REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION

WRIT PETITION (CIVIL) NO. 1031 OF 2019

ANURADHA BHASIN ...**PETITIONER**

VERSUS

UNION OF INDIA AND ORS. ...**RESPONDENT(S)**

And

WRIT PETITION (CIVIL) NO. 1164 OF 2019

GHULAM NABI AZAD ...**PETITIONER**

VERSUS

UNION OF INDIA AND ANR. ...**RESPONDENT(S)**

JUDGMENT

TABLE OF CONTENTS

Introduction	**A**
Contentions	**B**
Issues	**C**
Production of Orders	**D**
Fundamental Rights under Part III and restrictions thereof	**E**
Internet Shutdown	**F**
Restrictions under Section 144, Cr.P.C.	**G**

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Freedom of the Press	**H**
Conclusion	**I**

N. V. RAMANA, J.

A. INTRODUCTION

"It was the best of times, it was the worst of times,

it was the age of wisdom, it was the age of foolishness,

it was the epoch of belief, it was the epoch of incredulity,

it was the season of Light, it was the season of Darkness,

it was the spring of hope, it was the winter of despair,

we had everything before us, we had nothing before us,

we were all going direct to Heaven, we were all going direct the other way-

in short, the period was so far like the present period, that some of its noisiest authorities insisted on its being received, for good or for evil, in the superlative degree of comparison only."

-Charles Dickens in A Tale of Two Cities

1. Although cherished in our heart as a “Paradise on Earth”, the history of this beautiful land is etched with violence and militancy. While the mountains of Himalayas spell tranquillity, yet blood is shed every day. In this land of inherent contradictions, these petitions add to the list, wherein two sides have shown two different pictures which are diametrically opposite and factually irreconcilable. In this context, this Court’s job is compounded by the magnitude of the task before it. It goes without saying that this Court will not delve into the political propriety of the decision taken herein, which is best left for democratic forces to act on. Our limited scope is to strike a balance between the liberty and security concerns so that the right to life is secured and enjoyed in the best possible manner.

2. Liberty and security have always been at loggerheads. The question before us, simply put, is what do we need more, liberty or security? Although the choice is seemingly challenging, we need to clear ourselves from the platitude of rhetoric and provide a meaningful answer so that every citizen has adequate security and sufficient liberty. The pendulum of preference should not swing in either extreme direction so that one preference

compromises the other. It is not our forte to answer whether it is better to be free than secure or be secure rather than free. However, we are here only to ensure that citizens are provided all the rights and liberty to the highest extent in a given situation while ensuring security at the same time.

3. The genesis of the issue starts with the Security Advisory issued by the Civil Secretariat, Home Department, Government of Jammu and Kashmir, advising the tourists and the Amarnath Yatris to curtail their stay and make arrangements for their return in the interest of safety and security. Subsequently, educational institutions and offices were ordered to remain shut until further orders. On 04.08.2019, mobile phone networks, internet services, landline connectivity were all discontinued in the valley, with restrictions on movement also being imposed in some areas.

4. On 05.08.2019, Constitutional Order 272 was issued by the President, applying all provisions of the Constitution of India to the State of Jammu and Kashmir, and modifying Article 367 (Interpretation) in its application to the State of Jammu and Kashmir. In light of the prevailing circumstances, on the same day, the District Magistrates, apprehending breach of peace and

tranquillity, imposed restrictions on movement and public gatherings by virtue of powers vested under Section 144, Cr.P.C. Due to the aforesaid restrictions, the Petitioner in W.P. (C) No. 1031 of 2019 claims that the movement of journalists was severely restricted and on 05.08.2019, the Kashmir Times Srinagar Edition could not be distributed. The Petitioner has submitted that since 06.08.2019, she has been unable to publish the Srinagar edition of Kashmir Times pursuant to the aforesaid restrictions.

5. Aggrieved by the same, the Petitioners (Ms. Anuradha Bhasin and Mr. Ghulam Nabi Azad) approached this Court under Article 32 of the Constitution seeking issuance of an appropriate writ for setting aside or quashing any and all order(s), notification(s), direction(s) and/or circular(s) issued by the Respondents under which any/all modes of communication including internet, mobile and fixed line telecommunication services have been shut down or suspended or in any way made inaccessible or unavailable in any locality. Further, the Petitioners sought the issuance of an appropriate writ or direction directing Respondents to immediately restore all modes of communication including mobile, internet and landline services throughout

Jammu and Kashmir in order to provide an enabling environment for the media to practice its profession. Moreover, the Petitioner in W.P. (C) No. 1031 of 2019 also pleaded to pass any appropriate writ or direction directing the Respondents to take necessary steps for ensuring free and safe movement of reporters and journalists and other media personnel. Lastly, she also pleaded for the framing of guidelines ensuring that the rights and means of media personnel to report and publish news is not unreasonably curtailed.

6. Moreover, Mr. Ghulam Nabi Azad (Petitioner in W.P. (C) No. 1164 of 2019), alleges that he was stopped from travelling to his constituency in Jammu and Kashmir. In this context, he alleges that due to the aforesaid restrictions, he is not able to communicate with the people of his constituency.

7. When W.P. (C) No. 1164 of 2019 (by Mr. Ghulam Nabi Azad), was listed before a Co-ordinate Bench of this Court on 16.09.2019, the following order was passed:

> "Issue notice.
> We permit the petitioner to go to Srinagar and visit the following districts, subject to restrictions, if any:-
> (i) Srinagar, (ii) Anantnag, (iii) Baramulla and (iv) Jammu.

> The petitioner has undertaken before the Court on his own volition that he will not indulge in any political rally or political activity during his visit. The visit will solely be concerned with making an assessment of the impact of the present situation on the life of the daily wage earners, if any.
> So far as prayers (2) and (3) of the writ petition are concerned, the State as well as, the Union of India will respond within two weeks hence."

8. When W.P. (C) No. 1031 of 2019, was listed on 16.08.2019, the matter was ordered to be tagged along with W.P. (C) No. 1013 of 2019 (five-Judge Bench) and was later de-tagged. On 16.09.2019, a Co-ordinate Bench of this Court ordered the following:

> "The State of Jammu & Kashmir, keeping in mind the national interest and internal security, shall make all endeavours to ensure that normal life is restored in Kashmir; people have access to healthcare facilities and schools, colleges and other educational institutions and public transport functions and operates normally. All forms of communication, subject to overriding consideration of national security, shall be normalized, if required on a selective basis, particularly for healthcare facilities."

When the said writ petition was listed before this Bench on 01.10.2019, in light of expediency, this Bench directed that no further intervention applications shall be entertained. However, liberty was granted to file additional documents in support of applications for intervention. When the matter came up for

hearing on the next date on 16.10.2019, the following order was passed:

> "When these matters came up for hearing today, learned Solicitor General appearing for the Union of India made a submission that after filing the counter affidavit in these matters, certain further developments have taken place and some of the restrictions imposed have been relaxed, particularly with reference to mobile connectivity as well as the landlines services etc. and, therefore, he wants to file another additional affidavit indicating the steps taken by the Government about relaxation of some restrictions. He also made a request to accommodate him for a week only. During the course of hearing, we are informed by the learned
>
> Senior counsel appearing for the petitioners that the orders which are issued by the authorities relating to the restrictions imposed have not been provided to them so far.
>
> When we asked the learned Solicitor General about the non- supply of orders issued by the authorities relating to the restrictions imposed, particularly with respect to the cell phone services as well as Section 144 proceedings, he claims privilege over those orders. He, however, states that those orders can be produced before this Court.
>
> However, if for any reason, learned Solicitor General does not want to give a copy of those orders to the petitioners, we request him to file an affidavit indicating the reasons for claiming such privilege."

On 24.10.2019, after the aforesaid orders were placed on record and pleadings were complete, the matter was listed for final disposal on 05.11.2019. Taking into account the concerns expressed by the parties, we extensively heard the counsel for both sides, as well as all the Intervenors on 05.11.2019, 06.11.2019, 07.11.2019, 14.11.2019, 19.11.2019, 21.11.2019, 26.11.2019 and 27.11.2019, and considered all the submissions made and documents placed before us.

B. CONTENTIONS

Ms. Vrinda Grover, Counsel for the Petitioner in W.P. (C) No. 1031 of 2019

- It was contended that the petitioner, being executive editor of one of the major newspapers, was not able to function post 05.08.2019, due to various restrictions imposed on the press.
- Print media came to a grinding halt due to non-availability of internet services, which in her view, is absolutely essential for the modern press.
- Curtailment of the internet, is a restriction on the right to free speech, should be tested on the basis of reasonableness and proportionality.
- The procedure that is to be followed for restricting Internet services is provided under the Temporary Suspension of Telecom Services (Public Emergency or Public Service) Rules, 2017 [hereinafter "**Suspension Rules**"], which were notified under the Telegraph Act. The Suspension Rules

indicate that the restriction imposed was contemplated to be of a temporary nature.

- The orders passed under the Suspension Rules placed on record by the State of Jammu and Kashmir, regarding the restrictions pertaining to the Internet and phones (either mobile or telephone were *ex facie* perverse and suffered from non-application of mind.
- Learned counsel submitted that the orders were not in compliance with the procedure prescribed under the Suspension Rules. Further, the orders did not provide any reasoning as to the necessity of the restrictions, as is required under the Suspension Rules.
- Lastly, the learned counsel contended that the orders are based on an apprehension of likelihood that there would be danger to a law and order situation. Public order is not the same as law and order, and the situation at the time when the orders were passed did not warrant the passing of the orders resulting in restrictions.

Mr. Kapil Sibal, Senior Counsel for the Petitioner in W.P. (C) No. 1164 of 2019

- Learned senior counsel submitted that the orders of the authorities had to be produced before the Court, and cannot be the subject of privilege, as claimed by the State.
- It was submitted that the conduct of the State, in producing documents and status reports during argumentation, was improper, as it did not allow the Petitioners with sufficient opportunity to rebut the same.
- Learned senior counsel submitted that the Union of India can declare an emergency only in certain limited situations. Neither any 'internal disturbance' nor any 'external aggression' has been shown in the present case for the imposition of restrictions which are akin to the declaration of Emergency.
- With respect to the orders restricting movement passed under Section 144, Cr.P.C., the learned senior counsel contended that such an order is made to deal with a 'law

and order' situation, but the orders do not indicate any existing law and order issue, or apprehension thereof.

- Learned senior counsel pointed out that the order of the Magistrate under Section 144, Cr.P.C. cannot be passed to the public generally, and must be specifically against the people or the group which is apprehended to disturb the peace. It is necessary for the State to identify the persons causing the problem, and an entire State cannot be brought to a halt. Moreover, he has contended that there was no application of mind before passing those orders.
- While submitting that it could be assumed that there was some material available for the purpose of passing the orders under Section 144, Cr.P.C., the question which then arises is how the State balances the rights of individuals.
- The learned senior counsel, with respect to the communications' restrictions, submitted that the State had not indicated as to the necessity to block landline services. He further submitted that the communications/Internet restrictions which were imposed under the Indian Telegraph Act, 1885 [hereinafter "**Telegraph Act**"] needs to follow the provisions of Section 5 of the Telegraph Act, in line with Article 19 of the Constitution. While there can be some restrictions, there can be no blanket orders, as it would amount to a complete ban. Instead, a distinction should be drawn while imposing restrictions on social media/mass communication and the general internet. The least restrictive option must be put in place, and the State should have taken preventive or protective measures. Ultimately, the State needs to balance the safety of the people with their lawful exercise of their fundamental rights.
- On internet restrictions, the learned senior counsel submitted that such restrictions not only impact the right to free speech of individuals but also impinges on their right to trade. Therefore, a less restrictive measure, such as restricting only social media websites like Facebook and Whatsapp, should and could have been passed, as has been done in India while prohibiting human trafficking and child pornography websites. The learned senior counsel pointed to orders passed in Bihar, and in Jammu and Kashmir in 2017, restricting only social media websites, and submitted that the same could have been followed in this case as well.

- Indicating that the State can impose restrictions, the learned senior counsel focussed on the question of the "least restrictive measure" that can be passed. The learned senior counsel submitted that while imposing restrictions, the rights of individuals need to be balanced against the duty of the State to ensure security. The State must ensure that measures are in place that allows people to continue with their life, such as public transportation for work and schools, to facilitate business, etc.

Mr. Huzefa Ahmadi, Senior Counsel for Intervenor in I.A. No. 139141 of 2019 in W.P. (C) No. 1031 of 2019

- The learned senior counsel emphasized on the term "reasonable", as used in Article 19(2) of the Constitution, and submitted that the restrictions on the freedom of speech should be reasonable as mandated under Article 19 of the Constitution. These restrictions need to be tested on the anvil of the test of proportionality.
- Learned senior counsel submitted that Section 144, Cr.P.C. orders should be based on some objective material and not merely on conjectures.

Mr. Dushyant Dave, Senior Counsel for the Intervenor in I.A. No. 139555 in W.P. (C) No. 1031 of 2019

- Learned senior counsel attempted to highlight that the issue of balancing the measures necessary for ensuring national security or curbing terrorism, with the rights of the citizens, is an endeavour that is not unique, and has been undertaken by Courts in various jurisdictions. Learned senior counsel relied on the judgment of the Supreme Court of Israel concerning the *Legality of the General Security Service's Interrogation Methods* in ***Public Committee Against Torture in Israel v. Israel*, 38 I.L.M. 1471 (1999)** relating to the question of whether torture during interrogation of an alleged terrorist was permissible. In that

case, the Israeli Supreme Court held that such acts were unconstitutional, and could not be justified in light of the freedoms and liberties afforded to the citizens of Israel.

- Learned senior counsel drew parallels between the situation faced by the Israeli Supreme Court in the abovementioned case, and that before this Court, wherein, according to the learned senior counsel, the State is attempting to justify the restrictions due to the circumstances prevailing in the State of Jammu and Kashmir. The learned senior counsel submitted that such a justification merits rejection as it would amount to granting too much power to the State to impose broad restrictions on fundamental rights in varied situations. It would amount to individual liberty being subsumed by social control.
- The learned senior counsel emphasized on the seriousness of the present matter, stating that such restrictions on the fundamental rights is the reason for the placement of Article 32 of the Constitution in Part III, as a fundamental right which allows for the enforcement of the other fundamental rights. He referred to the Constituent Assembly debates to highlight the import of Article 32, as contemplated by the Members of the Constituent Assembly.
- The learned senior counsel also placed before this Court the Government of India National Telecom Policy, 2012, and submitted that the wide restrictions imposed by the State are in contravention of the aforementioned policy. He submitted that the freedom of speech and expression is meant to allow people to discuss the burning topic of the day, including the abrogation of Article 370 of the Constitution.
- Lastly, the learned senior counsel emphasized that the restrictions that were imposed are meant to be temporary in nature, have lasted for more than 100 days, which fact should be taken into account by this Court while deciding the matter.

Ms. Meenakshi Arora, Senior Counsel for the Intervenor in I.A. No. 140276 in W.P. (C) No. 1031 of 2019

- Learned senior counsel submitted that Articles 19 and 21 of the Constitution require that any action of the State must demonstrate five essential features: (a) backing of a 'law', (b) legitimacy of purpose, (c) rational connection of the act and object, (d) necessity of the action, and (e) when the above four are established, then the test of proportionality.
- At the outset, learned senior counsel submitted that it is necessary to test the validity of the orders by reference to the facts and circumstances prevailing on the date of passing of the said orders, *i.e.*, 04.08.2019.
- Learned senior counsel submitted that the orders that have not been published cannot be accorded the force of law. The necessity of publication of law is a part of the rule of natural justice. Not only must the orders be published, it is also necessary that these orders be made available and accessible to the public. The State cannot refuse to produce the orders before the Court or claim any privilege.
- The learned senior counsel further submitted that, notwithstanding the expediency of the situation, the necessity of a measure must be shown by the State. 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.
- On the point of proportionality, the learned senior counsel submitted that the test of proportionality was upheld by this Court in the case of ***K. S. Puttaswamy v. Union of India***, (2017) 10 SCC 1 (hereinafter "**K. S. Puttaswamy (Privacy-9J.)**") and therefore the proportionality of a measure must be determined while looking at the restrictions being imposed by the State on the fundamental rights of citizens. The learned senior counsel pointed out that 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.

