

## ACCESS DENIED: THE SUPREME COURT AND KASHMIR'S INTERNET CRISIS

By Manthan Nagpal and Vasanthi Hariharan<sup>1</sup>

### INTRODUCTION

The impact of the COVID-19 pandemic is devastating for both life and livelihood globally. While India combats the novel coronavirus, a significant percentage of the world population in India is currently under lockdown<sup>2</sup> and as a result, it continues to face threats to national security from terror modules<sup>3</sup> in some areas of the Union Territory of Jammu and Kashmir. Citing the apprehension of misuse of the internet for propagating and inciting terror activities through the spread of misinformation, the government has continually imposed restrictions on access to the internet in the region.

In January 2020, the Supreme Court of India (SC) had the opportunity to decide on a challenge to the longest internet shutdown in a democracy<sup>4</sup> in *Anuradha Bhasin v. Union of India*<sup>5</sup> (hereinafter '*Anuradha Bhasin*'), and issued directions that the imposition of restrictions on the internet must be carried out proportionately. In addition to the rules concerning the suspension of internet services, the SC stressed on a periodic review and non-permanence of such orders. Most importantly, the Court held that the "freedom of speech and expression and the freedom to practice any profession or carry on any trade, business or occupation over the medium of internet enjoys constitutional protection under Article 19(1)(a) and Article 19(1)(g) of the Constitution of India".

### THE CHALLENGE TO MOBILE INTERNET RESTRICTION

Post *Anuradha Bhasin*, orders regarding the suspension of telecom services in the region were reviewed and renewed with adjustments. These new orders that restricted mobile internet speed to

---

<sup>1</sup> IVth year students, Gujarat National Law University, Gandhinagar.

<sup>2</sup> Nikhil Imamdar, *Coronavirus lockdown: India jobless numbers cross 120 million in April*, BBC NEWS (Mumbai) May 06, 2020; <https://www.bbc.com/news/world-asia-india-52559324>.

<sup>3</sup> Safwat Zargar, *Kashmir: Amidst Covid-19 lockdown, security operations in Valley continue – as do militant attacks*, SCROLL (Kashmir) May 08, 2020; <https://scroll.in/article/961325/kashmir-amidst-covid-19-lockdown-security-operations-in-valley-continue-as-do-militant-attacks>.

<sup>4</sup> The Wire Staff, *Kashmir: Indefinite Suspension of Internet Not Permissible, Review Orders in a Week, Says SC*, THE WIRE (New Delhi) January 10, 2020; <https://thewire.in/law/supreme-court-kashmir-internet-suspension-judgment>.

<sup>5</sup> *Anuradha Bhasin v. Union of India*, 2020 3 SCC 637.

2G in the whole of the Union Territory of Jammu and Kashmir were challenged before the SC in *Foundation for Media Professionals v. Union Territory of Jammu and Kashmir*<sup>6</sup> (hereinafter ‘*Media Professionals*’) as being violative of the directions laid down in *Anuradha Bhasin* and the Temporary Suspension of Telecom Services (Public Emergency or Public Safety) Rules, 2017 (hereinafter ‘the Suspension Rules’). In the order dated 11<sup>th</sup> May 2020<sup>7</sup>, while observing that the submissions of the petitioner regarding the violation of fundamental rights merit consideration in ordinary circumstances, the Court reiterated that the “compelling circumstances of cross border terrorism in the Union Territory of Jammu and Kashmir, at present, cannot be ignored”. Reflecting on the national character of the concerns at the border that have merited these restrictions, the Court constituted a Special Committee, in place of the Review Committee provided for in Rule 2(5) of the Suspension Rules<sup>8</sup>, to look into the prevailing circumstances and immediately determine the necessity of continuing the impugned restrictions.

#### **VALIDITY OF ORDERS UNDER THE SUSPENSION RULES**

Ordinarily, the Committee constituted under the Suspension Rules is supposed to meet within five working days of the issuance of the order and decide whether the directions are in accordance with Section 5(2) of the Indian Telegraph Act, 1885<sup>9</sup>. However, in *Media Professionals*, the SC has neither asked the Special Committee to report back nor imposed any timeline for the periodic review of such orders, as mandated by *Anuradha Bhasin*, while dismissing the petitions. In addition to this, the Court did not deliberate on whether the orders restricting mobile internet speed all over the Union Territory of Jammu and Kashmir stand strong against the tests laid down in the Suspension Rules and *Anuradha Bhasin* that expressly observed that all orders passed under the Suspension Rules are subject to judicial review.

