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JUDICIAL REMEDIES FOR THE JAMMU AND KASHMIR NET RESTRICTIONS

Relevant for: Indian Polity | Topic: Indian Constitution - Features & Significant Provisions related to Fundamental Rights, Directive Principles and Fundamental Duties

During the novel coronavirus pandemic, a large part of the realm of freedoms protected by the Constitution, ranging from carrying on a business, to obtaining education, health care, and information, have all moved online. This has meant that we have had to discuss ways to improve access to the Internet for all. But even as we do this, the Internet restrictions in Jammu and Kashmir (J&K) have completed a whole year.

In response to the Supreme Court of India's stern approach in the recent hearing on August 7, the Central **government has agreed to restore Internet in two districts** on a trial basis. While this is a welcome step, the fundamental rights of the people of J&K will truly only have meaning if the Supreme Court maintains this stern approach and assesses the proportionality of the State's restrictions, and is willing to grant an effective remedy where disproportionate restrictions are identified.

The Special Rapporteur on Freedom of Opinion and Expression of the United Nations and representatives of other regional organisations, in a Joint Declaration, have pointed out that neither the slowing nor the shutting down of the Internet is justifiable even on national security grounds.This is because Internet shutdowns or slowdowns are an inherently overbroad restriction for it adversely affects millions of innocent civilians owing to the actions of a few. Indeed, the **provision of 2G Internet on mobile phones** since March 2020 has failed to provide any meaningful respite to the people of J&K. It has become impossible for them to adapt to the pandemic, by resorting, as the rest of India has, to online classes, working from home, tele-consults with doctors or even video calls with family.

Social media makes a 'silent' comeback to Kashmir Valley

What is more, important industries such as tourism, handicrafts and agriculture have faced devastating losses. The president of the Kashmir Chamber of Commerce and Industry has estimated the loss to the region's economy this past year at 40,000 crore. Moreover, experts have found shutdowns counter-productive in reducing violence.

Despite having heard two challenges to the restrictions since August 2019, the Supreme Court has remarkably not ruled on their validity. In January 2020, in *Anuradha Bhasin*, the Court granted limited relief by directing the government to publish reasoned orders and review the restrictions every seven days. A pandemic and a lockdown later, the Court faced criticism for its order in *Foundation For Media Professionals* where it set up an Executive Committee to review the 2G speed restrictions that had been imposed by the Executive in the first place.

Two arguments have been advanced to justify the Court's deferential approach. But both are unsustainable. First, that such decisions are not based on objective factors that can be presented to and assessed by a judicial body, but are based on the "subjective satisfaction" of officers who possess exclusive knowledge of the situation on the ground. This notion of subjective satisfaction can be traced back to English public law where Parliament could grant the Executive the power to exercise subjective satisfaction in certain cases. The English courts

did not have the power to strike down legislation as invalid. The framers of our Constitution consciously moved away from this legal tradition while entrenching judicial review as a fundamental right under Article 32.

In 1956, Justice Vivian Bose emphasised this fundamental aspect of the Constitution, when he wrote that if the power of subjective satisfaction was conferred on executive bodies, then "there would be no point in these fundamental rights, for the courts would then be powerless to interfere and determine whether those rights have been infringed". Two decades later, the Supreme Court, in what is regarded as its nadir, held in *ADM Jabalpur* that detentions during the Emergency were based on the subjective satisfaction of the Executive and were not amenable to judicial review. In overruling this decision, in *K.S. Puttaswamy*, the Court affirmed that our Constitution guarantees that "judicial remedies would be available to ask searching questions and expect answers when a citizen has been deprived of these, most precious rights".

The second, and closely related, argument offered is that the Court does not have the competence to review matters of national security. However, this argument taken to its logical conclusion would imply that the Court cannot rule on any complex issue irrespective of its impact on fundamental rights. Indeed, the Court has often ruled on complex issues such as the ban on the use of crypto-currency and the linkage of Aadhaar to SIM cards and bank accounts on grounds of national security and money laundering, respectively, and even struck them down. In these cases, instead of choosing between either refraining altogether or substituting the decision of the government, the Court assessed the quality of the government's justifications.

The Court in *Anuradha Bhasin* recognised the proportionality test as the framework for such assessment. Under this, the government must provide a four-step justification. It has to show that the restrictions are in pursuance of a legitimate aim (in this case, national security), that they are suitable to achieving that aim, that there exist no less restrictive alternatives that would limit the right to a lesser extent, and finally, that the adverse impact of the restrictions are proportionate to their benefit. In *Foundation For Media Professionals*, the government of J&K's own affidavit revealed that terrorist incidents have continued despite these restrictions. But the government failed to explain why less restrictive alternatives such as permitting the use of 4G on verified post-paid SIMs, blocking and intercepting specific numbers, websites or applications, issuing takedown orders of content that incite violence, and limiting restrictions to particular areas for shorter durations could not be applied. Finally, on the impact of restrictions, the government asserted that people can download e-learning applications, e-books and use websites and messaging platforms on 2G Internet. Not only is this statement factually incorrect, it also contradicts the government's own claim that the restriction to 2G speed is suitable as it restricts terrorists from communicating and circulating videos.

It is difficult to fathom how such weak and inconsistent reasons could have been the basis for restricting the entire realm of rights of 1,25,00,000 people. Indeed, these restrictions were unconstitutional the day they were imposed. One year on, it is imperative that the Court fulfils its constitutional duty by examining and going over any further reasons given by the State with a fine toothcomb.

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