Mr. Sanjay Hegde, Senior Counsel for the Petitioner in W.P. (Crl.) No. 225 of 2019

- Although this Writ Petition was withdrawn during arguments, the learned senior counsel wished to make certain submissions regarding the issue at hand. The learned senior counsel submitted on behalf of the Petitioner that although he and his family were law abiding citizens, yet they are suffering the effects of the restrictions. Citing the House of Lords judgment of ***Liversidge v. Anderson*, (1941) 3 All ER 338** the learned senior counsel submitted that it was the dissent by Lord Atkin, upholding the fundamental rights of the citizens of the United Kingdom, which is now the law of the land.

Mr. K. K. Venugopal, Learned Attorney General for the Union of India

- The learned Attorney General supported the submissions made by the Solicitor General. He submitted that the background of terrorism in the State of Jammu and Kashmir needs to be taken into account. Relying on ***National Investigation Agency v. Zahoor Ahmad Shah* Watali, 2019 (5) SCC 1**, the learned Attorney General submitted that this Court while deciding the aforementioned case, has taken cognizance of the problem of terrorism in the State before.
- According to the learned Attorney General, keeping in mind the facts regarding cross border terrorism and internal militancy, it would have been foolish to have not taken any preventive measures in the circumstances. The necessity of the orders under Section 144, Cr.P.C. are apparent from the background facts and circumstances, when there can be huge violence if the Government did not take these kinds of measures. In fact, similar steps were taken earlier by the Government in 2016 when a terrorist was killed in the State.

Mr. Tushar Mehta, Solicitor General for the State of Jammu and Kashmir

- The learned Solicitor General submitted that the first and foremost duty of the State is to ensure security and protect the citizens- their lives, limbs and property. He further submitted that the facts relied on by the Petitioners and the Intervenors were incorrect, as they did not have the correct information about the factual position on the ground in the State of Jammu and Kashmir.
- The learned Solicitor General submitted that the historical background of the State of Jammu and Kashmir is necessary to be looked at to understand the measures taken by the State. The State has been a victim of both physical and digital cross border terrorism.
- The abrogation of Article 370 of the Constitution on 05.08.2019 was a historic step, which resulted not in the taking away of the rights of the citizens of Jammu and Kashmir, but conferment of rights upon them which they never had. Now, with the abrogation, 106 people friendly laws have become applicable to the State of Jammu and Kashmir.
- The learned Solicitor General submitted that the Petitioners were incorrect to state that public movement was restricted. In fact, individual movement had never been restricted. Additionally, while schools were closed initially, they have now been reopened. Depending on the facts, circumstances and requirements of an area, restrictions were put in place which are now being relaxed gradually.
- On the orders passed by the Magistrates under Section 144, Cr.P.C., in their respective jurisdictional areas, the learned Solicitor General submitted that they were best placed to know the situation on the ground, and then took their respective decisions accordingly. Currently, there is nearly hundred percent relaxation of restrictions. Restrictions were being relaxed on the basis of the threat perception. Restrictions were never imposed in the Ladakh region. This fact shows that there was application of mind while passing the orders by the officers on the ground, and that there was no general clampdown, as is being suggested by the Petitioners.
- Further, the learned Solicitor General pointed to various figures to indicate that people were leading their ordinary lives in the State. He submitted that all newspapers,

television and radio channels are functioning, including from Srinagar, where the Petitioner in W.P. (C) No. 1031 of 2019 is situated. The learned Solicitor General further indicated that the Government had taken certain measures to ensure that essential facilities would be available to the populace.

- The learned Solicitor General submitted that orders passed under Section 144, Cr.P.C. can be preventive in nature, in order to prevent danger to public safety. The Magistrate can pass the order even on the basis of personal knowledge, and the same is supposed to be a speedy mechanism. The orders passed must be considered keeping in mind the history and the background of the State.
- Relying on ***Babulal Parate v. State of*** **Bombay, AIR 1960 SC 51,** and ***Madhu Limaye v. Sub-Divisional Magistrate*****, Monghgyr, (1970) 3 SCC 746**, the learned Solicitor General submitted that the situation in the State of Jammu and Kashmir was such that the orders could be justified in view of maintenance of the "security of the State". Regarding the Petitioners' submission that the restrictions could have been imposed on specific individuals, the learned Solicitor General submitted that it was impossible to segregate, and control, the troublemakers from the ordinary citizens.
- The learned Solicitor General submitted that there were enough facts in the knowledge of the Magistrate to pass the orders under Section 144, Cr.P.C. There was sufficient speculation on the ground to suggest that there might be a move to abrogate Article 370 of the Constitution, and they were aware of the situation on the ground. Provocative speeches and messages were being transmitted. This information is all available in the public domain.
- It was further submitted that the Court does not sit in appeal of the decision to impose restrictions under Section 144, Cr.P.C. and has limited jurisdiction to interfere, particularly when there are no allegations of *mala fide* made against the officers and when the question involved is of national security. The level of restriction required is best left to the officers who are on the ground with the requisite information and knowledge, and the same is not to be replaced by the opinion of the Courts.

- With respect to the communications and internet shutdown, the learned Solicitor General submitted that internet was never restricted in the Jammu and Ladakh regions. Further, he submitted 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. The purpose of the limited and restricted use of internet is to ensure that the situation on the ground would not be aggravated by targeted messages from outside the country. Further, the internet allows for the transmission of false news or fake images, which are then used to spread violence. The dark web allows individuals to purchase weapons and illegal substances easily.
- The learned Solicitor General submitted that the jurisprudence on free speech relating to newspapers cannot be applied to the internet, as both the media are different. While newspapers only allowed one-way communication, the internet makes two-way communication by which spreading of messages are very easy. The different context should be kept in mind by the Court while dealing with the restrictions with respect to the two media.
- While referring to various photographs, tweets and messages of political leaders of Kashmir, he stated that these statements are highly misleading, abrasive and detrimental to the integrity and sovereignty of India.
- Further, it is not possible to ban only certain websites/parts of the Internet while allowing access to other parts. Such a measure was earlier attempted in 2017, but it was not successful.
- Lastly, the learned Solicitor General submitted that the orders passed under the Suspension Rules were passed in compliance with the procedure in the Suspension Rules, and are being reviewed strictly in terms of the same.

9. Some of the intervenors have supported the submissions made by the learned Attorney General and the Solicitor General, and indicated that the restrictions were necessary and in compliance with the law. They have also submitted that normalcy is

returning in the State of Jammu and Kashmir, and that the present petitions are not maintainable.

C. ISSUES

10. In line with aforesaid facts and arguments, the following questions of law arise for our consideration:

I. Whether the Government can claim exemption from producing all the orders passed under Section 144, Cr.P.C. and other orders under the Suspension Rules?

II. Whether the freedom of speech and expression and freedom to practise any profession, or to carry on any occupation, trade or business over the Internet is a part of the fundamental rights under Part III of the Constitution?

III. Whether the Government's action of prohibiting internet access is valid?

IV. Whether the imposition of restrictions under Section 144, Cr.P.C. were valid?

V. Whether the freedom of press of the Petitioner in W.P. (C) No. 1031 of 2019 was violated due to the restrictions?

D. PRODUCTION OF ORDERS

11. The present petitions, their context and conduct of the parties, have placed this Court in a peculiar situation. We have been

asked to go into the question of the validity of orders, restricting movement and communication, passed in the State of Jammu and Kashmir by various authorities, however, the orders are not before us. The Petitioners and Intervenors claim that the orders were not available, which is why they could not place them on record.

12. At the same time, while the non-availability of orders was not denied by the Respondent-State, they did not produce the said orders. In fact, when this Court by order dated 16.10.2019 asked them to produce the orders, the Respondent-State placed on record only sample orders, citing difficulty in producing the numerous orders which were being withdrawn and modified on a day-to-day basis. The Respondent-State also claimed that the plea to produce orders by the Petitioners was an expansion of the scope of the present petitions.

13. At the outset, a perusal of the prayers in the Writ Petitions before us should be sufficient to reject the aforementioned contention of the Respondent-State. In W.P. (C) No. 1164 of 2019 and I.A no. 157139 in I.A. no. 139555 of 2019 in W.P. (C) No. 1031 of 2019, a prayer has been made to issue a writ of mandamus or any other writ directing Respondent Nos. 1 and 2 to produce all

orders by which movement of all persons has been restricted since 04.08.2019. Further, production of all orders by way of which communication has been blocked in State of Jammu and Kashmir has also been sought.

14. On the obligation of the State to disclose information, particularly in a writ proceeding, this Court in ***Ram Jethmalani v. Union of India*****,** (2011) 8 SCC 1, observed as follows:

> "**75.** In order that the right guaranteed by clause (1) of Article 32 be meaningful, and particularly because such **petitions seek the protection of fundamental rights, it is imperative that in such proceedings the petitioners are not denied the information necessary for them to properly articulate the case and be heard, especially where such information is in the possession of the State.**"
>
> *(emphasis supplied)*

15. We may note that there are two separate types of reasoning that mandates us to order production of the orders passed by the authorities in this case. *First*, Article 19 of the Constitution has been interpreted to mandate right to information as an important facet of the right to freedom of speech and expression. 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. Moreover, fundamental rights itself connote a qualitative requirement wherein the State has to act in a responsible manner to uphold Part III of the Constitution and not to take away these rights in an implied fashion or in casual and cavalier manner.

16. *Second*, there is no dispute that democracy entails free flow of information. There is not only a normative expectation under the Constitution, but also a requirement under natural law, that no law should be passed in a clandestine manner. As Lon L. Fuller suggests in his celebrated article "*there can be no greater legal monstrosity than a secret statute*".[1] In this regard, Jeremy Bentham spoke about open justice as the "*keenest spur to exertion*". In the same context, James Madison stated "*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*

1Lon L. Fuller, *Positivism and Fidelity to Law: A Reply to Professor Hart*, The Harvard Law Review, 71(4), 630, 651 [February, 1958].

who mean to be their own Governors must arm themselves with the power which knowledge gives".

17. As a general principle, on a challenge being made regarding the curtailment of fundamental rights as a result of any order passed or action taken by the State which is not easily available, the State should take a proactive approach in ensuring that all the relevant orders are placed before the Court, unless there is some specific ground of privilege or countervailing public interest to be balanced, which must be specifically claimed by the State on affidavit. In such cases, the Court could determine whether, in the facts and circumstances, the privilege or public interest claim of the State overrides the interests of the Petitioner. Such portion of the order can be redacted or such material can be claimed as privileged, if the State justifies such redaction on the grounds, as allowed under the law.

18. In the present case, while the State initially claimed privilege, it subsequently dropped the claim and produced certain sample orders, citing difficulty in producing all the orders before this Court. In our opinion, this is not a valid ground to refuse production of orders before the Court.

E. FUNDAMENTAL RIGHTS UNDER PART III AND RESTRICTIONS THEREOF

19. The petitioners have contended that the impugned restrictions have affected the freedom of movement, freedom of speech and expression and right to free trade and avocation. In this context, we have to first examine the nature of the fundamental rights provided under the Constitution.

20. The nature of fundamental rights under Part III of the Constitution is well settled. The fundamental rights are prescribed as a negative list, so that "no person could be denied such right until the Constitution itself prescribes such limitations". The only exception to the aforesaid formulation is Article 21A of the Constitution, which is a positive right that requires an active effort by the concerned government to ensure that the right to education is provided to all children up to the age of 16 years.

21. The positive prescription of freedom of expression will result in different consequences which our own Constitution has not entered into. Having different social and economic backgrounds and existing on a different scale of development, the human

rights enshrined therein have taken a different role and purpose. The framers of the Indian Constitution were aware of the situation of India, including the socio-economic costs of such proactive duty, and thereafter took an informed decision to restrict the application of fundamental rights in a negative manner. This crucial formulation is required to be respected by this Court, which has to uphold the constitutional morality behind utilization of such negative prescriptions.

22. Now, we need to concern ourselves about the freedom of expression over the medium of internet. There is no gainsaying that in today's world the internet stands as the most utilized and accessible medium for exchange of information. The revolution within the cyberspace has been phenomenal in the past decade, wherein the limitation of storage space and accessibility of print medium has been remedied by the usage of internet.

23. At this point it is important to note the argument of Mr. Vinton G. Cerf, one of the 'fathers of the internet'. He argued that while the internet is very important, however, it cannot be elevated to the status of a human right.[2] Technology, in his view, is an enabler of rights and not a right in and of itself. He distinguishes

2 Vinton G. Cerf, *Internet Access is not a Human Right*, The New York Times (January 04, 2012).

between placing technology among the exalted category of other human rights, such as the freedom of conscience, equality etc. With great respect to his opinion, the prevalence and extent of internet proliferation cannot be undermined in one's life.

24. Law and technology seldom mix like oil and water. There is a consistent criticism that the development of technology is not met by equivalent movement in the law. In this context, we need to note that the law should imbibe the technological development and accordingly mould its rules so as to cater to the needs of society. Non recognition of technology within the sphere of law is only a disservice to the inevitable. In this light, the importance of internet cannot be underestimated, as from morning to night we are encapsulated within the cyberspace and our most basic activities are enabled by the use of internet.

25. We need to distinguish between the internet as a tool and the freedom of expression through the internet. There is no dispute that freedom of speech and expression includes the right to disseminate information to as wide a section of the population as is possible. The wider range of circulation of information or its greater impact cannot restrict the content of the right nor can it

justify its denial. [*refer to* ***Secretary, Ministry of Information & Broadcasting Government of India v. Cricket Association of Bengal***, (1995) 2 SCC 161*;* ***Shreya Singhal v. Union of India***, (2015) 5 SCC 1].

26. The development of the jurisprudence in protecting the medium for expression can be traced to the case of ***Indian Express v. Union of India***, (1985) 1 SCC 641, wherein this Court had declared that the freedom of print medium is covered under the freedom of speech and expression. In ***Odyssey Communications Pvt. Ltd. v. Lokvidayan Sanghatana,*** (1988) 3 SCC 410, it was held that the right of citizens to exhibit films on Doordarshan, subject to the terms and conditions to be imposed by the Doordarshan, is a part of the fundamental right of freedom of expression guaranteed under Article 19(1)(a), which can be curtailed only under circumstances set out under Article 19(2). Further, this Court expanded this protection to the use of airwaves in the case of ***Secretary, Ministry of Information & Broadcasting, Government of India*** (*supra*). In this context, we may note that this Court, in a catena of judgments, has

recognized free speech as a fundamental right, and, as technology has evolved, has recognized the freedom of speech and expression over different media of expression. Expression through the internet has gained contemporary relevance and is one of the major means of information diffusion. Therefore, 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.

27. In this context, we need to note that the internet is also a very important tool for trade and commerce. The globalization of the Indian economy and the rapid advances in information and technology have opened up vast business avenues and transformed India as a global IT hub. There is no doubt that there are certain trades which are completely dependent on the internet. Such a right of trade through internet also fosters consumerism and availability of choice. Therefore, the freedom of trade and commerce through the medium of the internet is also constitutionally protected under Article 19(1)(g), subject to the restrictions provided under Article 19(6).

28. 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.

29. Having explained the nature of fundamental rights and the utility of internet under Article 19 of the Constitution, we need to concern ourselves with respect to limitations provided under the Constitution on these rights. With respect to the freedom of speech and expression, restrictions are provided under Article 19(2) of the Constitution, which reads as under:

> "(2) Nothing in sub clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence."

