
INTERNET SHUTDOWNS VIS-À-VIS FREEDOM OF SPEECH AND EXPRESSION

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ABSTRACT

For a last few years India has emerged as the leader of ‘Internet Shutdowns’ in the world. In fact, in the year 2020, India accounted for more than 70 percent of the total internet shutdowns imposed across the globe. Such data do not go well with the fact that India is the biggest democracy in the world. Internet in modern times is a prime tool for communication and occupation. To suspend internet services means to hamper the day to day activity of any individual. Such internet shutdowns can be used to curb voices of dissent against the Government. Such curtailment amounts to violation of freedom of speech and expression, which has been declared as fundamental rights by our Constitution. The Hon’ble Supreme Court in the landmark case of ‘*Anuradha Bhasin v. Union of India*’ has declared that expression of opinions over internet and businesses on internet are protected under Article 19(1) (a) and Article 19(1) (g) of the Indian Constitution. Another aspect of this issue is that India is highly affected by terrorist activities. These terror groups use internet to communicate and promote their anti-government propagandas which becomes very feasible due to internet. This leads to a conundrum that whether the State should compromise the right to freedom of speech and expression, which is a fundamental right for national security which is the prime duty of any State. Apex Court has opted for ‘proportionality’ between the two and declared means of internet shutdown as ‘drastic’ which should only be used when it is absolutely necessary and unavoidable.

Keywords: Internet Shutdowns, Fundamental Rights, Article 19, ICCPR

Introduction

The number of active internet users in India is on a rapid exponential growth. From 795.18 million in December 2020 the number of active internet users have increased to 825.30 million in March 2021¹. It is further speculated that India would have about 900 million active internet users by the year 2025.² With such high numbers there remains no need to explain the reach and role of internet in everyday life of an individual in India. Especially, during the period of COVID induced pandemic, significance of internet has taken unprecedented strides in the country. From online classes for students to internet based medical consultations for the patients, internet is no more a luxury but certainly a necessity in modern times. With that been said, internet further plays a very pertinent role- connecting and communicating, it can be through multiple means like that of electronic mails, or messaging services like ‘WhatsApp’ or video call services through ‘skype’ or other internet based applications. Internet also gives a platform for ordinary individuals to express his opinions on social media websites like Facebook, Instagram or Twitter. These opinions at times can be really harsh and extremely critical of the institutions or the governments and can also be used for furthering propagandas which are in interests of certain groups or communities. These websites help in very easy flow of such opinions irrespective of the physical geographical boundaries. Thus, in recent times it has been seen that governments, especially in India in order to curb such activities uses a method which is known as “internet shutdown”.

This paper aims to discuss the meaning of internet shutdown along with its possible reasons. Further, the Indian laws along with the concerned Articles of the ICCPR on internet shutdowns. It further discussed the ‘three-part test’ for violation of freedom of speech and expression and the assessment of Indian laws relating to internet shutdowns on these the-part test. Internet shutdowns are then discussed in the light of freedom of speech and expression along with the related judicial pronouncements on the subject in hand.

Internet Shutdowns

The Office of the United Nations High Commissioner for Human Rights (OHCHR) has defined Internet Shutdowns as “All measures that intentionally prevent or disrupt access to, or

¹ Megha Manchanda, “Internet Users up nearly 4% to over 825 million in Q4 of FY21: TRAI Data”, Business Standard, Aug. 27, 2021.

² Hemai Sheth, “India’s Active Internet Population likely to reach 900 Million by 2025: Report”, The Hindu, June 03, 2021.

dissemination of, information online are “shutdowns”. Shutdowns come in a wide range of forms, including: bandwidth throttling to slow internet access, blocking of specific apps such as social media or messaging services, and the partial or complete shutdown of access to the internet.”³ In simpler terms, it is preventing of accessibility of internet facilities in order to disrupt means of communication and information over internet.

Instances of Internet Shutdowns

India has proved to be a leader for internet shutdowns in the world. India topped the rankings for the most number of internet shutdowns for three consecutive years-2018, 2019 and 2020⁴. In the year 2020, India imposed 109 internet shutdowns with 155 being the global number for internet shutdowns.⁵ In 2021, India ranked third only behind Myanmar and Nigeria, with internet shutdowns in India lasting for 1157 hours which impacted 59.1 million people in the country⁶. While in 2022, there were 187 reported incidents of internet shutdowns across 35 countries in the world, India accounted for 84 of those.⁷ Jammu and Kashmir alone was subject to 49 of such internet shutdowns.⁸

Need of Internet Shutdown

The biggest question obviously is what is the need for internet shutdowns? Or why does Government imposes such shutdowns? The prime answer to this question would be for the ‘security and safety’ of the country or any specific area in contention and its citizens. As is stated earlier internet provides platform for communicating and connecting, thus fake news or propagandas can easily be circulated in any conflict ridden area. Anarchists can use internet to bring about instability and create anti-government stance in such areas. Connectivity also implies connectivity of anti-social elements of the society, thus internet shutdown aims, on the part of the Government, to block such communications which can incite violence in any form. This is not applicable only in any war or any violent times but also to situations where fake

³ Available at <https://www.ohchr.org/Documents/Press/Internet-shutdowns-and-human-rights.pdf> last visited on March 2, 2022.

⁴ Anam Ajmal, “70% of global internet shutdowns in 2020 were in India: Report”, Times of India, March 04, 2021

⁵ Ibid.

⁶ ENS Economic Bureau, “1157 hour of Govt-ordered net outrages in 2021”, The Indian Express, January 11, 2022.

⁷ Zeeshan Kaskar, “India Remains Internet Shutdown Capital of the world for Fifth Year Running”, The Wire, February 28, 2023.

⁸ Ibid.

news can be circulated in order to create panic. Manifestation of this was observed during the COVID pandemic where fake news of shortage of medical supplies etc. were highly circulated and also resulted in panic among the common people. Thus maintaining peace is also one of the goals of internet shutdown.

Effectiveness of Internet Shutdown

So the next question which comes to mind is whether these means achieve the end they aim for? Frankly, there cannot be any factual answer to this as to come up with some concrete data on the point which was made to avoid certain unforeseen circumstances does not seem pragmatic. It would be illogical to consider that if there wasn't any internet shutdown, would or would not any riot might have occurred in an area, say which was facing religious tensions among its residents.

But such internet shutdowns seriously impact the economy of the country. The monetary loss due to internet shutdown in the year 2020 alone amounted approximately \$2.8 billion⁹.

Internet Shutdown and Freedom and Speech & Expression

Article 19(1) (a) of the Indian Constitution provides the citizens of India with Freedom of Speech & Expression but this freedom is not absolute. Freedom of Speech and Expression is subjected to certain restrictions which are enlisted in Article 19(2), which are as follows:

- Sovereignty and integrity of India.
- The security of the state.
- Friendly relations with foreign states.
- Public order.
- Decency and morality.
- Contempt of court.

⁹ Pranav Mukul, "Economic Impact: 'India lost \$2.8 bn in 2020 to Internet shutdowns; over double of 20 others'", *The Indian Express*, Jan 6, 2021.

- Defamation.
- Incitement to an offence.

The foremost question which needs to be answered is whether access to internet forms part of freedom of speech and expression.

In the landmark case of *Shreya Singhal v. Union of India*¹⁰, the Apex Court has said that internet is an integral part of freedom of speech and expression. The Court Observed “*If the right to freedom of speech and expression includes the right to disseminate information to as wide a section of the population as is possible, the access which enables the right to be so exercised is also an integral part of the said right.*”¹¹

Kerala High Court in the case of *Faheema Shirin R.K. vs State of Kerala and Others*¹² held that right to access to internet is a fundamental right.

Though in a recent and landmark judgement of *Anuradha Bahsin v. Union of India*¹³ the Supreme Court observed that “*None of the counsels have argued for declaring the right to access the internet as a fundamental right and therefore we are not expressing any view on the same. We are confining ourselves to declaring that the right to freedom of speech and expression under Article 19(1) (a), and the right to carry on any trade or business under 19(1) (g), using the medium of internet is constitutionally protected.*”

Thus right to access of internet is not a fundamental right but any expression through the medium of internet is under the ambit of freedom of speech and expression under Article 19.

Despite right to access of internet not being a fundamental right, it is impossible to express opinion over internet without access to the internet. So, there must be some protection assured by the government that the internet facilities would not be discontinued without reasonable and express procedures. As is stated above, the freedom of speech and expression under Article 19(1) (a) is not unrestricted, provisions of Code of Criminal Procedure under section 144 and

¹⁰ AIR 2015 SC 1523

¹¹ *ibid*

¹² (WP (C) No. 19716 of 2019 (L))

¹³ WRIT PETITION (CIVIL) NO. 1031 OF 2019

section 5 of the Telegraph Act of 1885 along with the provisions of the Temporary Suspension of Telecom Services (Public Emergency and Public Safety) Rules, 2017 allows the government to impose the 'digital curfew'.

ICCPR

Article 19 of International Covenant on Civil and Political Rights (ICCPR) states:

- “1. Everyone shall have the right to hold opinions without interference.*
- 2. Everyone shall have the right to freedom of expression; 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 other media of his choice.*
- 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:*
 - (a) For respect of the rights or reputations of others;*
 - (b) For the protection of national security or of public order (ordre public), or of public health or morals.”*

Clause 2 of this Article clearly manifests the expression through internet as a human right but at the same time clause 3 imposes, what can be called as reasonable restrictions.

The Three-Part Test

The right to express opinions over internet falls within the ambit of freedom of speech and expression. The international law recognises a three-part test for any Government which allows it to violate the freedom of speech and expression of the citizens.

- Such violation must be '**provided by law**', i.e., the domestic law must provide with a piece of legislation, which lays down the principal and procedure for such shutdowns.
- Such limitation to freedom of speech and expression must have a '**legitimate aim**'. Article 19(3) of ICCPR clearly states that freedom of speech and expression is not

absolute. Article 19(3) (a) states that if such expression is in violation of someone else's right or in reputation, i.e., if it's defamatory, such extent cannot be considered under freedom of speech and expression. Similarly, Article 19(3) (b) states that if such violation is made keeping in regard to the national security, or public order, or public health or morals it would not amount to violation of freedom of speech and expression.

- Any violation of freedom of speech and expression should only done when it is 'necessary'. This exception entails the proportionality test i.e. is the limitation in proportion to the issue in hand.

Indian Laws and the Three-Part Test

As stated above, the internet shutdowns in India are conducted primarily by Section 144 of Code of Criminal Procedure (CrPC) and Section 5 of the Telegraph Act 1885 together with Temporary Suspension of Telecom Services (Public Emergency and Public Safety) Rules, 2017. Section 69A of the Information Act (IT Act) also allows the state to block certain information over internet which the state deems necessary in the interest of sovereignty and integrity of India, defence of India, security of the State, friendly relations with foreign States or public order or for preventing incitement to the commission of any cognizable offence relating to these.

While Section 69A deals with blocking of certain sensitive information over internet, internet shutdowns are complete inaccessibility of internet services, which is primarily conducted by former two statutes stated above. Thus, according to the first rule, there is a law provided in India to issue internet shutdowns. But, Section 5 of the Telegraph Act uses the term 'public emergency', but what amounts to 'public emergency' is not stated. Thus it gives authorities opportunities to mould the definition in any way that suits there requirement.

Kashmir has been the recipient of maximum number of internet shutdowns over a very considerable period of time in India. It cannot be denied that Kashmir has been a hotspot for terrorism as well for a very substantial period of time. But even after evoking the temporary provisions of Article 370 of Indian Constitution, which gave special status to the state of Jammu & Kashmir, internet shutdowns have been imposed by the authorities for months. Thus, the second rule that of legitimate aim, can be said not to have been strictly followed in Kashmir.

Finally, the third test- 'necessary'. Authorities in India have not always been able to completely satisfy that such measures, where a prime mean of communication, business, entertainment etc. should be completely shut down. As far as proportionality is concerned, the economic losses due to such shutdowns have to be considered as well. The aim of internet shutdowns over national security is also arguable.

Anuradha Bhasin v. Union of India¹⁴

The Hon'ble Supreme Court in this landmark case took the issue of internet shutdown in Kashmir. As has been stated earlier the Apex Court did not declare 'right to access of internet' as a fundamental right but opinion expressed over internet and business conducted over business under the purview of Article 19(1) (a) and Article 19(1) (g) respectively. There are few very important points which were discussed by the Supreme Court in the judgement of this case:

- Internet as a tool and freedom of expression through the internet needs to be distinguished. (Point 25 of the judgement)
- *“The freedom of speech and expression through the medium of internet is an integral part of Article 19(1) (a) and accordingly, any restriction on the same must be in accordance with Article 19(2) of the Constitution.”* (Point 26)
- There can be a complete prohibition under Article 19(2). Though it has to fulfil certain conditions:
 - “(i) Restriction on free speech and expression may include cases of prohibition. (ii) There should not be excessive burden on free speech even if a complete prohibition is imposed, and the government has to justify imposition of such prohibition and explain as to why lesser alternatives would be inadequate. (iii) Whether a restriction amounts to a complete prohibition is a question of fact, which is required to be determined by the Court with regard to the facts and circumstances of each case.”* (Point 33)
- There should be a proportionality between the state encroachment of rights and the legitimate interests aimed. The Supreme Court agreed with the explanation of

¹⁴ ibid

‘proportionality’ expressed in the case of *K.S.Puttaswamy v. Union of India*¹⁵(Point 47)

- The Hon’ble Court further argued for proportionality for ‘rights’ as ‘rules’ and as ‘principles’ as has been stated by Ronald Dworkin and Robert Alexy respectively. While Dworkin consider ‘rights’ to be a goal in itself and no public good is a reasonable reason for its violation, thus they are ‘rules’. On the other hand Alexy considers them ‘principles’ which portray ‘rights’ in a normative manner, which should be realised to the greatest extent possible given the legal and factual possibilities. (Point 51 and 52)
- The Court relying on the judgement of *Modern Dental College & Research Centre v. State of Madhya Pradesh*¹⁶ stated that no constitutional right can be absolute. (Point 54)
- Four subcomponents of proportionality from the above mentioned case¹⁷ were relied upon:
 - “(a) A measure restricting a right must have a legitimate goal (legitimate goal stage).
 - (b) It must be a suitable means of furthering this goal (suitability or rational connection stage).
 - (c) There must not be any less restrictive but equally effective alternative (necessity stage).
 - (d) The measure must not have a disproportionate impact on the rightholder (balancing stage).” (Point 66)
- The Hon’ble Court stated that complete suspension of telecom services, internet or otherwise is a ‘drastic’ step and should only be taken when it is absolutely necessary and unavoidable.

¹⁵ (2017) 10 SCC 1.

¹⁶ (2016) 7 SCC 353

¹⁷ ibid

Conclusion

It goes without saying that internet now is an integral part of life. To discontinue such services without any reasonable reason is no less than atrocity on the citizens. But there is always two sides to a coin. National security is the prime concern of any state. India, unfortunately is receipt of numerous terrorist attacks over the years and also she does not enjoy the luxury of having peaceful relations with her neighbours. Internet is now being used by terrorist organisations to communicate among themselves and also to promote their propagandas. They are targeting young people in order for them to join their terror groups. Supreme Court Observed *“Modern terrorism heavily relies on the internet. Operations on the internet do not require substantial expenditure and are not traceable easily. The internet is being used to support fallacious proxy wars by raising money, recruiting and spreading propaganda/ideologies. The prevalence of the internet provides an easy inroad to young impressionable minds.”*¹⁸

It should also be kept in mind that a State on the name of ‘rights’ should not be left powerless on any front. A State must have power but it must be assured with the practice of ‘check and balances’. State should not have absolute powers, especially to curtail the freedom of speech and expression, which is the soul of any democracy. Drastic measures such as ‘internet shutdowns’ should only be used when there is absolutely no other choice. It must be made sure that actual and reasonable voices of dissent should not be suppressed by using such measures on part of the Government.

¹⁸ WRIT PETITION (CIVIL) NO. 1031 OF 2019