**ANURADHA BHASIN V UNION OF INDIA & ORS**

DATE OF DECISION: **JANUARY 10, 2020**

NUMBER OF PAGES: **130 PAGES**

COUNTRY/JUDICIAL BODY: **INDIA**/ **SUPREME COURT OF INDIA**

THEME: **ACCESS TO PUBLIC INFORMATION, PUBLIC ORDER**

**CASE SUMMARY AND OUTCOME:**

The Supreme Court of India ruled that the Indian government could impose a complete internet shutdown, as long as the restrictions were not permanent and satisfied the tests of necessity and proportionality. The case concerned the lengthy internet and movement restrictions imposed on the Janmu and Kashmir region in the name of protecting public order. In a lengthy judgment, the Supreme Court of India stressed that freedom of expression online enjoyed Constitutional protection, but could be restricted in the name of national security. Orders imposing such restrictions had to be made public and were subject to judicial review. At the end, the Court did not lift the restrictions, and instead directed the government to review the orders on the basis of which the restrictions were made against the tests outlined in its judgment, and to lift those orders that failed the meet the said tests.

**Facts:**

Janmu and Kashmir is an Indian territory bordering Pakistan that has been the subject of a decades long dispute between the two countries. Under Article 370 of the Indian Constitution, the territory enjoyed special status, had its own constitution and Indian citizens from other states were not allowed to purchase land or property there. This all changed on August 5, 2019, when the Indian Parliament passed Constitutional Order 272, which stripped Janmu and Kashmir of its special status it enjoyed since 1954 and made it fully subservient to all provisions of the Constitution of India.

Fearing acts of terrorism and public disorder, the Indian government began imposing restrictions on online communication and freedom of movement days before the passage of Order 272. On August 2, the Civil Secretariat, Home Department, Government of Jammu and Kashmir, advised tourists and Amarnath Yatra pilgrims to leave the Janmu and Kashmir area in India. Subsequently, schools and offices were ordered to remain close until further notice. On August 4, 2019, mobile phone networks, internet services, landline connectivity were all discontinued in the valley. The District Magistrates imposed additional restrictions on freedoms of movement and public assembly citing authority to do so under Section 144 of the Criminal Penal Code.

The internet shutdown and movement restrictions (hereafter “restrictions”) limited the ability of journalists to travel and to publish and accordingly were challenged in court for their violations of Article 19 of India’s Constitution which guarantees the right to freedom of expression. The Supreme Court of India reviewed five petitions challenging the legality of the internet shutdown and movement restrictions:

* W.P. (C) No. 1031 of 2019: the petition was brought by the editor of the Kashmir Times Srinagar Edition. She argued the internet is essential for the modern press and that by shutting it down, the authorities forced the print media to come to “a grinding halt.” Because of this she was unable to publish her newspaper since August 6, 2019. She also argued that the government failed to consider whether the internet shutdown was reasonable and proportionate to the aims it pursued. Lastly she argued that the restrictions were passed on the belief that there would be “a danger to law and order. However, public order is not the same as law and order and neither were at risk when the order was passed.”
* W.P. (C) No. 1164 of 2019: the petitioner argued that restrictions must be based on objective reasons and not merely on conjectures. The emergency state used by the authorities to justify the restrictions could be declared only in light of an internal disturbance of external aggression, neither of which occurred here. Further, the petitioner argued that restrictions on movement must be specific in scope, targeting those who may disturb the peace, and cannot be applied broadly against the public in general. Further, in imposing restrictions, the State must choose the least restrictive measures and balance the safety of people with their lawful exercise of their fundamental rights, which did not occur here. Concerning the internet shutdown, the petitioner argued that internet restriction did not merely affect freedom of expression but also the right to trade.
* W.P. (C) No. 1031 of 2019: the petitioner argued that giving the State a carte blanche to restrict fundamental rights in the name of national security and terrorism prevention would allow the State to impose broad restrictions on fundamental rights in varied situations. Further, the restrictions censored the discussion of the passage of the Constitutional Amendment stripping Janmu and Kashmir of special status by the persons living there. Lastly, the restrictions were supposedly temporary in nature, but lasted over 100 days.
* W.P. (C) No. 1031 of 2019: the petitioner argued that the State failed to prove the necessity of the restrictions. “The people have a right to speak their view, whether good, bad or ugly, and the State must prove that it was necessary to restrict the same.” Further, the petitioner argued that the restriction was not proportionate. The State had to consider the effect of the restriction on fundamental rights, which did not occur here. “it is not just the legal and physical restrictions that must be looked at, but also the fear that these sorts of restrictions engender in the minds of the populace, while looking at the proportionality of measures.”
* W.P. (Crl.) No. 225 of 2019: the petition was withdrawn at some state, but the court noted that it argued that the restrictions caused broad harm even to regular and law-abiding citizens.