30. The right provided under Article 19(1) has certain exceptions, which empowers the State to impose reasonable restrictions in appropriate cases. The ingredients of Article 19(2) of the Constitution are that:

a. The action must be sanctioned by law;

b. The proposed action must be a reasonable restriction;

c. Such restriction must be in furtherance of interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence.

31. At the outset, the imposition of restriction is qualified by the term 'reasonable' and is limited to situations such as 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. Reasonability of a restriction is used in a qualitative, quantitative and relative sense.

32. It has been argued by the counsel for the Petitioners that the restrictions under Article 19 of the Constitution cannot mean

complete prohibition. In this context we may note that the aforesaid contention cannot be sustained in light of a number of judgments of this Court wherein the restriction has also been held to include complete prohibition in appropriate cases. [***Madhya Bharat Cotton Association Ltd. v. Union of India***, AIR 1954 SC 634, ***Narendra Kumar v. Union of India***, (1960) 2 SCR 375, ***State of Maharashtra v. Himmatbhai Narbheram Rao***, (1969) 2 SCR 392, ***Sushila Saw Mill v. State of Orissa***, (1995) 5 SCC 615, ***Pratap Pharma (Pvt.) Ltd. v. Union of India***, (1997) 5 SCC 87 and ***Dharam Dutt v. Union of India***, (2004) 1 SCC 712]

33. The study of aforesaid case law points to three propositions which emerge with respect to Article 19(2) of the Constitution. (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. [*refer to* ***State of Gujarat v. Mirzapur Moti Kureshi Kassab Jamat,*** (2005) 8 SCC 534].

34. The second prong of the test, wherein this Court is required to find whether the imposed restriction/prohibition was least intrusive, brings us to the question of balancing and proportionality. These concepts are not a new formulation under the Constitution. In various parts of the Constitution, this Court has taken a balancing approach to harmonize two competing rights. In the case of ***Minerva Mills Ltd. v. Union of India***, (1980) 2 SCC 591 and ***Sanjeev Coke Manufacturing Company v. M/s Bharat Coking Coal Ltd.,*** (1983) 1 SCC 147, this Court has already applied the balancing approach with respect to fundamental rights and the directive principles of State Policy.

35. Before, we delve into the nuances of 'restriction' as occurring under Article 19(2) of the Constitution, we need to observe certain facts and circumstances in this case. There is no doubt that Jammu and Kashmir has been a hot bed of terrorist insurgencies for many years. In this light, we may note the State's submission that since 1990 to 2019 there have been

71,038 recorded incidents of terrorist violence, 14,038 civilians have died, 5292 security personnel were martyred, 22,536 terrorists were killed. The geopolitical struggle cannot be played down or ignored. In line with the aforesaid requirement, we may note that even the broadest guarantee of free speech would not protect the entire gamut of speech. The question which begs to be answered is whether there exists a clear and present danger in restricting such expression.

36. 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. In this regard, *Gregory S. McNeal*,[3] Professor of Law and Public Policy, Pepperdine University, states in his article about propaganda and the use of internet in the following manner:

> "Terrorist organisations have also begun to employ websites as a form of information warfare. Their websites can disperse inaccurate information that has far-reaching

3 Gregory S. McNeal, *Cyber Embargo: Countering the Internet Jihad*, 39 Case W. Res. J. Int'l L. 789 (2007).

> consequences. Because internet postings are not regulated sources of news, they can reflect any viewpoint, truthful or not. Thus, readers tend to consider internet items to be fact, and stories can go unchecked for some time. Furthermore, streaming video and pictures of frightening scenes can support and magnify these news stories. As a result, the internet is a powerful and effective tool for spreading propaganda."

37. *Susan W. Brenner*,[4] NCR Distinguished Professor of Law and Technology, University of Dayton School of Law, also notes that the traditional approach has not worked satisfactorily on terrorism due to the proliferation of the internet. It is the contention of the respondents that the restriction on the freedom of speech was imposed due to the fact that there were national security issues over and above a law and order situation, wherein there were problems of infiltration and support from the other side of the border to instigate violence and terrorism. The learned Solicitor General pointed out that the 'war on terrorism' requires imposition of such restriction so as to nip the problem of terrorism in the bud. He submitted that in earlier times, sovereignty and integrity of a State was challenged only on occurrence of war. In some cases, there have been instances

4 Susan W. Brenner, *Why the Law Enforcement Model is a Problematic Strategy for Dealing with Terrorist Activity Online*, 99 Am. Soc'y Int'l. L. Proc. 108 (2005).

where the integrity of the State has been challenged by secessionists. However, the traditional conceptions of warfare have undergone an immense change and now it has been replaced by a new term called 'war on terror'. This war, unlike the earlier ones, is not limited to territorial fights, rather, it transgresses into other forms affecting normal life. The fight against terror cannot be equated to a law and order situation as well. In this light, we observe that this confusion of characterising terrorism as a war *stricto sensu* or a normal law and order situation has plagued the submission of the respondent Government and we need to carefully consider such submissions.

38. Before analysing the restrictions imposed on the freedom of speech and expression in the Indian context, we need to have a broad analysis of the state of affairs in the United States of America (hereinafter '**US**') where freedom of expression under the First Amendment is treated to be very significant with the US being perceived to be one of the liberal constituencies with respect to free speech jurisprudence. However, we need to refer to the context and state of law in the US, before we can understand such an assertion.

39. During the US civil war, a dramatic confrontation over free speech arose with respect to the speech of Clement L. Vallandigham, who gave a speech calling the civil war 'wicked, cruel and unnecessary'. He urged the citizens to use ballot boxes to hurl 'President Lincoln' from his throne. As a reaction, Union soldiers arrested Mr. Vallandigham and he had to face a five-member military commission which charged him with '*declaring disloyal sentiments and opinions with the object and purpose of weakening the power of the government in its efforts to suppress an unlawful rebellion*'. [***Ex parte Vallandigham**, 28 F. Cas. 874 (1863)*] The commission found Mr. Vallandigham guilty and imposed imprisonment during the war. The aforesaid imprisonment was met with demonstrations and publications calling such imprisonment as a crime against the US Constitution. President Lincoln, having regard to the US Constitution, commuted the imprisonment and converted the same to banishment. He justified the aforesaid act by stating that banishment was more humane and a less disagreeable means of securing least restrictive measures.

40. During World War I, many within the US had strong feelings against the war and the draft imposed by the administration of President Woodrow Wilson. During this period, the US enacted the Espionage Act, 1917 which penalised any person who wilfully caused or attempted to cause insubordination, disloyalty, mutiny by refusal from duty or naval services. In any case, in ***Abraham v. United States***, 250 U.S. 616 (1919), Justice Holmes even in his dissent observed as under:

> "I do not doubt for a moment that, by the same reasoning that would justify punishing persuasion to murder, the United States constitutionally may punish speech that produces or is intended to produce a clear and imminent danger that it will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent. **The power undoubtedly is greater in time of war than in time of peace, because war opens dangers that do not exist at other times."**
>
> *(emphasis supplied)*

41. The Second World War was also riddled with instances of tussle between the First Amendment and national security issues. An instance of the same was the conviction of William Dudley Pelley,

under the Espionage Act, 1917, which the Supreme Court of United States refused to review.

42. During the Cold War, the attention of the American Congress was on the increase of communism. In 1954, Congress even enacted the Communist Control Act, which stripped the Communist party of all rights, privileges and immunities. During this time, ***Dennis v. United States***, 341 US 494 (1951), is an important precedent. Sections 2(a)(1), 2(a)(3) and 3 of the Alien Registration Act, 1940 made it unlawful for any person to knowingly or wilfully advocate with the intent of the overthrowing or destroying the Government of the United States by force or violence, to organize or help to organize any group which does so, or to conspire to do so. The Petitioner in the aforementioned case challenged the aforesaid provision on the ground that these provisions violated the First Amendment. The US Supreme Court held:

> "An analysis of the leading cases in this Court which have involved direct limitations on speech, however, will demonstrate that both the majority of the Court and the dissenters in particular cases have recognized that this is not an unlimited, unqualified right, but that the societal value of speech must, on occasion, be subordinated to other values and considerations."

43. During the Vietnam war, the US Supreme Court had to deal with the case of ***Brandenburg v. Ohio***, 395 US 444 (1969), wherein the Court over-ruled **Dennis** (*supra*) and held that the State cannot punish advocacy of unlawful conduct, unless it is intended to incite and is likely to incite 'imminent lawless action'.

44. There is no doubt that the events of September 2011 brought new challenges to the US in the name of 'war on terror'. In this context, Attorney General John Ashcroft stated that "*To those... who scare peace-loving 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...*'.[5] However, Bruce Ackerman, in his article,[6] states that:

> "The "war on terrorism" has paid enormous political dividends .... but that does not make it a compelling legal concept. War is traditionally defined as a state of belligerency between sovereigns .... The selective adaptation of doctrines dealing with war predictably leads to sweeping incursions on fundamental liberties."

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5 Senate Judiciary Committee Hearing on Anti-Terrorism Policy, 106th Cong. (Dec. 6, 2001) (testimony of Attorney General John Ashcroft)

6 Ackerman, Bruce, "The Emergency Constitution", Faculty Scholarship Series, 113 (2004).

45. From the aforesaid study of the precedents and facts, we may note that the law in the US has undergone lot of changes concerning dissent during war. The position that emerges is that any speech which incites imminent violence does not enjoy constitutional protection.

46. It goes without saying that the Government is entitled to restrict the freedom of speech and expression guaranteed under Article 19(1)(a) if the need be so, in compliance with the requirements under Article 19(2). It is in this context, while the nation is facing such adversity, an abrasive statement with imminent threat may be restricted, if the same impinges upon sovereignty and integrity of India. The question is one of extent rather than the existence of the power to restrict.

47. The requirement of balancing various considerations brings us to the principle of proportionality. In the case of ***K. S. Puttaswamy (Privacy-9J.)*** (*supra*), this Court observed:

> "**310...**Proportionality is an essential facet of the guarantee against arbitrary State action because it ensures that the nature and quality of the encroachment on the right is not disproportionate to the purpose of the law..."

48. Further, in the case of ***CPIO v Subhash Chandra Aggarwal***, (2019) SCC OnLine SC 1459, the meaning of proportionality was explained as:

> "**225...**It is also crucial for the standard of proportionality to be applied to ensure that neither right is restricted to a greater extent than necessary to fulfil the legitimate interest of the countervailing interest in question..."

49. At the same time, we need to note that when it comes to balancing national security with liberty, we need to be cautious. In the words of Lucia Zedner[7]:

> "Typically, conflicting interests are said to be 'balanced' as if there were a self-evident weighting of or priority among them. Yet rarely are the particular interests spelt out, priorities made explicitly, or the process by which a weight is achieved made clear. Balancing is presented as a zero-sum game in which more of one necessarily means less of the other ... Although beloved of constitutional lawyers and political theorists, the experience of criminal justice is that balancing is a politically dangerous metaphor unless careful regard is given to what is at stake."

50. The proportionality principle, can be easily summarized by Lord Diplock's aphorism '*you must not use a steam hammer to crack a nut, if a nutcracker would do?*' [*refer to* ***R v. Goldsmith***, [1983] 1

7Lucia Zedner, *Securing Liberty in the Face of Terror: Reflections from Criminal Justice*, (2005) 32 Journal of Law and Society 510.

WLR 151, 155 (Diplock J)]. In other words, proportionality is all about means and ends.

51. The suitability of proportionality analysis under Part III, needs to be observed herein. The nature of fundamental rights has been extensively commented upon. One view is that the fundamental rights apply as 'rules', wherein they apply in an 'all-or-nothing fashion'. This view is furthered by Ronald Dworkin, who argued in his theory that concept of a right implies its ability to trump over a public good.[8] Dworkin's view necessarily means that the rights themselves are the end, which cannot be derogated as they represent the highest norm under the Constitution. This would imply that if the legislature or executive act in a particular manner, in derogation of the right, with an object of achieving public good, they shall be prohibited from doing so if the aforesaid action requires restriction of a right. However, while such an approach is often taken by American Courts, the same may not be completely suitable in the Indian context, having regard to the structure of Part III which comes with inbuilt restrictions.

8Ronald Dworkin, "Rights as Trumps" in Jeremy Waldron (ed.), *Theories of Rights* (1984) 153 (hereinafter Dworkin, "Rights as is trumps").

52. However, there is an alternative view, held by Robert Alexy, wherein the 'fundamental rights' are viewed as 'principles',[9] wherein the rights are portrayed in a normative manner. Rules are norms that are always either fulfilled or not; whereas principles are norms which require that something be realized to the greatest extent possible given the legal and factual possibilities.[10] This characterisation of principles has implications for how to deal with conflicts between them: it means that where they conflict, one principle has to be weighed against the other and a determination has to be made as to which has greater weight in this context.[11] Therefore, he argues that nature of principles implies the principle of proportionality.[12]

53. The doctrine of proportionality is not foreign to the Indian Constitution, considering the use of the word 'reasonable' under Article 19 of the Constitution. In a catena of judgments, this Court has held "reasonable restrictions" are indispensable for the realisation of freedoms enshrined under Article 19, as they are what ensure that enjoyment of rights is not arbitrary or excessive, so as to affect public interest. This Court, while sitting

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9R. Alexy, *A Theory of Constitutional Rights* (Oxford, Oxford University Press, 2002).
10Ibid at page 47.
11Ibid, page 50.
12Ibid, page 66.

in a Constitution Bench in one of its earliest judgments in ***Chintaman Rao* v. *State of Madhya Pradesh***, AIR 1951 SC 118 interpreted limitations on personal liberty, and the balancing thereof, as follows:

> "7. **The phrase "reasonable restriction" connotes that *the limitation imposed* on a person in enjoyment of the right *should not be* arbitrary or *of an excessive nature, beyond what is required in the interests of the public.*** The word "reasonable" implies intelligent care and deliberation, that is, the choice of a course which reason dictates. *Legislation which arbitrarily or excessively invades the right cannot be said to contain the quality of reasonableness* and unless it strikes a proper balance between the freedom guaranteed in Article 19(1)(*g*) and the social control permitted by clause (6) of Article 19, it must be held to be wanting in that quality."
>
> *(emphasis supplied)*

This Court, in ***State of Madras v. V.G. Row*,** AIR 1952 SC 196, while laying down the test of reasonableness, held that:

> **15.** … It is important in this context to bear in mind that the test of reasonableness, wherever prescribed, should be applied to each individual statute impugned, and no abstract standard or general pattern, of reasonableness can be laid down as applicable to all cases. **The nature of the right alleged to have been infringed, the underlying purpose of the**

> **restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict....**
>
> *(emphasis supplied)*

A Constitution Bench of this Court in ***Mohammed Faruk* v. *State of Madhya Pradesh*,** (1969) 1 SCC 853 while determining rights under Article 19(1)(*g*) of the Constitution, discussed the doctrine of proportionality in the aforesaid terms:

> "*10*. ... The Court must in considering the validity of the impugned law imposing a prohibition on the carrying on of a business or profession, **attempt an evaluation of its direct and immediate impact upon the fundamental rights of the citizens affected thereby and the larger public interest sought to be ensured in the light of the object sought to be achieved, the necessity to restrict the citizen's freedom ... the possibility of achieving the object by imposing a less drastic restraint ... or that a less drastic restriction may ensure the object intended to be achieved.**"
>
> *(emphasis supplied)*

In the case of ***Om Kumar v. Union of India*,** (2001) 2 SCC 386 the principle of proportionality, in light of administrative orders, was explained as follows:

> **28. By "proportionality", we mean the question whether, while 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**. Under the principle, the court will see that the *legislature* and the *administrative authority* "**maintain a *proper balance* between the adverse effects which the legislation or the administrative order may have on the rights, liberties or interests of persons keeping in mind the purpose which they were intended to serve**". The legislature and the administrative authority are, however, given an area of discretion or a range of choices but as to whether the choice made infringes the rights excessively or not is for the court. That is what is meant by proportionality.
>
> *(emphasis supplied)*

[See also ***State of Bihar* v. *Kamla Kant Misra***, (1969) 3 SCC 337; ***Bishambhar Dayal Chandra Mohan* v. *State of Uttar Pradesh***, (1982) 1 SCC 39]

54. Recently, this Court in ***Modern Dental College & Research Centre v. State of Madhya Pradesh***, (2016) 7 SCC 353 has held that no constitutional right can be claimed to be absolute in a realm where rights are interconnected to each other, and limiting

some rights in public interest might therefore be justified. The Court held as follows:

> **"62. It is now almost accepted that there are no absolute constitutional rights.** [Though, debate on this vexed issue still continues and some constitutional experts claim that there are certain rights, albeit very few, which can still be treated as "absolute". Examples given are:(*a*) Right to human dignity which is inviolable, (*b*) Right not to be subjected to torture or to inhuman or degrading treatment or punishment. **Even in respect of such rights, there is a thinking that in larger public interest, the extent of their protection can be diminished**. However, so far such attempts of the States have been thwarted by the judiciary.] … In fact, such a provision in Article 19 itself on the one hand guarantees some certain freedoms in clause (1) of Article 19 and at the same time empowers the State to impose reasonable restrictions on those freedoms in public interest. **This notion accepts the modern constitutional theory that the constitutional rights are related. This relativity means that a constitutional licence to limit those rights is granted where such a limitation will be justified to protect public interest or the rights of others**. **This phenomenon—of both the right and its limitation in the Constitution—exemplifies the inherent tension between democracy's two fundamental elements…**"
>
> *(emphasis supplied)*

55. In the aforesaid case, this Court was posed with a dilemma as to how to treat competing rights. The Court attempted to resolve the conflict by holding that rights and limitations must be interpreted harmoniously so as to facilitate coexistence. This Court observed therein:

> "62… On the one hand is the right's element, which constitutes a fundamental component of substantive democracy; on the other hand is the people element, limiting those very rights through their representatives. These two constitute a fundamental component of the notion of democracy, though this time in its formal aspect. **How can this tension be resolved? The answer is that this tension is not resolved by eliminating the "losing" facet from the Constitution. Rather, the tension is resolved by way of a proper balancing of the competing principles.** This is one of the expressions of the multi-faceted nature of democracy. **Indeed, the inherent tension between democracy's different facets is a "constructive tension". It enables each facet to develop while harmoniously coexisting with the others. The best way to achieve this peaceful coexistence is through balancing between the competing interests. Such balancing enables each facet to develop alongside the other facets, not in their place.** This tension between the two fundamental aspects—rights on the one hand and its limitation on the other hand—is to be resolved by balancing the two so that they harmoniously coexist with each other. **This balancing is to be done keeping**

in mind the relative social values of each competitive aspects when considered in proper context."

(emphasis supplied)

56. The next conundrum faced by the Court was in achieving the requisite balance, the solution for which was derived from the principle of proportionality. The eminent constitutional jurist, Kai Möller states that the proportionality principle is the doctrinal tool which guides Judges through the process of resolving these conflicts.[13] One of the theories of proportionality widely relied upon by most theorists is the version developed by the German Federal Constitutional Court. The aforesaid doctrine lays down a four pronged test wherein, first, it has to be analysed as to whether the measure restricting the rights serves a legitimate goal (also called as legitimate goal test), then it has to be analysed whether the measure is a suitable means of furthering this goal (the rational connection stage), next it has to be assessed whether there existed an equally effective but lesser restrictive alternative remedy (the necessity test) and at last, it should be analysed if such a measure had a disproportionate impact on the right-holder (balancing stage). One important

13Kai Möller, *The Global Model of Constitutional Rights* (Oxford, Oxford University Press, 2012).

feature of German test is the last stage of balancing, which determines the outcome as most of the important issues are pushed to the balancing stage and the same thereby dominates the legal analysis. Under this approach, *any* goal which is legitimate will be accepted; as usually a lesser restrictive measure might have the disadvantage of being less effective and even marginal contribution to the goal will suffice the rational connection test.[14]

57. The aforesaid test needs to be contrasted with its Canadian counterpart also known as the *Oakes* test. According to the said doctrine, the object of the measure must be compelling enough to warrant overriding of the constitutionally guaranteed freedom; a rational nexus must exist between such a measure and the object sought to be achieved; the means must be least restrictive; and lastly, there must be proportionality between the effects of such measure and the object sought to be achieved. This doctrine of proportionality is elaborately propounded by Dickson, C.J., of the Supreme Court of Canada in ***R. v. Oakes***, (1986) 1 SCR 103 (Can) SC, in the following words (at p. 138):

14Kai Möller, *Constructing the Proportionality Test: An Emerging Global Conversation, Reasoning Rights Comparative Judicial Engagement* (Hart Publishing, 2014).

> "To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective, which the measures, responsible for a limit on a Charter right or freedom are designed to serve, must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom" … Second … the party invoking Section 1 must show that the means chosen are reasonable and demonstrably justified. This involves "a form of proportionality test"… Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups. **There are, in my view, three important components of a proportionality test. First, the measures adopted must be … rationally connected to the objective. Second, the means … should impair "as little as possible" the right or freedom in question … Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of "sufficient importance"…** The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society."
>
> *(emphasis supplied)*

58. As can be seen, there exists substantial difference in both approaches, as the *Oakes* test, instead of requiring "any"

legitimate goal, demands the same to be compelling enough to warrant the limitation of constitutional rights. Additionally, while the German necessity test calls for a lesser restrictive measure which is equivalently effective, the need for effectiveness has been done away with in the *Oakes* test wherein the requirement of least infringing measure has been stipulated.

59. It is also imperative for us to place reliance on Aharon Barak's seminal book[15] on proportionality upon which Dr A.K. Sikri, J. placed reliance while expounding the doctrine of proportionality in ***Modern Dental College*** case (*supra)* as follows:

> "*60*. … a limitation of a constitutional right will be constitutionally permissible if:
>
> (*i*) it is designated for a **proper purpose**;
> (*ii*) the measures undertaken to effectuate such a limitation are **rationally connected** to the fulfilment of that purpose;
> (*iii*) the measures undertaken are **necessary** in that there are **no alternative measures that may similarly achieve that same purpose with a lesser degree of limitation**; and finally
> (*iv*) there needs to be a proper relation **("*proportionality stricto sensu*" or "*balancing*")** between the importance of achieving the proper purpose and the social importance of preventing the limitation on the constitutional right."
>
> *(emphasis supplied)*

15Aharon Barak, Proportionality: Constitutional Rights and Their Limitation (Cambridge University Press, 2012)

60. In ***Modern Dental College*** case (*supra*), this Court also went on to analyse that the principle of proportionality is inherently embedded in Indian Constitution under the realm of the doctrine of reasonable restrictions and that the same can be traced under Article 19. The relevant extracts are placed below:

> "**65. We may unhesitatingly remark that this doctrine of proportionality, explained hereinabove in brief, is enshrined in Article 19 itself when we read clause (1) along with clause (6) thereof.** While defining as to what constitutes a reasonable restriction, this Court in a plethora of judgments has held that the expression "*reasonable restriction*" seeks to strike a balance between the freedom guaranteed by any of the sub-clauses of clause (1) of Article 19 and the social control permitted by any of the clauses (2) to (6). **It is held that the expression "*reasonable*" connotes that the limitation imposed on a person in the enjoyment of the right should not be arbitrary or of an excessive nature beyond what is required in the interests of public.** Further, in order to be reasonable, the restriction must have a reasonable relation to the object which the legislation seeks to achieve, and must not go in excess of that object (see *P.P. Enterprises* v. *Union of India*, (1982) 2 SCC 33). **At the same time, reasonableness of a restriction has to be determined in an objective manner and from the standpoint of the interests of the general public and not from the point of view of the persons upon whom the**

> **restrictions are imposed or upon abstract considerations** (see *Mohd. Hanif Quareshi* v. *State of Bihar*, AIR 1958 SC 731)."
>
> *(emphasis supplied)*

61. Thereafter, a comprehensive doctrine of proportionality in line with the German approach was propounded by this Court in the ***Modern Dental College*** case (*supra*) wherein the Court held that:

> "**63.** In this direction, the next question that arises is as to what criteria is to be adopted for a proper balance between the two facets viz. the rights and limitations imposed upon it by a statute. **Here comes the concept of "*proportionality*", which is a proper criterion. To put it pithily, when a law limits a constitutional right, such a limitation is constitutional if it is proportional**. The law imposing restrictions will be treated as proportional if it is meant to achieve a proper purpose, and if the measures taken to achieve such a purpose are rationally connected to the purpose, and such measures are necessary...
>
> **64.** The exercise which, therefore, is to be taken is to find out as to whether the limitation of constitutional rights is for a purpose that is reasonable and necessary in a democratic society and such an exercise involves the weighing up of competitive values, and ultimately an assessment based on proportionality i.e. balancing of different interests."
>
> *(emphasis supplied)*

62. While some scholars such as Robert Alexy[16] call for a strong interpretation of the necessity stage as it has direct impact upon the realisation and optimisation of constitutional rights while others such as David Bilchitz[17] found significant problems with this approach.

63. *First*, Bilchitz focuses on the issues arising out of both the German test and the *Oakes* test, wherein the former treats all policies to be necessary by justifying that the available alternatives may not be equally effective, while the latter applies the "minimal impairment test" narrowing the constitutionally permissible policies and places a strong burden on the Government to justify its policies. Therefore, Bilchitz argues that if the necessity stage is interpreted strictly, legislations and policies no matter how well intended will fail to pass the proportionality inquiry if any other slightly less drastic measure exists. Bilchitz, therefore, indicates that Alexy's conclusion may be too quick.

16Robert Alexy, *A Theory of Constitutional Rights* (Oxford, Oxford University Press, 2002) 47.

17David Bilchitz, *Necessity and Proportionality: Towards A Balanced Approach?* in L. Lazarus, C. McCrudden and N. Bowles (eds.), Reasoning Rights, 41 (2014).

64. Moreover, this also leads to the issue regarding the doctrine of separation of power, as Courts would often substitute the views of the legislature in deciding what is the "least restrictive measure". Taking the aforesaid issues into consideration, Bilchitz proposed a moderate interpretation of the necessity test wherein Courts may no longer be required to assess policies and measures against impractical and unreasonable standards. He states that "*[n]ecessity involves a process of reasoning designed to ensure that only measures with a strong relationship to the objective they seek to achieve can justify an invasion of fundamental rights. That process thus requires courts to reason through the various stages of the moderate interpretation of necessity.*"[18] He therefore recommends a four-step inquiry which is listed below:[19]

> (MN1) All feasible alternatives need to be identified, with courts being explicit as to criteria of feasibility;
>
> (MN2) The relationship between the government measure under consideration, the alternatives identified in MN1 and the objective sought to be achieved must be determined. An attempt must be made to retain only those alternatives to the measure that realise the objective in a real and substantial manner;

18 Ibid, page 61.
19Ibid, page 61.

(MN3) The differing impact of the measure and the alternatives (identified in MN2) upon fundamental rights must be determined, with it being recognised that this requires a recognition of approximate impact; and

(MN4) Given the findings in MN2 and MN3, an overall comparison (and balancing exercise) must be undertaken between the measure and the alternatives. A judgement must be made whether the government measure is the best of all feasible alternatives, considering both the degree to which it realises the government objective and the degree of impact upon fundamental rights ('the comparative component').

65. Admittedly, fundamental rights may not be absolute, however, they require strong protection, thereby mandating a sensible necessity test as the same will prevent the fundamental right from becoming either absolute or to be diminished. Bilchitz, describes the aforesaid test to be neither factual nor mechanical, but rather normative and qualitative. He states that "*[t]he key purpose of the necessity enquiry is to offer an explicit consideration of the relationship between means, objectives and rights… Failure to conduct the necessity enquiry with diligence, however, means that a government measure can escape close*

scrutiny in relation to both the realisation of the objective and its impact upon fundamental rights."[20]

66. Taking into consideration the aforesaid analysis, Dr. Sikri, J., in ***K.S. Puttaswamy (Retired) v. Union of India***, (2019) 1 SCC 1 (hereinafter "***K.S. Puttaswamy (Aadhaar 5J.)***") reassessed the test laid down in ***Modern Dental College*** Case (*supra*) which was based on the German Test and modulated the same as against the tests laid down by Bilchitz. Therein this Court held that:

> **"157.** In *Modern Dental College & Research Centre* [*Modern Dental College & Research Centre* v. *State of M.P.*, (2016) 7 SCC 353], four sub-components of proportionality which need to be satisfied were taken note of. These are:
> (*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 right-holder (balancing stage).
>
> **158.**This has been approved in *K.S. Puttaswamy* [*K.S. Puttaswamy* v. *Union of India*, (2017) 10 SCC 1] as well. Therefore, the aforesaid stages of proportionality can be looked into and discussed. **Of course, while undertaking this exercise it has also to be**

20Ibid, 62

> **seen that the legitimate goal must be of sufficient importance to warrant overriding a constitutionally protected right or freedom and also that such a right impairs freedom as little as possible**. This Court, in its earlier judgments, applied German approach while applying proportionality test to the case at hand. We would like to proceed on that very basis which, however, is tempered with more nuanced approach as suggested by Bilchitz. This, in fact, is the amalgam of German and Canadian approach. **We feel that the stages, as mentioned in *Modern Dental College & Research Centre* [*Modern Dental College & Research Centre* v. *State of M.P.*, (2016) 7 SCC 353] and recapitulated above, would be the safe method in undertaking this exercise, with focus on the parameters as suggested by Bilchitz, as this projects an ideal approach that need to be adopted**."
>
> *(emphasis supplied)*

67. Dr. Chandrachud, J., in ***K.S. Puttaswamy (Aadhaar-5J.)*** (*supra*), made observations on the test of proportionality that needs to be satisfied under our Constitution for a violation of the right to privacy to be justified, in the following words:

> "**1288.** In *K.S. Puttaswamy* v. *Union of India* [*K.S. Puttaswamy* v. *Union of India*, (2017) 10 SCC 1], one of us (Chandrachud, J.), speaking for four Judges, laid down the tests that would need to be satisfied under our Constitution for violations of privacy to be justified. This included the test of proportionality: (SCC p. 509, para 325)

> "325. … A law which encroaches upon privacy will have to withstand the touchstone of permissible restrictions on fundamental rights. In the context of Article 21 an invasion of privacy must be justified on the basis of a law which stipulates a procedure which is fair, just and reasonable. The law must also be valid with reference to the encroachment on life and personal liberty under Article 21**. An invasion of life or personal liberty must meet the threefold requirement of (i) legality, which postulates the existence of law; (ii) need, defined in terms of a legitimate State aim; and (iii) proportionality which ensures a rational nexus between the objects and the means adopted to achieve them**."

The third principle [(iii) above] adopts the **test of proportionality to ensure a rational nexus between the objects and the means adopted to achieve them.** The essential role of the test of proportionality is to enable the court to determine whether a legislative measure is disproportionate in its interference with the fundamental right. In determining this, the court will have regard to whether a less intrusive measure could have been adopted consistent with the object of the law and whether the impact of the encroachment on a fundamental right is disproportionate to the benefit which is likely to ensue. The proportionality standard must be met by the procedural and substantive aspects of the law. **Sanjay Kishan Kaul, J., in his concurring**

opinion, suggested a four-pronged test as follows: (SCC p. 632, para 638)

> **"(i) The action must be sanctioned by law;**
> **(ii) The proposed action must be necessary in a democratic society for a legitimate aim;**
> **(iii) The extent of such interference must be proportionate to the need for such interference;**
> **(iv) There must be procedural guarantees against abuse of such interference.**"
>
> *(emphasis supplied)*

68. After applying the aforesaid doctrine in deciding the constitutional validity of the Aadhaar scheme, Dr. Chandrachud, J., in the ***K.S. Puttaswamy (Aadhaar-5J.)*** case (*supra*), reiterated the fundamental precepts of doctrine of proportionality in relation to protection of privacy interests while dealing with personal data:

> "1324. The fundamental precepts of proportionality, as they emerge from decided cases can be formulated thus:
>
> 1324.1. A law interfering with fundamental rights must be in pursuance of a **legitimate State aim**;
> 1324.2. The justification for rights-infringing measures that interfere with or limit the exercise of fundamental rights and

liberties must be based on the **existence of a rational connection** between those measures, the situation in fact and the object sought to be achieved;

1324.3. The measures must be **necessary to achieve the object and must not infringe rights to an extent greater than is necessary to fulfil the aim**;

1324.4. Restrictions must not only serve legitimate purposes; they must also be **necessary to protect them**; and

1324.5. The State must **provide sufficient safeguards relating to the storing and protection of centrally stored data**. In order to prevent arbitrary or abusive interference with privacy, the State must guarantee that the collection and use of personal information is based on the consent of the individual; that it is authorised by law and that sufficient safeguards exist to ensure that the data is only used for the purpose specified at the time of collection. Ownership of the data must at all times vest in the individual whose data is collected. The individual must have a right of access to the data collected and the discretion to opt out."

(emphasis supplied)

69. This is the current state of the doctrine of proportionality as it exists in India, wherein proportionality is the key tool to achieve

judicial balance. But many scholars are not agreeable to recognize proportionality equivalent to that of balancing.[21]

70. In view of the aforesaid discussion, we may summarize the requirements of the doctrine of proportionality which must be followed by the authorities before passing any order intending on restricting fundamental rights of individuals. In the first stage itself, the possible goal of such a measure intended at imposing restrictions must be determined. It ought to be noted that such goal must be legitimate. However, before settling on the aforesaid measure, the authorities must assess the existence of any alternative mechanism in furtherance of the aforesaid goal. The appropriateness of such a measure depends on its implication upon the fundamental rights and the necessity of such measure. It is undeniable from the aforesaid holding that only the least restrictive measure can be resorted to by the State, taking into consideration the facts and circumstances. Lastly, since the order has serious implications on the fundamental rights of the

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21Julian Rivers, *Proportionality and Variable Intensity of Review*, (2006) 65 *C.L.J.* 174 (hereinafter Rivers, "Proportionality"); Martin Luteran, *Towards Proportionality as a Proportion Between Means and Ends* in Cian C. Murphy and Penny Green (eds.), *Law and Outsiders: Norms, Processes and "Othering" in the 21st Century* (2011) (hereinafter Luteran, "Towards Proportionality"); see also the contribution of Alison L. Young in Chapter 3 of this volume.

affected parties, the same should be supported by sufficient material and should be amenable to judicial review.

71. 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.

72. To consider the immediate impact of restrictions upon the realization of the fundamental rights, the decision maker must prioritize the various factors at stake. Such attribution of relative importance is what constitutes proportionality. It ought to be noted that a decision which curtails fundamental rights without appropriate justification will be classified as disproportionate. 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. The triangulation of a restriction requires the consideration of appropriateness, necessity and the least restrictive measure before being imposed.

73. In this context, we need to note that the Petitioners have relied on a recent judgment of the High Court of Hong Kong, in ***Kwok***

Wing Hang and Ors. v. Chief Executive in Council, [2019] HKCFI 2820 to state that the Hong Kong High Court has utilised the principle to declare the "anti-mask" law as unconstitutional. In any case, we need not comment on the law laid down therein, as this Court has independently propounded the test of proportionality as applicable in the Indian context. However, we may just point out that the proportionality test needs to be applied in the context of facts and circumstances, which are very different in the case at hand.

74. Having observed the law on proportionality and reasonable restrictions, we need to come back to the application of restrictions on the freedom of speech over the internet.

75. The respondent-State has vehemently opposed selective access to internet services based on lack of technology to do the same. If such a contention is accepted, then the Government would have a free pass to put a complete internet blockage every time. Such complete blocking/prohibition perpetually cannot be accepted by this Court.

76. However, there is 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. This Court would only observe that achievement of peace and tranquillity within the erstwhile State of Jammu and Kashmir requires a multifaceted approach without excessively burdening the freedom of speech. In this regard the Government is required to consider various options under Article 19(2) of the Constitution, so that the brunt of exigencies is decimated in a manner which burdens freedom of speech in a minimalist manner.

77. Having discussed the general constitutional ambit of the fundamental rights, proportionality and reasonable restrictions, and a specific discussion on freedom of expression through the internet and its restriction under Article 19(2), we now need to analyse the application of the same in the present case.

F. INTERNET SHUTDOWN

78. Having observed the substantive law concerning the right to internet and the restrictions that can be imposed on the same, we need to turn our attention to the procedural aspect.

79. It must be noted that although substantive justice under the fundamental rights analysis is important, procedural justice cannot be sacrificed on the altar of substantive justice. There is a

need for procedural justice in cases relating to restrictions which impact individuals' fundamental rights as was recognized by this Court in the case of ***Maneka Gandhi v. Union of India***, (1978) 1 SCC 248 and the ***K. S. Puttaswamy (Privacy-9J.)*** case (*supra*).

80. The procedural mechanism contemplated for restrictions on the Internet, is twofold: first is contractual, relating to the contract signed between Internet Service Providers and the Government, and the second is statutory, under the Information Technology Act, 2000, the Criminal Procedure Code, 1973 and the Telegraph Act. In the present case, we are concerned only with the statutory scheme available, particularly under the Telegraph Act, and we will therefore confine our discussion mostly to the same. However, as it would be apposite to distinguish between the different statutory mechanisms, we would touch upon these cursorily.

81. Section 69A of the Information Technology Act, 2000 read with the Information Technology (Procedures and Safeguards for Blocking for Access of Information by Public) Rules, 2009 allows blocking of access to information. This Court, in the ***Shreya Singhal*** case (*supra*), upheld the constitutional validity of this

Section and the Rules made thereunder. It is to be noted however, that the field of operation of this section is limited in scope. The aim of the section is not to restrict/block the internet as a whole, but only to block access to particular websites on the internet. Recourse cannot, therefore, be made by the Government to restrict the internet generally under this section.

82. Prior to 2017, any measure restricting the internet generally or even shutting down the internet was passed under Section 144, Cr.P.C., a general provision granting wide powers to the Magistrates specified therein to pass orders in cases of apprehended danger. In 2015, the High Court of Gujarat, in the case of ***Gaurav Sureshbhai Vyas v. State of Gujarat***, in Writ Petition (PIL) No. 191 of 2015, considered a challenge to an order under Section 144, Cr.P.C. blocking access to mobile internet services in the State of Gujarat. The High Court of Gujarat, *vide* order dated 15.09.2015, upheld the restriction imposed by the Magistrate under Section 144, Cr.P.C. While the Court did not undertake a full-fledged discussion of the power of the Magistrate to issue such restrictions under Section 144, Cr.P.C., the Court observed as follows:

> "**9.**...[**U]nder Section 144 of the Code, directions may be issued to certain persons who may be the source for extending the facility of internet access**. Under the circumstances, we do not find that the contention raised on behalf of the petitioner that the resort to only Section 69A was available and exercise of power under Section 144 of the Code was unavailable, can be accepted."
>
> *(emphasis supplied)*

A Special Leave Petition was filed against the above judgment of the Gujarat High Court, being SLP (C) No. 601 of 2016, which was dismissed by this Court *in limine* on 11.02.2016.

83. The position has changed since 2017, with the passage of the Suspension Rules under Section 7 of the Telegraph Act. With the promulgation of the Suspension Rules, the States are using the aforesaid Rules to restrict telecom services including access to the internet.

84. The Suspension Rules lay down certain safeguards, keeping in mind the fact that an action under the same has a large effect on the fundamental rights of citizens. It may be mentioned here that we are not concerned with the constitutionality of the Suspension Rules, and arguments on the same were not canvassed by either

side. As such, we are limiting our discussion to the procedure laid down therein. Rule 2 lays down the procedure to be followed for the suspension of telecom services, and merits reproduction in its entirety:

> "**2.**(1) Directions to suspend the telecom services shall not be issued except by an order made by the Secretary to the Government of India in the Ministry of Home Affairs in the case of Government of India or by the Secretary to the State Government in-charge of the Home Department in the case of a State Government (hereinafter referred to as the competent authority), and in unavoidable circumstances, where obtaining of prior direction is not feasible, such order may be issued by an officer, not below the rank of a Joint Secretary to the Government of India, who has been duly authorised by the Union Home Secretary or the State Home Secretary, as the case may be:
>
> Provided that the order for suspension of telecom services, issued by the officer authorised by the Union Home Secretary or the State Home Secretary, shall be subject to the confirmation from the competent authority within 24 hours of issuing such order:
>
> Provided further that the order of suspension of telecom services shall cease to exist in case of failure of receipt of confirmation from the competent authority within the said period of 24 hours.
>
> (2) Any order issued by the competent authority under sub-rule (1) shall contain

reasons for such direction and a copy of such order shall be forwarded to the concerned Review Committee latest by next working day.

(3) The directions for suspension issued under sub-rule (1) shall be conveyed to designated officers of the telegraph authority or to the designated officers of the service providers, who have been granted licenses under section 4 of the said Act, in writing or by secure electronic communication by an officer not below the rank of Superintendent of Police or of the equivalent rank and mode of secure electronic communication and its implementation shall be determined by the telegraph authority.

(4) The telegraph authority and service providers shall designate officers in every licensed service area or State or Union territory, as the case may be, as the nodal officers to receive and handle such requisitions for suspension of telecom services.

(5) The Central Government or the State Government, as the case may be, shall constitute a Review Committee.

(i) The Review Committee to be constituted by the Central Government shall consist of the following, namely:-

(a) Cabinet Secretary-Chairman;
(b) Secretary to the Government of India In-charge, Legal Affairs-Member;
(c) Secretary to the Government, Department of Telecommunications -Member.

(ii) The Review Committee to be constituted by the State Government shall consist of the following, namely:-

(a) Chief Secretary-Chairman;
(b) Secretary Law or Legal Remembrancer In-Charge, Legal Affairs-Member;
(c) Secretary to the State Government (other than the Home Secretary) -Member.

(6) The Review Committee shall meet within five working days of issue of directions for suspension of services due to public emergency or public safety and record its findings whether the directions issued under sub-rule (1) are in accordance with the provisions of sub-section (2) of section 5 of the said Act."

85. Rule 2(1) specifies the competent authority to issue an order under the Suspension Rules, who in ordinary circumstances would be the Secretary to the Ministry of Home Affairs, Government of India, or in the case of the State Government, the Secretary to the Home Department of the State Government. The sub-rule also provides that in certain "unavoidable" circumstances an officer, who is duly authorised, not below the rank of a Joint Secretary, may pass an order suspending services. The two provisos to Rule 2(1) are extremely relevant herein, creating an internal check as to orders which are passed by an authorised officer in "unavoidable" circumstances, as opposed to the ordinary mechanism envisaged, which is the

issuing of the order by the competent authority. The provisos together provide that the orders passed by duly authorised officers in "unavoidable" circumstances need to be confirmed by the competent authority within twenty-four hours, failing which, as *per* the second proviso, the order of suspension will cease to exist. The confirmation of the order by the competent authority is therefore essential, failing which the order passed by a duly authorised officer will automatically lapse by operation of law.

86. Rule 2(2) is also extremely important, as it lays down twin requirements for orders passed under Rule 2(1). *First*, it requires that every order passed by a competent authority under Rule 2(1) must be a reasoned order. This requirement must be read to extend not only to orders passed by a competent authority, but also to those orders passed by an authorised officer which is to be sent for subsequent confirmation to the competent authority. The reasoning of the authorised officer should not only indicate the necessity of the measure but also what the "unavoidable" circumstance was which necessitated his passing the order. The purpose of the aforesaid rule is to integrate the proportionality analysis within the framework of the Rules.

87. Only in such an event would the requirement of confirmation by the competent authority have any meaning, as it would allow the competent authority to properly consider the action taken by the authorised officer. Further, the confirmation must not be a mere formality, but must indicate independent application of mind by the competent authority to the order passed by the authorised officer, who must also take into account changed circumstances if any, etc. After all, it is the competent authority who has been given the power under the Suspension Rules to suspend telecom services, with the authorised officer acting under the Suspension Rules only due to some exigent circumstances.

88. The second requirement under Rule 2(2) is the forwarding of the reasoned order of the competent authority to a Review Committee which has been set up under the Suspension Rules, within one working day. The composition of the Review Committee is provided under Rule 2(5), with two distinct review committees contemplated for the Union and the State, depending on the competent authority which issued the order under Rule 2(1). Rule 2(6) is the final internal check under the Suspension Rules with respect to the orders issued thereunder. Rule 2(6) requires the concerned Review Committee to meet within five working

days of issuance of the order suspending telecom services, and record its findings about whether the order issued under the Suspension Rules is in accordance with the provisions of the main statute, *viz.*, Section 5(2) of the Telegraph Act.

89. This last requirement, of the orders issued under the Rules being in accordance with Section 5(2), Telegraph Act, is very relevant to understand the circumstances in which the suspension orders may be passed. Section 5(2), Telegraph Act is as follows:

> **"5. Power for Government to take possession of licensed telegraphs and to order interception of messages**
> **xxx**
> (2) On the occurrence of any public emergency, or in the interest of the public safety, the Central Government or a State Government or any officer specially authorised in this behalf by the Central Government or a State Government may, if satisfied that it is necessary or expedient so to do in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign states or public order or for preventing incitement to the commission of an offence, for reasons to be recorded in writing, by order, direct that any message or class of messages to or from any person or class of persons, or relating to any particular subject, brought for transmission by or transmitted or received by any telegraph, shall not be transmitted, or shall be intercepted or detained, or shall be disclosed to the Government making the order or an officer thereof mentioned in the order:

> Provided that the press messages intended to be published in India of correspondents accredited to the Central Government or a State Government shall not be intercepted or detained, unless their transmission has been prohibited under this sub-section."

90. This Court has had prior occasion to interpret Section 5 of the Telegraph Act. In the case of ***Hukam Chand Shyam Lal v. Union of India,*** (1976) 2 SCC 128, a Four-Judge Bench of this Court interpreted Section 5 of the Telegraph Act and observed as follows:

> "**13.** Section 5(1) if properly construed, does not confer unguided and unbridled power on the Central Government/State Government/ specially authorised officer to take possession of any telegraphs. **Firstly, the occurrence of a "public emergency" is the *sine qua non for* the exercise of power under this section**. As a preliminary step to the exercise of further jurisdiction under this section the Government or the authority concerned must record its satisfaction as to the existence of such an emergency. Further, the existence of the emergency which is a pre-requisite for the exercise of power under this section, must be a "public emergency" and not any other kind of emergency. The expression public emergency has not been defined in the statute, but contours broadly delineating its scope and features are discernible from the section which has to be read as a whole. **In sub-section (1) the phrase 'occurrence of any public**

> **emergency' is connected with and is immediately followed by the phrase "or in the interests of the public safety". These two phrases appear to take colour from each other. In the first part of sub-section (2) those two phrases again occur in association with each other, and the context further clarifies with amplification that a "public emergency" within the contemplation of this section is one which raises problems concerning the interest of the public safety, the sovereignty and integrity of India, the security of the State, friendly relations with foreign States or public order or the prevention of incitement to the commission of an offence.** It is in the context of these matters that the appropriate authority has to form an opinion with regard to the occurrence of a public emergency with a view to taking further action under this section..."
>
> *(emphasis supplied)*

91. The aforementioned case was followed in ***People's Union for Civil Liberties (PUCL) v. Union of India,*** (1997) 1 SCC 301, in the context of phone-tapping orders passed under Section 5(2) of the Telegraph Act, wherein this Court observed as follows:

> "**29.** The first step under Section 5(2) of the Act, therefore, is the occurrence of any public emergency or the existence of a public safety interest. Thereafter the competent authority under Section 5(2) of the Act is empowered to pass an order of interception after recording its

> satisfaction that it is necessary or expedient so to do in the interest of (*i*) sovereignty and integrity of India, (*ii*) the security of the State, (*iii*) friendly relations with foreign States, (*iv*) public order or (*v*) for preventing incitement to the commission of an offence. When any of the five situations mentioned above to the satisfaction of the competent authority require then the said authority may pass the order for interception of messages by recording reasons in writing for doing so."

92. Keeping in mind the wordings of the section, and the above two pronouncements of this Court, what emerges is that the pre-requisite for an order to be passed under this sub-section, and therefore the Suspension Rules, is the occurrence of a "public emergency" or for it to be "in the interest of public safety". Although the phrase "public emergency" has not been defined under the Telegraph Act, 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. The ***Hukam Chand Shyam Lal*** case (*supra*) further clarifies that the scope of "public emergency" relates to the situations contemplated under the sub-section pertaining to "*sovereignty and integrity of India, the security of the State, friendly relations with foreign states or*

public order or for preventing incitement to the commission of an offence".

93. The word 'emergency' has various connotations. Everyday emergency, needs to be distinguished from the type of emergency wherein events which involve, or might involve, serious and sometimes widespread risk of injury or harm to members of the public or the destruction of, or serious damage to, property. Article 4 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 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.

94. The second requirement of Section 5(2) of the Telegraph Act is for the authority to be satisfied that it is necessary or expedient to pass the orders in the interest of the sovereignty and integrity of India, the security of the State, friendly relations with foreign

states or public order or for preventing incitement to the commission of an offence, and must record reasons thereupon. The term 'necessity' and 'expediency' brings along the stages an emergency is going to pass through usually. A public emergency usually would involve different stages and the authorities are required to have regards to the stage, before the power can be utilized under the aforesaid rules. The appropriate balancing of the factors differs, when considering the stages of emergency and accordingly, the authorities are required to triangulate the necessity of imposition of such restriction after satisfying the proportionality requirement.

95. A point canvassed by the learned counsel for the Petitioner, Ms. Vrinda Grover, with regard to the interpretation of the proviso to Section 5(2) of the Telegraph Act. The *proviso* to the section specifies that a class of messages, *i.e.*, press messages intended to be published in India of correspondents accredited to the Central Government or a State Government, will be treated differently from other classes of messages. The learned counsel contended that this separate classification necessitates that an order interfering with the press would be in compliance with Section 5(2) of the Telegraph Act only if it specifically states that

the press is also to be restricted. However, the aforesaid interpretation could not be supported by the petitioner with any judgments of this Court.

96. It must be noted that although the Suspension Rules does not provide for publication or notification of the orders, a settled principle of law, and of natural justice, is that an order, particularly one that affects lives, liberty and property of people, must be made available. Any law which demands compliance of the people requires to be notified directly and reliably. This is the case regardless of whether the parent statute or rule prescribes the same or not. We are therefore required to read in the requirement of ensuring that all the orders passed under the Suspension Rules are made freely available, through some suitable mechanism. [*See* ***B.K. Srinivasan v. State of Karnataka,*** (1987) 1 SCC 658]

97. The above requirement would further the rights of an affected party to challenge the orders, if aggrieved. Judicial review of the orders issued under the Suspension Rules is always available, although no appellate mechanism has been provided, and the same cannot be taken away or made ineffective. An aggrieved

person has the constitutional right to challenge the orders made under the Suspension Rules, before the High Court under Article 226 of the Constitution or other appropriate forum.

98. We also direct that all the above procedural safeguards, as elucidated by us, need to be mandatorily followed. In this context, this Court in the ***Hukam Chand Shyam Lal*** case (*supra*), observed as follows:

> "**18. <u>It is well-settled that where a power is required to be exercised by a certain authority in a certain way, it should be exercised in that manner or not at all, and all other amodes (*sic*) of performance are necessarily forbidden</u>**. It is all the more necessary to observe this rule where power is of a drastic nature..."
>
> *(emphasis supplied)*

This applies with even more force considering the large public impact on the right to freedom of speech and expression that such a broad-based restriction would have.

99. Lastly, we think it necessary to reiterate 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. Having said so, we may note that the aforesaid Suspension Rules have certain gaps, which are required to be considered by the legislature.

100. One of the gaps which must be highlighted relates to the usage of the word "temporary" in the title of the Suspension Rules. Despite the above, there is no indication of the maximum duration for which a suspension order can be in operation. Keeping in mind the requirements of proportionality expounded in the earlier section of the judgment, we are of the opinion that an order suspending the aforesaid services indefinitely is impermissible. In this context, it is necessary to lay down some procedural safeguard till the aforesaid deficiency is cured by the legislature to ensure that the exercise of power under the Suspension Rules is not disproportionate. We therefore direct that the Review Committee constituted under Rule 2(5) of the Suspension Rules must conduct a periodic review within seven working days of the previous review, in terms of the requirements under Rule 2(6). The Review Committee must therefore not only look into the question of whether the restrictions are still in compliance with the requirements of Section 5(2) of the Telegraph

Act, but must also look into the question of whether the orders are still proportionate, keeping in mind the constitutional consequences of the same. We clarify that looking to the fact that the restrictions contemplated under the Suspension Rules are temporary in nature, the same must not be allowed to extend beyond that time period which is necessary.

101. Coming to the orders placed before us regarding restrictions on communication and Internet, there are eight orders that are placed before us. Four orders have been passed by the Inspector General of Police, of the respective zone, while the other four orders are confirmation orders passed by the Principal Secretary to the Government of Jammu and Kashmir, Home Department, confirming the four orders passed by the Inspector General of Police.

102. The learned Solicitor General has apprised the Bench that the authorities are considering relaxation of the restrictions and in some places the restrictions have already been removed. He also pointed that the authorities are constantly reviewing the same. In this case, the submission of the Solicitor General that there is still possibility of danger to public safety cannot be ignored, as this Court has not been completely apprised about the ground

situation by the State. We believe that the authorities have to pass their orders based on the guidelines provided in this case afresh. The learned Solicitor General had submitted, on a query being put to him regarding the feasibility of a measure blocking only social media services, that the same could not be done. However, the State should have attempted to determine the feasibility of such a measure. As all the orders have not been placed before this Court and there is no clarity as to which orders are in operation and which have already been withdrawn, as well as the apprehension raised in relation to the possibility of public order situations, we have accordingly moulded the relief in the operative portion.

G. RESTRICTIONS UNDER SECTION 144 OF CRPC.

"**As *emergency does not shield the actions of Government completely; disagreement does not justify destabilisation; the beacon of rule of law shines always***."

103. The Petitioners have asserted that there were no disturbing facts which warranted the imposition of restrictions under Section 144, Cr.P.C. on 04.08.2019. They strenuously argued that there

had to be a circumstance on 04.08.2019 showing 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.

104. In response, the learned Solicitor General, on behalf of the Respondent, 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, Cr.P.C.

105. These contentions require us to examine the scope of Section 144, Cr.P.C, which reads as follows:

> **"144. Power to issue order in urgent cases of nuisance or apprehended danger**.—(1) In cases where, *in the opinion* of a District Magistrate, a Sub-divisional Magistrate or any other Executive Magistrate specially empowered by the State Government in this behalf, there *is sufficient ground for proceeding*

under this section and immediate prevention or speedy remedy is desirable, such Magistrate may, by a *written order stating the material facts of the case* and served in the manner provided by Section 134, direct any person to abstain from a certain act or to take certain order with respect to certain property in his possession or under his management, if such Magistrate considers that such direction is likely to prevent, or tends 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 tranquillity, or a riot, or an affray.

(2) An order under this section may, in cases of emergency or in cases where the circumstances do not admit of the serving in due time of a notice upon the person against whom the order is directed, be passed *ex parte*.

(3) An order under this section may be directed to a particular individual, or to persons residing in a particular place or area, or to the public generally when frequenting or visiting a particular place or area.

(4) No order under this section shall remain in force for more than two months from the making thereof:

Provided that, if the State Government considers it necessary so to do for preventing danger to human life, health or safety or for preventing a riot or any affray, it may, by notification, direct that an order made by a Magistrate under this section shall remain in force for such further period not exceeding six months from the date on which the order made by the Magistrate would have, but for such order, expired, as it may specify in the said notification.

(5) Any Magistrate may, either on his own motion or on the application of any person aggrieved, rescind or alter any order made under this section, by himself or any Magistrate subordinate to him or by his predecessor-in-office.

(6) The State Government may, either on its own motion or on the application of any person aggrieved, rescind or alter any order made by it under the proviso to sub-section (4).

(7) Where an application under sub-section (5) or sub-section (6) is received, the Magistrate, or the State Government, as the case may be, shall afford to the applicant an *early opportunity of appearing before him or it*, either in person or by pleader and showing cause

against the order; and if the Magistrate or the State Government, as the case may be, rejects the application wholly or in part, he or it *shall record in writing the reasons* for so doing.

106. Section 144, Cr.P.C. is one of the mechanisms that enable the State to maintain public peace. It forms part of the Chapter in the Criminal Procedure Code dealing with "*Maintenance of Public Order and Tranquillity*" and is contained in the sub-chapter on "*urgent cases of nuisance or apprehended danger*". The structure of the provision shows that this power can only be invoked in "*urgent cases of nuisance or apprehended danger*".

107. Section 144, Cr.P.C. enables the State to take preventive measures to deal with imminent threats to public peace. It enables the Magistrate to issue a mandatory order requiring certain actions to be undertaken, or a prohibitory order restraining citizens from doing certain things. But it also provides for several safeguards to ensure that the power is not abused, *viz.*- prior inquiry before exercising this power, setting out material facts for exercising this power and modifying/rescinding the order when the situation so warrants.

108. The aforesaid safeguards in Section 144, Cr.P.C. are discussed below and deserve close scrutiny.

(a) ***Prior Inquiry before issuing Order***: Before issuing an order under Section 144, Cr.P.C., the District Magistrate (or any authorised Magistrate) must be of the *opinion* that:

i. There is a sufficient ground for proceeding under this provision i.e. the order is *likely to prevent* obstruction, annoyance or injury to any person lawfully employed or danger to human life, health or safety or disturbance to the public tranquillity; and

ii. Immediate prevention or speedy remedy is desirable.

The phrase "opinion" suggests that it must be arrived at after a careful inquiry by the Magistrate about the need to exercise the extraordinary power conferred under this provision.

(b) ***Content of the Order***: Once a Magistrate arrives at an opinion, he may issue a written order either prohibiting a person from doing something or a mandatory order requiring a person to take action with respect to property in his possession or under his management. But the order cannot be a blanket order. It must set out the "material facts" of the case. The "material facts" must indicate the reasons which

weighed with the Magistrate to issue an order under Section 144, Cr.P.C.

(c) ***Communication of the Order****:* The Order must be served in the manner provided under Section 134, Cr.P.C., i.e., served on the person against whom it is made. If such a course of action is not practicable, it must be notified by proclamation and publication so as to convey the information to persons affected by the order. Only in case of an emergency or where the circumstances are such that notice cannot be served on such a person, can the order be passed *ex parte*.

(d) ***Duration of the Order:*** As this power can only be exercised in urgent cases, the statute has incorporated temporal restrictions—the order cannot be in force for more than two months. However, the State Government can extend an order issued under Section 144, Cr.P.C. by a Magistrate for a further period up to six months if the State Government considers it necessary for preventing danger to human life, health or safety or preventing a riot.

Although, a two-month period outer limit for the Magistrate, and a six-month limit for the State Government, has been provided under Section 144, Cr.P.C. but the concerned

Magistrate and the State Government must take all steps to ensure that the restrictions are imposed for a limited duration.

(e) ***Act Judicially while Rescinding or Modification of the Order:*** The Magistrate can rescind or alter any order made by him on his own or on an application by any aggrieved person. Similarly, the State Government may also on its own motion rescind or alter any order passed by it, extending an order passed under Section 144, Cr.P.C. While considering any application for modification or alteration, the Magistrate or the State Government is required to act judicially, i.e., give a personal hearing and give reasons if it rejects the application. Care should be taken to dispose of such applications expeditiously.

109. Section 144, Cr.P.C. has been the subject matter of several Constitution Bench rulings and we will briefly examine them. The constitutional validity of Section 144, Cr.P.C. under the predecessor of the 1898 Act came up for the first time before the Constitution Bench of this Court in ***Babulal Parate*** case (*supra*).

Repelling the contention that it is an infringement of the fundamental right of assembly, this Court upheld the provision due to the various safeguards inbuilt under Section 144, Cr.P.C. This Court opined that:

a. Section 144, Cr.P.C does not confer arbitrary power on the Magistrate, since it must be preceded by an inquiry.
b. Although Section 144, Cr.P.C confers wide powers, it can only be exercised in an emergency, and for the purpose of preventing obstruction and annoyance or injury to any person lawfully employed. Section 144, Cr.P.C is not an unlimited power.
c. The Magistrate, while issuing an order, has to state the material facts upon which it is based. Since the order states the relevant facts, the High Court will have relevant material to consider whether such material is adequate to issue Section 144, Cr.P.C order. While considering such reasons, due weight must be given to the opinion of the District Magistrate who is responsible for the maintenance of public peace in the district.
d. This power can be exercised even when the Magistrate apprehends danger. It is not just mere "likelihood" or a "tendency", but immediate prevention of particular acts to counteract danger.
e. Even if certain sections of people residing in the particular area are disturbing public order, the Magistrate can pass an order for the entire area as it is difficult for the Magistrate to distinguish between members of the public and the people engaging in

unlawful activity. However, any affected person can always apply to the Magistrate under Section 144(4), Cr.P.C. seeking exemption or modification of the order to permit them to carry out any lawful activity.

f. If any person makes an application for modification or alteration of the order, the Magistrate has to conduct a judicial proceeding by giving a hearing, and give the reasons for the decision arrived at.

g. The order of the Magistrate under Section 144, Cr.P.C is subject to challenge before the High Court. The High Court's revisionary powers are wide enough to quash an order which cannot be supported by the materials upon which the order is supposed to be based.

h. If any prosecution is launched for non-compliance of an order issued under Section 144, Cr.P.C., the validity of such an order under Section 144, Cr.P.C. can be challenged even at that stage.

110. The validity of the Section 144(6) under the 1898 Act again came up for consideration before a Bench of five Judges in ***State of Bihar v. Kamla Kant Misra*****,** (1969) 3 SCC 337. The majority judgment declared the latter part of Section 144(6), Cr.P.C as it then existed, which enabled the State Government to extend an order passed under Section 144, Cr.P.C. indefinitely, as unconstitutional, since it did not provide limitations on the duration of the order and no mechanism was provided therein to

make a representation against the duration of the order. Under the 1973 Act, a time limit has been prescribed on the maximum duration of the order.

111. A Bench of seven Judges in the ***Madhu Limaye*** case (*supra*) was constituted to re-consider the law laid down in ***Babulal Parate*** (*supra*) and the constitutional validity of Section 144, Cr.P.C. This Court, while affirming the constitutional validity of Section 144, Cr.P.C. reiterated the safeguards while exercising the power under Section 144, Cr.P.C. The Court highlighted that the power under Section 144, Cr.P.C. must be:

(a) exercised in urgent situations to prevent harmful occurrences. Since this power can be exercised absolutely and even *ex parte*, "the emergency must be sudden and the consequences sufficiently grave"

(b) exercised in a judicial manner which can withstand judicial scrutiny.

This Court observed that:

> "**24**. The gist of action under Section 144 is the urgency of the situation, its efficacy in the likelihood of being able to prevent some harmful occurrences. As it is possible to act absolutely and even ex parte. **it is obvious that the emergency must be sudden and the consequences sufficiently grave.** Without it the exercise of power would have no

> justification. **It is not an ordinary power flowing from administration but a power used in a judicial manner and which can stand further judicial scrutiny in the need for the exercise of the power, in its efficacy and in the extent of its application.** There is no general proposition that an order under Section 144, Criminal Procedure Code cannot be passed without taking evidence: …
>
> These fundamental facts emerge from the way the occasions for the exercise of the power are mentioned. Disturbances of public tranquillity, riots and affray lead to subversion of public order unless they are prevented in time. Nuisances dangerous to human life, health or safety have no doubt to be abated and prevented. …..In so far as the other parts of the section are concerned the key-note of the power is to free society from menace of serious disturbances of a grave character. The section is directed against those who attempt to prevent the exercise of legal rights by others or imperil the public safety and health. If that be so the matter must fall within the restrictions which the Constitution itself visualizes as permissible in the interest of public order, or in the interest of the general public. **We may say, however, that annoyance must assume sufficiently grave proportions to bring the matter within interests of public order.**"
>
> *(emphasis supplied)*

112. Again, in ***Mohd. Gulam Abbas v. Mohd. Ibrahim,*** (1978) 1 SCC 226**,** this Court, in deciding a review petition, elaborated on the circumstances in which the power under Section 144, Cr.P.C. can be exercised. This Court held as under:

"**3.** ...**It is only where it is not practicable to allow them to do something which is quite legal, having regard to the state of excited feelings of persons living in an area or frequenting a locality, that any action may be taken under Section 144 of the Criminal Procedure Code which may interfere with what are, otherwise, completely legal and permissible conduct and speech**.

4.....It may however be noted that the Magistrate is not concerned with individual rights in performing his duty under Section 144 but he has to determine what may be reasonably necessary or expedient in a situation of which he is the best judge.

5.... If public peace and tranquillity or other objects mentioned there are not in danger the Magistrate concerned cannot act under Section 144. He could only direct parties to go to the proper forum. On the other hand, if the public safety, peace, or tranquillity are in danger, it is left to the Magistrate concerned to take proper action under Section 144, Cr.P.C."

(emphasis supplied)

113. In ***Gulam Abbas v. State of Uttar Pradesh***, (1982) 1 SCC 71, this Court held that an order passed under Section 144, Cr.P.C. is an executive order which can be questioned in exercise of writ jurisdiction under Article 226 of the Constitution. The Court reiterated the circumstances in which the power can be exercised. The Court observed as under:

"**27.** The entire basis of action under Section 144 is **provided by the urgency of the**

situation and the power thereunder is intended to be availed of for preventing disorders, obstructions and annoyances with a view to secure the public weal by maintaining public peace and tranquillity. **Preservation of the public peace and tranquillity is the primary function of the Government and the aforesaid power is conferred on the executive magistracy enabling it to perform that function effectively during emergent situations and as such it may become necessary for the Executive Magistrate to override temporarily private rights and in a given situation the power must extend to restraining individuals from doing acts perfectly lawful in themselves**, for, it is obvious that when there is a conflict between the public interest and private rights the former must prevail. **.... In other words, the Magistrate's action should be directed against the wrong-doer rather than the wronged. Furthermore, it would not be a proper exercise of discretion on the part of the Executive Magistrate to interfere with the lawful exercise of the right by a party on a consideration that those who threaten to interfere constitute a large majority and it would be more convenient for the administration to impose restrictions which would affect only a minor section of the community rather than prevent a larger section more vociferous and militant.**

33. ...**It is only in an extremely extraordinary situation, when other measures are bound to fail, that a total prohibition or suspension of their rights may be resorted to as a last measure.**"

(emphasis supplied)

114. Again, in ***Acharya Jagdishwaranand Avadhuta v. Commr. of Police, Calcutta,*** (1983) 4 SCC 522, a Bench of three Judges expressed doubts about the dicta in the ***Gulam Abbas*** case (*supra*) on the nature of the order under Section 144, Cr.P.C. but reiterated that repetitive orders under Section 144, Cr.P.C. would be an abuse of power. This Court observed as follows:

> "**16**.... **The scheme of that section does not contemplate repetitive orders and in case the situation** so warrants steps have to be taken under other provisions of the law such as Section 107 or Section 145 of the Code when individual disputes are raised and to meet a situation such as here, there are provisions to be found in the Police Act. **If repetitive orders are made it would clearly amount to abuse of the power conferred by Section 144 of the Code.**"

(emphasis supplied)

115. In ***Ramlila Maidan Incident, In re***, (2012) 5 SCC 1, this Court emphasised the safeguards under Section 144, Cr.P.C. and the circumstances under which such an order can be issued.

116. The learned counsel on behalf of the Petitioners vehemently contested the power of the Magistrate to pass the aforesaid orders under Section 144, Cr.P.C. as there existed no incumbent

situation of emergency. It was argued that such orders passed in mere anticipation or apprehension cannot be sustained in the eyes of law. As explained above, the power under Section 144, Cr.P.C. is a preventive power to preserve public order. In ***Babulal Parate*** case (*supra*), this Court expressly clarified that this power can be exercised even where there exists an apprehension of danger. This Court observed as under:

> **"25.** The language of Section 144 is somewhat different. The test laid down in the section is not merely "likelihood" or "tendency". The section says that the Magistrate must be satisfied that immediate prevention of particular acts is necessary to counteract danger to public safety etc. **The power conferred by the section is exercisable not only where present danger exists but is exercisable also when there is an apprehension of danger."**
>
> *(emphasis supplied)*

117. In view of the language of the provision and settled law, we are unable to accept the aforesaid contention.

118. Further, learned senior counsel Mr. Kapil Sibal expressed his concern that in the future any State could pass such type of blanket restrictions, for example, to prevent opposition parties

from contesting or participating in elections. In this context, it is sufficient to note that the power under Section 144, Cr.P.C. cannot be used as a tool to prevent the legitimate expression of opinion or grievance or exercise of any democratic rights. Our Constitution protects the expression of divergent views, legitimate expressions and disapproval, and this cannot be the basis for invocation of Section 144, Cr.P.C. unless there is sufficient material to show that there is likely to be an incitement to violence or threat to public safety or danger. It ought to be noted that provisions of Section 144, Cr.P.C. will only be applicable in a situation of emergency and for the purpose of preventing obstruction and annoyance or injury to any person lawfully employed [*refer to* ***Babulal Parate*** case (*supra*)]. It is enough to note that sufficient safeguards exist in Section 144, Cr.P.C., including the presence of judicial review challenging any abuse of power under the Section, to allay the apprehensions of the petitioner.

119. The Petitioners have also contended that 'law and order' is of a narrower ambit than 'public order' and the invocation of 'law and order' would justify a narrower set of restrictions under Section 144, Cr.P.C.

120. In this context, it is pertinent for us to emphasize the holding rendered by a five-Judge Bench of this court in ***Ram Manohar Lohia v. State of Bihar*****,** AIR 1966 SC 740, wherein this Court emphasised the difference between "public order" and "law and order" situation. This Court observed as under:

> "**55.** It will thus appear that just as "public order" in the rulings of this Court (earlier cited) was said to comprehend disorders of less gravity than those affecting "security of State", "law and order" also comprehends disorders of less gravity than those affecting "public order". **One has to imagine three concentric circles. Law and order represents the largest circle within which is the next circle representing public order and the smallest circle represents security of State.** It is then easy to see that an act may affect law and order but not public order just as an act may affect public order but not security of the State. By using the expression "maintenance of law and order" the District Magistrate was widening his own field of action and was adding a clause to the Defence of India Rules."
>
> *(emphasis supplied)*

121. This Court therein held that a mere disturbance of law and order leading to disorder may not necessarily lead to a breach of public order. Similarly, the seven-Judge Bench in ***Madhu Limaye*** case

(*supra*) further elucidated as to when and against whom the power under Section 144, Cr.P.C. can be exercised by the Magistrate. This Court held therein, as under:

> "**24. The gist of action under Section 144 is the urgency of the situation, its efficacy in the likelihood of being able to prevent some harmful occurrences.** As it is possible to act absolutely and even ex parte it is obvious that the emergency must be sudden and the consequences sufficiently grave. Without it the exercise of power would have no justification. **It is not an ordinary power flowing from administration but a power used in a judicial manner and which can stand further judicial scrutiny in the need for the exercise of the power, in its efficacy and in the extent of its application**.... **Disturbances of public tranquillity, riots and affray lead to subversion of public order unless they are prevented in time. Nuisances dangerous to human life, health or safety have no doubt to be abated and prevented**. We are, however, not concerned with this part of the section and the validity of this part need not be decided here. In so far as the other parts of the section are concerned the key-note of the power is to free society from menace of serious disturbances of a grave character. **The section is directed against those who attempt to prevent the exercise of legal rights by others or imperil the public safety and health. <u>If that be so the matter must fall within the restrictions which the Constitution itself visualizes as permissible in the interest of public order, or in the interest of the general public. We may say,</u>**

however, that annoyance must assume sufficiently grave proportions to bring the matter within interests of public order."

(emphasis supplied)

122. This Court in ***Ramlila Maidan Incident, In re*** case (*supra*) further enunciated upon the aforesaid distinction between a "public order" and "law and order" situation:

"**44. The distinction between "public order" and "law and order" is a fine one, but nevertheless clear. A restriction imposed with "law and order" in mind would be least intruding into the guaranteed freedom while "public order" may qualify for a greater degree of restriction since public order is a matter of even greater social concern.**

...

45. It is keeping this distinction in mind, the legislature, under Section 144 CrPC, has empowered the District Magistrate, Sub-Divisional Magistrate or any other Executive Magistrate, specially empowered in this behalf, to direct any person to abstain from doing a certain act or to take action as directed, where sufficient ground for proceeding under this section exists and immediate prevention and/or speedy remedy is desirable. **By virtue of Section 144-A CrPC, which itself was introduced by Act 25 of 2005 [Ed.: The Code of Criminal Procedure (Amendment) Act, 2005.] , the District Magistrate has**

been empowered to pass an order prohibiting, in any area within the local limits of his jurisdiction, the carrying of arms in any procession or the organising or holding of any mass drill or mass training with arms in any public place, where it is necessary for him to do so for the preservation of public peace, public safety or maintenance of public order. …"

(emphasis supplied)

123. In view of the above, 'law and order', 'public order' and 'security of State' are distinct legal standards and the Magistrate must tailor the restrictions depending on the nature of the situation. If two families quarrel over irrigation water, it might breach law and order, but in a situation where two communities fight over the same, the situation might transcend into a public order situation. However, it has to be noted that a similar approach cannot be taken to remedy the aforesaid two distinct situations. The Magistrate cannot apply a straitjacket formula without assessing the gravity of the prevailing circumstances; the restrictions must be proportionate to the situation concerned.

124. Learned senior counsel, Mr. Kapil Sibal also contended that an order under Section 144, Cr.P.C. cannot be issued against the

public generally and must be specifically intended against the people or the group which is apprehended to disturb the peace and tranquillity. This Court in the ***Madhu Limaye*** case (*supra*)**,** has clarified that such an order can be passed against either a particular individual or the public in general. This Court was aware that, at times, it may not be possible to distinguish between the subject of protection under these orders and the individuals against whom these prohibitory orders are required to be passed:

> "**27.**... Ordinarily the order would be directed against a person found acting or likely to act in a particular way. **A general order may be necessary when the number of persons is so large that distinction between them and the general public cannot be made without the risks mentioned in the section. 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."**
>
> *(emphasis supplied)*

125. The counsel on behalf of the Petitioners have argued that the validity of the aforesaid restrictions has to be tested on its reasonableness. The restrictions imposed must be proportionate to the proposed/perceived threat. In the context of restrictions

imposed by way of orders passed under Section 144, Cr.P.C., this Court, in ***Ramlila Maidan Incident*** case (*supra*), held that an onerous duty is cast upon the concerned Magistrate to first assess the perceived threat and impose the least invasive restriction possible. The concerned Magistrate is duty bound to ensure that the restrictions should never be allowed to be excessive either in nature or in time. The relevant portion is extracted below:

> "39. **There has to be a balance and proportionality between the right and restriction on the one hand, and the right and duty, on the other.** It will create an imbalance, if undue or disproportionate emphasis is placed upon the right of a citizen without considering the significance of the duty. The true source of right is duty...
>
> ...
>
> 58. Out of the aforestated requirements, the requirements of existence of sufficient ground and need for immediate prevention or speedy remedy is of prime significance. **In this context, the perception of the officer recording the desired/contemplated satisfaction has to be reasonable, least invasive and bona fide. The restraint has to be reasonable and further must be minimal. Such restraint should not be allowed to exceed the constraints of the particular situation either in nature or in duration.** The most onerous duty that is cast upon the

> empowered officer by the legislature is that the perception of threat to public peace and tranquillity should be real and not quandary, imaginary or a mere likely possibility."
>
> *(emphasis supplied)*

126. As discussed above, the decisions of this Court in the ***Modern Dental College*** case (*supra*) and ***K.S. Puttaswamy (Aadhaar-5J.)*** case (*supra*), which brought the concept of proportionality into the fold, equally apply to an order passed under Section 144, Cr.P.C.

127. The Petitioners also contended that orders passed under Section 144, Cr.P.C., imposing restrictions, cannot be a subject matter of privilege. Moreover, material facts must be recorded in the order itself. On the other hand, the learned Solicitor General argued that the empowered officers were in the best position to know the situation on the ground and accordingly the aforesaid orders were passed. There existed sufficient speculation on the ground to suggest abrogation of Article 370, and the respective Magistrates, being aware of the circumstances, imposed the aforesaid restrictions in a periodic manner, indicating due application of mind. The learned Solicitor General further argued

that this Court cannot sit in appeal over the order passed by the magistrate, particularly when there is no imputation of *mala fide.*

128. To put a quietus to the aforesaid issue it is pertinent to reproduce and rely on a relevant extract from the ***Ramlila Maidan Incident, In re*** case (*supra*):

> "**56.** Moreover, **an order under Section 144 CrPC being an order which has a direct consequence of placing a restriction on the right to freedom of speech and expression and right to assemble peaceably, should be an order in writing and based upon material facts of the case.** This would be the requirement of law for more than one reason. **Firstly, it is an order placing a restriction upon the fundamental rights of a citizen and, thus, may adversely affect the interests of the parties, and secondly, under the provisions of CrPC, such an order is revisable and is subject to judicial review**. **Therefore, it will be appropriate that it must be an order in writing, referring to the facts and stating the reasons for imposition of such restriction**. In *Praveen Bhai Thogadia* [(2004) 4 SCC 684: 2004 SCC (Cri) 1387], this Court took the view that the Court, while dealing with such orders, does not act like an appellate authority over the decision of the official concerned. **It would interfere only where the order is patently illegal and without jurisdiction or with ulterior motive and on extraneous consideration of political victimisation by those in power**. **Normally,**

> **interference should be the exception and not the rule**."
>
> *(emphasis supplied)*

129. We may note that orders passed under Section 144, Cr.P.C. 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. The order is open to judicial review, so that any person aggrieved by such an action can always approach the appropriate forum and challenge the same. But, the aforesaid means of judicial review will stand crippled if the order itself is unreasoned or un-notified. This Court, in the case of ***Babulal Parate*** (*supra*), also stressed upon the requirement of having the order in writing, wherein it is clearly indicated that opinion formed by the Magistrate was based upon the material facts of the case. This Court held as under:

> "**9.** Sub-section (1) confers powers not on the executive but on certain Magistrates...**Under sub-section (1) the Magistrate himself has to form an opinion that there is sufficient ground for proceeding under this section**

> **and immediate prevention or speedy remedy is desirable. Again the sub-section requires the Magistrate to make an order in writing and state therein the material facts by reason of which he is making the order thereunde**r. The sub-section further enumerates the particular activities with regard to which the Magistrate is entitled to place restraints."
>
> *(emphasis supplied)*

130. While passing orders under Section 144, Cr.P.C., it is imperative to indicate the material facts necessitating passing of such orders. Normally, it should be invoked and confined to a particular area or some particular issues. However, in the present case, it is contended by the Petitioners that the majority of the geographical area of the erstwhile State of Jammu and Kashmir was placed under orders passed under Section 144, Cr.P.C. and the passing of these orders need to be looked at in this perspective. In response, it is the case of the Respondent, although it has not been stated in clear terms, that it is an issue of national security and cross border terrorism. Before we part, we need to caution against the excessive utility of the proportionality doctrine in the matters of national security, sovereignty and integrity.

131. Although, the Respondents submitted that this Court cannot sit in appeal or review the orders passed by the executive, particularly those pertaining to law and order situation, the scope of judicial review with respect to law and order issues has been settled by this Court. In ***State of Karnataka v. Dr. Praveen Bhai Thogadia,*** (2004) 4 SCC 684, this Court observed, specifically in the context of Section 144, Cr.P.C., as follows:

> "**6.** Courts should not normally interfere with matters relating to law and order which is primarily the domain of the administrative authorities concerned. They are by and large the best to assess and to handle the situation depending upon the peculiar needs and necessities within their special knowledge. ..... **Therefore, whenever the authorities concerned in charge of law and order find that a person's speeches or actions are likely to trigger communal antagonism and hatred resulting in fissiparous tendencies gaining foothold, undermining and affecting communal harmony, prohibitory orders need necessarily to be passed, to effectively avert such untoward happenings**.
>
> **7.**.. If they feel that the presence or participation of any person in the meeting or congregation would be objectionable, for some patent or latent reasons as well as the past track record of such happenings in other places involving such participants, necessary prohibitory orders can be passed. Quick decisions and swift as well as effective action

necessitated in such cases may not justify or permit the authorities to give prior opportunity or consideration at length of the pros and cons. The imminent need to intervene instantly, having regard to the sensitivity and perniciously perilous consequences it may result in if not prevented forthwith, cannot be lost sight of. **The valuable and cherished right of freedom of expression and speech may at times have to be subjected to reasonable subordination to social interests, needs and necessities to preserve the very core of democratic life - preservation of public order and rule of law.** At some such grave situation at least the decision as to the need and necessity to take prohibitory actions must be left to the discretion of those entrusted with the duty of maintaining law and order, and interposition of courts unless a concrete case of abuse or exercise of such sweeping powers for extraneous considerations by the authority concerned or that such authority was shown to act at the behest of those in power, and interference as a matter of course and as though adjudicating an appeal, will defeat the very purpose of legislation and legislative intent…"

(emphasis supplied)

~~132.~~ It is true that we do not sit in appeal, however, the existence of the power of judicial review is undeniable. We are of the opinion that it is for the Magistrate and the State to make an informed judgement about the likely threat to public peace and law and

order. The State is best placed to make an assessment of threat to public peace and tranquillity or law and order. However, the law requires them to state the material facts for invoking this power. This will enable judicial scrutiny and a verification of whether there are sufficient facts to justify the invocation of this power.

133. In a situation where fundamental rights of the citizens are being curtailed, the same cannot be done through an arbitrary exercise of power; rather it should be based on objective facts. The preventive/remedial measures under Section 144, Cr.P.C. should be based on the type of exigency, extent of territoriality, nature of restriction and the duration of the same. In a situation of urgency, the authority is required to satisfy itself of such material to base its opinion on for the immediate imposition of restrictions or measures which are preventive/remedial. However, if the authority is to consider imposition of restrictions over a larger territorial area or for a longer duration, the threshold requirement is relatively higher.

134. An order passed under Section 144, Cr.P.C. should be indicative of proper application of mind, which should be based on the

material facts and the remedy directed. Proper reasoning links the application of mind of the officer concerned, to the controversy involved and the conclusion reached. Orders passed mechanically or in a cryptic manner cannot be said to be orders passed in accordance with law.

135. During the course of hearing, on 26.11.2019, the learned Solicitor General sought the permission of this Court to produce certain confidential documents to be perused by this Court. However, he objected to revealing certain documents to the Petitioners, claiming sensitivity and confidentiality. Learned senior counsel Mr. Kapil Sibal stated that the Court could assume the existence of such intelligence inputs and materials. In view of such stand, we have not gone into the adequacy of the material placed before this Court; rather, we have presumed existence of the same.

136. One of the important criteria to test the reasonableness of such a measure is to see if the aggrieved person has the right to make a representation against such a restriction. It is a fundamental principle of law that no party can be deprived of his liberty without being afforded a fair, adequate and reasonable opportunity of hearing. Therefore, in a situation where the order

is silent on the material facts, the person aggrieved cannot effectively challenge the same. Resultantly, there exists no effective mechanism to judicially review the same. [*See* ***State of Bihar v. Kamla Kant Misra*****,** (1969) 3 SCC 337]. In light of the same, it is imperative for the State to make such orders public so as to make the right available under Section 144(5), Cr.P.C. a practical reality.

137. One thing to remember is that no *mala fide* has been alleged by the Petitioners. It was not denied by the Petitioners that the State has the power to pass such restrictive order. Additionally, the Respondents contended that the historical background of the State- cross border terrorism, infiltration of militants, security issues, etc., cannot be forgotten and must be kept in mind while testing the legality of the orders. Further, the Respondent submitted that the orders were passed in the aforementioned context and in the anticipated threat to law and order, to prevent any loss of life, limb and property. However, these orders do not explain the aforesaid aspects.

138. Although the restrictions have been allegedly removed on 27.09.2019, thereby rendering the present exercise into a

virtually academic one, we cannot ignore non-compliance of law by the State. As learned senior counsel Mr. Kapil Sibal submitted, this case is not just about the past or what has happened in the erstwhile State of Jammu and Kashmir, but also about the future, where this Court has to caution the Government. Hence, we direct that the authorities must follow the principles laid down by this Court and uphold the rule of law.

139. It is contended by the Petitioners that while the Respondents stated that there are no prohibitory orders during the day and there are certain restrictions in certain areas during the night, on the ground, the situation is different as the police is still restricting the movement of the people even during the day. If that is so, it is not proper and correct for the State to resort to such type of acts. A Government, if it thinks that there is a threat to the law and order situation or any other such requirement, must follow the procedure laid down by law, taking into consideration the rights of the citizens, and pass appropriate need-based orders. In view of the same, appropriate directions are provided in the operative part of this judgment.

140. Before parting we summarise the legal position on Section 144, Cr.P.C as follows:

i. The power under Section 144, Cr.P.C., being remedial as well as preventive, is exercisable 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.

ii. The power under Section 144, Cr.P.C cannot be used to suppress legitimate expression of opinion or grievance or exercise of any democratic rights.

iii. An order passed under Section 144, Cr.P.C. should state the material facts to enable judicial review of the same. The power should be exercised in a *bona fide* and reasonable manner, and the same should be passed by relying on the material facts, indicative of application of mind. This will enable judicial scrutiny of the aforesaid order.

iv. While exercising the power under Section 144, Cr.P.C. the Magistrate is duty bound to balance the rights and restrictions based on the principles of proportionality and thereafter apply the least intrusive measure.

v. Repetitive orders under Section 144, Cr.P.C. would be an abuse of power.

H. FREEDOM OF THE PRESS

141. The Petitioner in W.P. (C) No. 1031 of 2019 has filed the petition basing her contention on the following factual premise, as averred:

> **13.** Writ Petition (Civil) No. 1031 of 2019 was filed on 10-08-2019 under Article 32 of the Constitution of India by the Executive Editor of the newspaper "Kashmir Times", which publishes two editions daily, one from Jammu and another from Srinagar. The English newspaper, Kashmir Times, was founded in 1954 as a news weekly. It was later converted to a daily newspaper in 1962 and has regularly been in print and circulation ever since. Kashmir Times is a widely read English newspaper in Jammu and Kashmir, and also has significant readership in the neighbouring States of Punjab, Delhi and Himachal Pradesh.
>
> **14.** On 04-08-2019, sometime during the day, mobile phone networks, internet services, and landline phones were all discontinued in the Kashmir valley and in some districts of Jammu and Ladakh. No formal orders under which such action was taken by the Respondents were communicated to the affected population, including the residents of the Kashmir Valley. This meant that the people of Kashmir were plunged into a communication blackhole and an information blackout. The actions of the

respondents have had a debilitating and crippling effect on newsgathering, reporting, publication, circulation and information dissemination, and have also resulted in freezing of web portals and news websites.

15. From the morning of 05-08-2019, with a heavy military presence, barricades and severance of all communication links, the state of Jammu and Kashmir was placed under *de facto curfew.* At the same time, on 05-08-2019, the Constitution (Application to Jammu and Kashmir) order, 2019, C.O. 272 was published in The Gazette of India, vide which under the powers vested by Article 370(1) of the Constitution of India, Article 367(4) was added to the Constitution. Also on 05-08-2019, the Jammu and Kashmir Reorganisation Bill, 2019, was introduced in the Rajya Sabha, and passed. On 06-08-2019, the said Bill was passed by the Lok Sabha. The President's assent was given to the Bill on 09-08-2019. The Gazette Notification, dt. 09-08-2019 states that the Jammu and Kashmir Reorganisation Act, 2019, will come into effect from 31st October, 2019, and that there shall be a new Union Territory of Jammu and Kashmir. All of this was carried out while the State of Jammu and Kashmir was in a lockdown and silenced through a communication shutdown.

16. In such Circumstances the Kashmir Times' Srinagar edition could not be distributed on 05-08-2019 and it could not be published thereafter from 06-08-2019 to 11-10-2019, as newspaper publication necessarily requires news gathering by reporters traveling across the Valley and unhindered interaction with public and officials. Due to the indiscriminate lockdown-including communication and internet blackout- and severe curbs on

> movement enforced by the respondents, the Petitioner was prevented and hindered from carrying out her profession and work. Even after 11-10-2019 only a truncated copy of the newspaper is being published because of the severe restrictions in place even today (internet services and SMS services are completely shut down even after 115 days). The new portal/website is frozen till date.

142. There is no doubt that the importance of the press is well established under Indian Law. The freedom of the press is a requirement in any democratic society for its effective functioning. The first case which dealt with the freedom of the press can be traced back to ***Channing Arnold v. The Emperor***, (1914) 16 Bom LR 544, wherein the Privy Council stated that:

> "**36.** 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."

143. During the drafting of our Constitution, B. N. Rau, while commenting on the amendments by Jaya Prakash Narayan, who had proposed a separate freedom of press, had commented in the following manner:

> "It is hardly necessary to provide specifically for the freedom of the press as freedom of expression provided in sub-clause (a) of clause (1) of article 13 will include freedom of the press..."

144. Thereafter, many judgments of this Court including ***Bennett Coleman* v. Union of India,** (1972) 2 SCC 788, ***Indian Express*** (*supra*)**, *Sakal Papers (P) Ltd. v. Union of India,*** [1962] 3 SCR 842 have expounded on the right of freedom of press and have clearly enunciated the importance of the aforesaid rights in modern society. In view of the same, there is no doubt that freedom of the press needs to be considered herein while dealing with the issue of the case at hand.

145. From the aforesaid factual averment, we may note that the Petitioner in W.P. (C) No. 1031 of 2019, with respect to the present issue, does not *impugn* any specific order of the government restricting the freedom of the press or restricting the content of the press. The allegation of the aforementioned Petitioner is that the cumulative effect of various other restrictions, such as the imposition of Section 144, Cr.P.C. and restriction on internet and communication, has indirectly affected the freedom of the press in the valley.

146. There is no doubt that the freedom of the press is a valuable and sacred right enshrined under Article 19(1)(a) of the Constitution. This right is required in any modern democracy without which there cannot be transfer of information or requisite discussion for a democratic society. Squarely however, the contention of the Petitioner rests on the chilling effects alleged to be produced by the imposition of restrictions as discussed above.

147. Chilling effect has been utilized in Indian Jurisprudence as a fairly recent concept. Its presence in the United States of America can be traced to the decision in ***Weiman v. Updgraff***, 344 U.S. 183. We may note that the argument of chilling effect has been utilized in various contexts, from being purely an emotive argument to a substantive component under the free speech adjudication. The usage of the aforesaid principle is chiefly adopted for impugning an action of the State, which may be constitutional, but which imposes a great burden on the free speech. We may note that the argument of chilling effect, if not tempered judicially, would result in a "self-proclaiming instrument".

148. The principle of chilling effect was utilized initially in a limited context, that a person could be restricted from exercising his protected right due to the ambiguous nature of an overbroad statute. In this regard, the chilling effect was restricted to the analysis of the First Amendment right. The work of Frederick Schauer provides a detailed analysis in his seminal work on the First Amendment.[22] This analysis was replicated in the context of privacy and internet usage in a regulatory set up by Daniel J. Solove. These panopticon concerns have been accepted in the case of ***K.S. Puttaswamy (Privacy-9J.)*** (*supra*).

149. We need to concern ourselves herein as to theoretical question of drawing lines as to when a regulation stops short of impinging upon free speech. A regulatory legislation will have a direct or indirect impact on various rights of different degrees. Individual rights cannot be viewed as silos, rather they should be viewed in a cumulative manner which may be affected in different ways. The technical rule of causal link cannot be made applicable in the case of human rights. Human rights are an inherent feature of every human and there is no question of the State not

22 Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the Chilling Effect* (1978).

providing for these rights. In one sense, the restrictions provided under Article 19(2) of the Constitution follow a utilitarian approach wherein individualism gives way for commonality of benefit, if such restrictions are required and demanded by law. In this context, the test of 'direct impact' as laid down in ***A.K Gopalan v. State of Madras,*** AIR 1950 SC 27, has been subsequently widened in ***Rustom Cavasjee Cooper v. Union of India***, 1970 (1) SCC 248, wherein the test of 'direct and inevitable consequence' was propounded. As this is not a case wherein a detailed analysis of chilling effect is required for the reasons given below, we leave the question of law open as to the appropriate standard for establishing causal link in a challenge based on chilling effect.

150. The widening of the 'chilling effect doctrine' has always been viewed with judicial scepticism. At this juncture, we may note the decision in ***Laird v. Tantum***, 408 U.S. 1 (1972), wherein the respondent brought an action against the authorities to injunct them from conducting surveillance of lawful and peaceful civilian political activity, based on the chilling effect doctrine. The United States Supreme Court, in its majority decision, dismissed the

plea of the respondent on the ground of lack of evidence to establish such a claim. The Court observed that:

> "Allegations of a subjective "chill" are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm."

Therefore, to say that the aforesaid restrictions were unconstitutional because it has a chilling effect on the freedom of press generally is to say virtually nothing at all or is saying something that is purely speculative, unless evidence is brought before the Court to enable it to give a clear finding, which has not been placed on record in the present case. [*refer to* ***Clapper v Amnesty Int'l***, **USA**, 568 U.S. 113 (2013)]

151. In this context, one possible test of chilling effect is comparative harm. In this frame-work, the Court is required to see whether the impugned restrictions, due to their broad-based nature, have had a restrictive effect on similarly placed individuals during the period. It is the contention of the Petitioner that she was not able to publish her newspaper from 06-08-2019 to 11-10-2019. However, no evidence was put forth to establish that such other individuals were also restricted in publishing newspapers in the

area. