Jammu and Kashmir Home Department Order No. Home-118 of 2012, available at:

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^{xxii} W.P (PIL) No.191 Of 2015.

^{xxiii} Indian Telegraph Act, 1885.

^{xxiv} AIR 1997 SC 568.

^{xxv} Temporary Suspension of Telecom Services (Public Emergency or Public Safety Act) Rules, 2017.

^{xxvi} *Living in Digital Darkness-A Handbook of Internet Shutdowns in India*, available at: <https://sflc.in/living-digital-darkness-handbook-internet-shutdowns-india>.

^{xxvii} *Anuradha Bhasin v. Union of India*, 2019 SCC OnLine SC 1725.