India’s Attorney General and the Solicitor General for the State of Jammu and Kashmir defended the restrictions. The Attorney General argued that the restrictions were a measure to prevent terrorist acts and were justified considering the history of cross border terrorism and internal militancy that had long plagued the State of Janmu and Kashmir. The Attorney General recalled that similar steps were taken in 2016 after a terrorist had been killed there.

The Solicitor General reiterated the historical necessity argument and noted that the first and foremost duty of the State is to ensure security and protect the citizens­ their lives. He also argued that the facts laid by the petitioners were false and exaggerated the effects of the restrictions. Particularly, he noted that individual movement had never been restricted, that restrictions were imposed only in certain areas and were relaxed soon after, and that all newspapers, television and radio channels were functioning.

Further, the Solicitor General argued that even before Article 370 was passed, it was already a subject of speculation in Janmu and Kashmir, including provocative speeches and messages. Accordingly, government officers on the ground decided that the restrictions were necessary, and courts have limited jurisdiction to question their judgment since issues of national security were at stake.

Specifically concerning the communications and internet shutdown, the Solicitor General submitted that internet was never restricted in the Jammu and Ladakh regions. He added that social media, which allowed people to send messages and communicate with a number of people at the same time, could be used as a means to incite violence. According to him, the internet allowed for the transmission of false news or fake images, which were then used to spread violence. Too, he claimed that the “dark web” allowed individuals to purchase weapons and illegal substances easily.

The Solicitor General rejected the argument that free speech standards as they related to newspapers applied to the internet because of their differences. He explained that while newspapers only allowed one-way communication, the internet made it possible to communicate in both directions, making dissemination of messages very simple. He concluded that it was not possible to ban only certain websites or parts of the Internet while allowing access to other parts, as the government learned in 2017.

**Decision analysis**

The Constitutional Court identified five issues from the arguments presented by the petitioners and the government:

1. Whether the Government can claim exemption from producing all of the restriction orders?
2. Whether the freedom of speech and expression and freedom to practice any profession, or to carry on any occupation, trade or business over the Internet is a part of the fundamental rights protected by the Constitution?
3. Whether the Government’s action of prohibiting internet access is valid?
4. Whether the imposition of movement restrictions under Section 144 of the Criminal Penal Code was valid?
5. Whether the freedom of press of the Petitioner in W.P. (C) No. 1031 of 2019 was violated due to the restrictions?

The five issues above were analyzed by the Court in four sections:

1. *Whether the Government can claim exemption from producing all the orders for the restrictions?*

The Court held that the State had to produce the orders imposing the restrictions. It began by noting the difficulty it had experienced in determining the legality of the restrictions when the authorities had refused to produce the orders imposing the said restrictions. Citing the precedent in [*Ram Jethmalani v. Union of India*](https://indiankanoon.org/doc/1232445/), (2011) 8 SCC 1, the Court explained that the State had an obligation to disclose information in order to satisfy the right to remedy as established in Article 32 of India’s Constitution.

Furthermore, Article 19 of India’s Constitution had been interpreted to include the right to information as an important part of the right to freedom of speech and expression. The Court added, “a democracy, which is sworn to transparency and accountability, necessarily mandates the production of orders as it is the right of an individual to know.” [para. 15] These fundamental rights obliged the State to act responsibly in protecting them and prohibited the State from taking away these rights casually.

The Court reiterated that no law should be passed in secret because of the danger to democracy that such acts may entail. To make its point, the Court cited James Madison, “a popular government, without popular information, or the means of acquiring it, is but a prologue to a farce or a tragedy; or perhaps both. Knowledge will forever govern the ignorance and a people.” [para. 16]

The State was thus obliged to take proactive steps to make public any law restricting fundamental rights, unless there was a countervailing public interest reason for secrecy. However, even in such cases, the State would be the body to weigh the State’s privileges against the right to information and decide what portions of the order could be hidden or redacted. In the present case, the State initially claimed privilege, but then dropped the claim and released some of the orders, explaining that all could not be released because of unspecified difficulties. For the court, such justification was not a valid ground.

1. *Did the restrictions affect* *freedom of movement, freedom of speech and expression and right to free trade and avocation?*

First, the Court determined that freedom of expression guarantees under Article 19 of India’s Constitution extended to the internet. The Court recalled its extensive jurisprudence that extended protections to new mediums for expression. In [*Indian Express v. Union of India*](https://indiankanoon.org/doc/223504/), (1985) 1 SCC 641, the Supreme Court ruled that freedom of expression protects the freedom of print medium. In [*Odyssey Communications Pvt. Ltd. v. Lokvidayan Sanghatana*](https://indiankanoon.org/doc/1241147/), (1988) 3 SCC 410, it was held that the right of citizens to screen films was a part of the fundamental right of freedom of expression. Online expression has become one of the major means of information diffusion, and accordingly it was integral to the enjoyment of freedom of speech and expression guaranteed by [Article 19(1)(a)](https://indiankanoon.org/doc/1378441/), but also could also be restricted under [Article 19(2)](https://indiankanoon.org/doc/493243/) of the Constitution.

Accordingly, Internet also plays a very important role in trade and commerce, and some businesses were completely dependent on the internet. Therefore the freedom of trade and commerce by using the internet was also constitutionally protected under [Article 19(1)(g](https://indiankanoon.org/doc/935769/)), subject to the restrictions provided under [Article 19(6).](https://indiankanoon.org/doc/626103/) The Court, however, did not go as far as to declare the right to access the internet as a fundamental right because none of the parties to the case made that argument.

The Court then discussed whether freedom of expression could be restricted and to what extent. India’s Constitution allows the Government to restrict freedom of expression under Article 19(2) as long as the restrictions were prescribed by law, were reasonable, and were imposed for a legitimate purpose. The Constitution lists an exhaustive list of reasonable restrictions that include “interests of the sovereignty, integrity, security, friendly relations with the foreign States, public order, decency or morality or contempt of Court, defamation or incitement to an offence.” [para. 31] By reviewing its jurisprudence concerning the application of Article 19(2), the Court concluded that restrictions on free speech and expression could impose complete prohibitions. In such cases, the complete prohibition should not excessively burden free speech and the government has to explain why lesser alternatives would be inadequate. Lastly, whether a restriction amounts to a complete prohibition is a question of fact to be determined by the Court on the circumstances of each case.

After, the Court turned to the geopolitical context of the restrictions. It agreed with the Government that Janmu and Kashmir has long been plagued by terrorism. The Court noted that modern terrorists relied heavily on the internet, which allowed them to disseminate false information and propaganda, raise funds, and recruit others to their cause. Accordingly, the Indian authorities argued that the “war on terrorism” required imposition of the restrictions “so as to nip the problem of terrorism in the bud.” [para. 37] The Court noted that “the war on terror” was unlike territorial fights and transgressed into other forms affecting normal life, thus it could not be treated as a law and order situation.

The Court then reviewed the U.S. First Amendment and its jurisprudence from 1863 to the present day to conclude that speech which incites imminent violence is not protected. The Court highlighted that American leaders and the judiciary repeatedly restricted freedom of expression in the name of national security. The first of these cases was from 1863, *Vallandigham,* 28 F. Cas. 874 (1863), when the Mr. Vallandigham was found guilty and imprisoned during the American Civil War for publicly calling it “‘wicked, cruel and unnecessary.” In *Abraham v. United States*, 250 U.S. 616 (1919), Justice Holmes wrote that the power to the United States government can punish speech that produces or is intended to produce a clear and imminent danger, and that this power “undoubtedly is greater in time of war than in time of peace, because war opens dangers that do not exist at other times.” [para. 40] In *Dennis v. United States*, 341 US 494 (1951) the US Supreme Court held that the “societal value of speech must, on occasion, be subordinated to other values and considerations.” [para. 41] In [*Brandenburg v. Ohio*](https://globalfreedomofexpression.columbia.edu/cases/brandenburg-v-ohio/), 395 US 444 (1969), the US Supreme Court held that the State can punish advocacy of unlawful conduct only if it intends to incite and is likely to incite “imminent lawless action.” Lastly, the Indian Court recalled that in the post 9/11 context, US Attorney General Ashcroft criticized those questioning the erosion of fundamental rights as the result of the war on terror. Specifically saying, “to those… who scare peace­loving people with phantoms of lost liberty, my message is this: Your tactics only aid terrorists, for they erode our national unity and diminish our resolve. They give ammunition to America’s enemies…” [para. 44]

The Court recalled that in the recent [*Modern Dental College & Research Centre v. State of Madhya Pradesh*](https://indiankanoon.org/doc/99335142/), (2016) 7 SCC 353 it found that no constitutional right can be clamed to be absolute considering the interconnectedness of all rights, and accordingly could be restricted. In that judgment, the Court also found that when there are tensions between fundamental rights, they must be balanced against each other so that “they harmoniously coexist with each other.” [para. 55]

Just as the First Amendment, the Indian Constitution allows the Government to restrict freedom of expression, but per the Indian Constitution such restrictions must be proportionate. The Court stressed that the standard of proportionality was key to ensuring that a right is not restricted beyond what is necessary. That said, the Court expressed caution at balancing national security with liberty and rejected the notion that a government should be prohibited from achieving a public good at the cost of fundamental rights. With this in mind, the Court defined proportionality as the question of whether “regulating exercise of fundamental rights, the appropriate or least ­restrictive choice of measures has been made by the legislature or the administrator so as to achieve the object of the legislation or the purpose of the administrative order, as the case maybe.” [para. 53]

The Supreme Court then proceeded to conduct an extensive comparative review of proportionality tests used by Indian, German and Canadian Courts. It found that there was agreement that proportionality was the key tool to achieve judicial balance when resolving questions of restrictions on fundamental rights, there was no agreement that proportionality and balancing were equivalent. The Court then outlined its understanding of the test of proportionality:

1. The goal of the restriction must be legitimate
2. The restriction must be necessary
3. The authorities must consider if alternative measures to the restriction exist
4. The least restrictive measure must be taken
5. The restriction must be open to judicial review

The Court added that the “degree of restriction and the scope of the same, both territorially and temporally, must stand in relation to what is actually necessary to combat an emergent situation… The concept of proportionality requires a restriction to be tailored in accordance with the territorial extent of the restriction, the stage of emergency, nature of urgency, duration of such restrictive measure and nature of such restriction.” [para. 71]

1. *Legality of the Internet Shutdown*

Having laid out the principles of proportionality and reasonable restrictions, the Court turned to the assessing the restriction imposed on freedom of speech online. It outright rejected the State’s justification for a total ban on the internet because it lacked the technology to selectively block internet services as accepting such logic would have given the State green light to completely ban internet access every time. However, the Court conceded that there was “ample merit in the contention of the Government that the internet could be used to propagate terrorism thereby challenging the sovereignty and integrity of India” and thus it had to determine the extent to which the restriction burdened free speech. [para. 76]

The Court highlighted that it had to consider both procedural and substantive elements to determine the Constitutional legality of the internet shutdown. The Procedural mechanism has two components. First, there is the contractual component between Internet Service Providers and the Government. Second, there is the statutory component as enshrined in under the [Information Technology Act](https://indiankanoon.org/doc/1965344/), 2000, [the Criminal Procedure Code](https://indiankanoon.org/doc/1233094/), 1973 and the [Telegraph Act](https://indiankanoon.org/doc/357830/). In its analysis, the Court focused largely on the latter as it directly applied to the case at hand.

The Suspension Rules under Section 7 of the Telegraph Act were passed in 2017 and allow the government to restrict telecom services, including access to the internet, subject to certain safeguards. First, the suspension orders may be issued only by the Secretary to the Government of India in the Ministry of Home Affairs or by the Secretary to the State Government in charge of the Home Department. In unavoidable circumstances another official not below the rank of a Joint Secretary to the Government of India may issue the orders provided that the competent authority approves the orders within 24 hours of its issuance. Without approval the suspension must be lifted within 24 hours. The orders must include reasons for the suspension and its copy must be sent to a Review Committee consisting of senior State officials. The reasons should not only explain the necessity of the suspension but also the “unavoidable” circumstance which necessitated the order.

Furthermore [Section 5(2)](https://indiankanoon.org/doc/1445510/) of the [Telegraph Act](https://indiankanoon.org/doc/357830/) permitted suspension orders only in a situation of public emergency or in the interest of public safety. The Court thus found that to issue a suspension order, the Government first had to determine that a public, and not any kind of other, emergency existed. “Although the phrase “public emergency” has not been defined under the [Telegraph Act](https://indiankanoon.org/doc/357830/), it has been clarified that the meaning of the phrase can be inferred from its usage in conjunction with the phrase “in the interest of public safety” following it.” [para. 92]

The Supreme Court noted that the definition of an emergency varies. For example, “[Article 4](https://indiankanoon.org/doc/1015123/) of the International Covenant on Civil and Political Rights, notes that ‘[I]n time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed...’. Comparable language has also been used in [Article 15](https://indiankanoon.org/doc/609295/) of the European Convention on Human Rights which says­ "In time of war or other public emergency threatening the life of the nation". We may only point out that the ‘public emergency’ is required to be of serious nature, and needs to be determined on a case to case basis.” [para. 93]

Although the Suspension Rules do not provide for publication or notification of the orders, the Court noted that public availability of a government order is a settled principle of law and of natural justice, particularly if an order affects lives, liberty and property of people. The Court reiterated that Article 226 of India’s Constitution grants an aggrieved person the constitutional right to challenge suspension orders.

Finding it necessary, the Court once again reiterated that “complete broad suspension of telecom services, be it the Internet or otherwise, being a drastic measure, must be considered by the State only if ‘necessary’ and ‘unavoidable’. In furtherance of the same, the State must assess the existence of an alternate less intrusive remedy.” [para. 99]

The Court noted that the Suspension Rules do not indicate the maximum duration of a suspension order. Nonetheless, considering the principle of proportionality, the Court opined that indefinite suspension is impermissible. Since the Suspension Rules were silent on the length of a permissible shutdown, the Court found that it was up to the Review Committee to determine its duration and to ensure that it would not extend beyond a period which is necessary.

The State submitted eight orders to the Court. Four were passed by the Inspector General of the Police and the other four by the government of Janmu and Kashmir. The Solicitor General explained that the authorities relaxed some restrictions but were continuously appraising the situation on the ground. The Court conceded that the danger to public safety could not be ignored, but noted that any new restrictions will have to be imposed on the basis of a new order. Since the Court could not view all orders to understand which were no longer in effect and could not assess the public order situation, it “moulded the relief in the operative portion.” [para. 102]

1. *Restrictions Under Section 144 of the Criminal Penal Code*

The Petitioners argued that to justify restrictions under Section 144 of the CPC, the State had to prove that there “would be an action which will likely create obstruction, annoyance or injury to any person or will likely cause disturbance of the public tranquillity, and the Government could not have passed such orders in anticipation or on the basis of a mere apprehension.” [ para. 103] The State argued that “the volatile history, overwhelming material available even in the public domain about external aggressions, nefarious secessionist activities and the provocative statements given by political leaders, created a compelling situation which mandated passing of orders under Section 144.” [ para. 104]

The Court noted that Section 144 if one of the mechanisms that enable the State to maintain public peace and it could be invoked in urgent cases of nuisance or apprehended danger. Thus, it allows the State to take preventive measures to deal with imminent threats to public peace. The Section contains several safeguards to prevent its abuse, including an assessment by a magistrate to conclude that there were sufficient grounds for restrictions under the section, identification of a person(s) whose rights may be restricted, and determining the length of the restriction.

Judicial precedent established that restrictions under Section 144 cannot be imposed merely because there was likelihood or tendency of danger, but only to immediately prevent specific acts that may lead to danger. The restriction could be imposed on an entire area if it contains groups of people disturbing public order. Indefinite restrictions under Section 144 are unconstitutional. Orders passed under Section 144 were executive orders subject to judicial review under Article 226 of the Constitution. The State cannot impose repetitive orders and would be an abuse of power.

The Petitioners also argued that law and order are a narrower concept than public order, and could not serve as justification for restrictions under Section 144. The Supreme Court agreed that the notions of “public order” and “law and order” differed, with the letter being the broadest. Allowing the imposition of restrictions to protect law and order would thus broaden the authority of the government to impose restrictions. Further, not all disturbances of law and order undermined public order.

The Court however agreed that there may be times when it is impossible to distinguish between the individuals who may break public order and others. “A general order is thus justified but if the action is too general, the order may be questioned by appropriate remedies for which there is ample provision in the law.” [para, 124]

Nevertheless, the Court noted that “orders passed under [Section 144](https://indiankanoon.org/doc/357830/), [Cr.P.C](https://indiankanoon.org/doc/1233094/). have direct consequences upon the fundamental rights of the public in general. Such a power, if used in a casual and cavalier manner, would result in severe illegality. This power should be used responsibly, only as a measure to preserve law and order.” [para. 129] Thus, it is imperative to indicate the material facts necessitating passing of such orders. The Court conceded that the State is best placed to assess threats to public order, but they had to exhibit the material facts to justify an order under Section 144 to enable judicial scrutiny and verification of the order’s legitimacy. “Orders passed mechanically or in a cryptic manner cannot be said to be orders passed in accordance with law.” [para. 134]

Although the restrictions may have been removed, the Court stated that it cannot ignore noncompliance with the law in this case, as the issue at hand is not just about what happened in Janmu and Kashmir but also about imposing a check on the State. The Court reiterated that a government must follow the law if it feels that there is a threat to public order.

Thus, the Court concluded that the power under Section 144 could be exercised “not only where there exists present danger, but also when there is an apprehension of danger. However, the danger contemplated should be in the nature of an ‘emergency’ and for the purpose of preventing obstruction and annoyance or injury to any person lawfully employed.” [para. 140] The power cannot be used to suppress legitimate expression and should be used only in the presence of material facts justifying its application.

1. *Freedom of the Press*

The Court rejected the Petitioners’ arguments that the restrictions on movement and communication imposed in Janmu and Kashmir restricted freedom of the press. The Court began by highlight the importance of freedom of the press. It recalled that as early as in 1914, the freedom of the press had been recognized in India. In [*Channing Arnold v. The Emperor*](https://indiankanoon.org/doc/1621673/), (1914) 16 Bom LR 544, the Privy Council stated that: “the freedom of the journalist is an ordinary part of the freedom of the subject and to whatever length, the subject in general may go, so also may the journalist, but apart from the statute law his privilege is no other and no higher. The range of his assertions, his criticisms or his comments is as wide as, and no wider than that of any other subject.” [para. 142] It was thus not doubted that the freedom of the press is a valuable and scared right protected by the Indian Constitution.

The Court interpreted the Petitioner to claim that the imposed restrictions did not necessarily have a direct but rather a chilling effect on their freedom of expression. However, the Court found that the Petitioners failed to offer evidence that the restrictions restricted the publishing of newspapers in Janmu and Kashmir or to challenge the State’s argument that newspapers were published and distributed during the communication and movement lockdown. “In view of these facts, and considering that the aforesaid Petitioner has now resumed publication, we do not deem it fit to indulge more in the issue than to state that responsible Governments are required to respect the freedom of the press at all times. Journalists are to be accommodated in reporting and there is no justification for allowing a sword of Damocles to hang over the press indefinitely.” [para. 151]

*Conclusions*

Based on the above the Court found that:

1. Freedom of expression and the freedom to practice any profession online was protected by India’s Constitution
2. Although the Government could suspend the Internet, the government had to prove necessity and impose a temporal limit, which it failed to do in this case. Thus, the government had to review its suspension orders and lift those that were not necessary or did not have a temporal limit.
3. Restrictions under Section 144 of the Criminal Penal Code could not be used to suppress legitimate expression and are subject to judicial scrutiny. The Court thus ordered the State to review its restrictions.

**Decision Overview**

Although the Court did not go as far as to lift the restriction on internet and movement, its judgment still expanded freedom of expression by reiterating that internet access was integral to freedom of expression and could not be restricted indefinitely even in the name of national security. The Court thoroughly outlined the principles and tests to strike a balance between fundamental rights and national security. Just as importantly, the Court stressed that orders that impact fundamental rights such as freedom of expression cannot be passed arbitrarily and in secret, but must be available to the public and subject to judicial scrutiny.