This judgment exposes a hands-off approach adopted by the SC while dealing with an important clash between disproportional restrictions in the name of national security and the protection of the fundamental rights guaranteed by the Constitution. In *GVK India Ltd. v. The Income Tax Officer & Anr.*<sup>10</sup>, the SC observed that while judicial restraint is necessary for dealing

---

<sup>6</sup> *Foundation for Media Professionals v. Union Territory of Jammu and Kashmir & Anr.*, 2020 SCC 453.

<sup>7</sup> *Ibid.*

<sup>8</sup> Temporary Suspension of Telecom Services (Public Emergency or Public Safety) Rules, 2017, Rule 2(5).

<sup>9</sup> Indian Telegraph Act, 1885, § 5(2), No. 13, Acts of Parliament (India).

<sup>10</sup> *GVK Inds. Ltd. v. The Income Tax Officer and Another*, 2011 (3) SCALE 111.

with the powers of another branch of government, it cannot imply the abdication of the judicial responsibility to ensure that legislative and executive powers are exercised within the bounds of the Constitution. In the present case, the evident denial of the SC to decide on the validity of the orders imposed under the Suspension Rules and delegation of duty to the Special Committee amounts to an abdication of such responsibility.

#### **CONSTITUTION OF THE SPECIAL COMMITTEE**

The grounds that led to the substitution of the Review Committee with a Special Committee were that the Review Committee would not be able to address the issues raised satisfactorily since it consisted only of State level officers. The Special Committee that is directed to be formed by the Supreme Court consists of:

1. The Secretary, Ministry of Home Affairs (Home Secretary), who will also act as the Head of the Special Committee.
2. The Secretary, Department of Communications, Ministry of Communications, Government of India.
3. The Chief Secretary, Union Territory of Jammu and Kashmir.

Further, the Special Committee constituted by the SC is starkly different from the Review Committee particularly because it includes the Secretary, Ministry of Home Affairs. The constitution of the Review Committee provided by the Suspension Rules is as follows:

1. When constituted under the order of the Central Government
  - a. Cabinet Secretary (Chairman)
  - b. Secretary to the Government of India In-Charge, Legal Affairs
  - c. Secretary to the Government, Department of Telecommunications
2. When formed under the order of State Government
  - a. Chief Secretary
  - b. Secretary Law or Legal Remembrancer In-Charge, Legal Affairs
  - c. Secretary to the State Government (other than the Home Secretary)

Rule 2(1) of the Suspension Rules<sup>11</sup> provides that an order for internet shutdown can be made by or under the authority of the Secretary of Home Affairs, Government of India (when passed by the Central Government) and the Secretary to the State Government in-charge of the Home Department (when passed by the State Government). As per Rule 2(5), The Secretary of Home Affairs, Government of India is not included in the Review Committee formed by the Central Government. Further, the Secretary to the State Government (Home Affairs) is explicitly excluded from the Review Committee of the State Government. Reading Rule 2(1) and 2(5) of the Suspension Rules, the intent of the law becomes evident i.e. the authority which passes the order cannot review that particular order, which is also in consonance with the principle of *nemo judex in causa sua*<sup>12</sup>.

Per the order of SC in *Media Professionals*, the Secretary of Home Affairs, Government of India will now sit at the helm of the substituted committee that will be reviewing the order restricting internet speed. As a direct consequence, the same office which had a hand in imposing the internet restrictions in the region earlier and had been excluded from reviewing such orders is now the *de-jure* head of the Special Committee. The intent of the review committee as per *Anuradha Bhasin* is to ensure whether such restrictions are in line with the Suspension Rules and standards of proportionality. The SC by enabling the same office of the executive branch to review its own order has defeated the purpose of the Review Committee. The result of this order will therefore be a clear violation of *nemo judex in causa sua*, where the executive will act as a judge in its own cause.

## CONCLUSION

The *Media Professionals* case was an opportunity for the Supreme Court to apply the principles laid down in *Anuradha Bhasin* and crackdown on arbitrary and disproportionate restrictions on access to the internet. Unfortunately, this did not materialize and the Government of Jammu and Kashmir once again renewed the order for the temporary suspension of telecom services on 11<sup>th</sup> May 2020<sup>13</sup> without any mention of the observations of the SC in *Media Professionals*. This order

---

<sup>11</sup> Temporary Suspension of Telecom Services (Public Emergency or Public Safety) Rules, 2017, Rule 2(1).

<sup>12</sup> A.K. Kraipak v. Union of India, AIR 1970 SC 150.

<sup>13</sup> Home Department, Government of Jammu and Kashmir, Temporary Suspension of Telecom Services Order, Home -48 (TSTS) of 2020 (May 27, 2020).

was further renewed without any reference to the Special Committee and prompted the filing of a contempt petition<sup>14</sup> by Foundation for Media Professionals on 9<sup>th</sup> June 2020 wherein the petitioner prayed for the initiation of contempt proceedings against the Secretary, Ministry of Home Affairs, Government of India and the Chief Secretary, Union Territory of Jammu and Kashmir for willful disobedience. Alongside the petition, an application seeking the constitution of the Special Committee, a quick decision as per *Media Professionals*, and the restoration of 4G internet services in the region in the interim was filed.

With successive orders being passed in the region, extending the internet restrictions and briefly suspending even 2G data services in Pulwama<sup>15</sup> and Shopian<sup>16</sup>, among other regions, encounters between security forces and terrorists followed<sup>17</sup>. It was only after the initiation of contempt proceedings and directions from the SC to consider the possibility of restoring internet services during these proceedings, did the government order dated 16<sup>th</sup> August 2020<sup>18</sup> reflect the constitution of the Special Committee and allowed for “lifting restrictions on high-speed internet connectivity on a trial basis” in the districts of Ganderbal and Udhampur while limiting internet speed in other districts.<sup>19</sup> While this is a positive step towards bringing the region online, the approach of the Special Committee and the SC seems to be based on the belief that there is a direct causal relationship between access to the internet and instability in the region, which is worrisome.

While issues of national security are of great importance, measures of the government must still adhere to reason and the principles of the Constitution. In this age of technology, access to the internet cannot be restricted either by reducing the speed of the internet or effectuating a complete blackout without considering whether such measures will be effective and proportionate to the

---

<sup>14</sup> Live Law News Network, *Foundation Of Media Professionals Files Contempt Petition In SC Over Non-Constitution Of Special Committee To Review J&K Internet Curbs*, LIVE LAW (June 9, 2020); <https://www.livelaw.in/top-stories/foundation-of-media-professionals-contempt-petition-over-non-constitution-of-special-committee-jk-internet-curbs-158053?infinitemscroll=1>.

<sup>15</sup> Home Department, Government of Jammu and Kashmir, Temporary Suspension of Telecom Services Order, Home - 60 (TSTS) of 2020 (June 4, 2020).

<sup>16</sup> Home Department, Government of Jammu and Kashmir, Temporary Suspension of Telecom Services Order, Home - 65 (TSTS) of 2020 (June 17, 2020).

<sup>17</sup> Trisha Jalan, *Internet speeds will continue to be restricted to 2G in Jammu & Kashmir*, MEDIANAMA (June 18, 2020); <https://www.medianama.com/2020/06/223-2g-restriction-jammu-and-kashmir-continues/>.

<sup>18</sup> Home Department, Government of Jammu and Kashmir, Temporary Suspension of Telecom Services Order, Home - 91 (TSTS) of 2020 (Aug 16, 2020).

<sup>19</sup> Mudasir Ahmad, *After More Than a Year, 4G Restored in Two J&K Districts on a ‘Trial Basis’*, THE WIRE (Aug 17, 2020); <https://thewire.in/government/jammu-kashmir-internet-4g-services-ban-lifted>.

danger posed. By arguing that misinformation will incite violence, the measures adopted have unreasonably restricted communication. The intent of controlling the spread of fake news and misinformation essentially remains unachieved even when 2G data is provided, leaving us to conclude that this measure goes beyond an ineffective policy decision, and demonstrates the abuse of power.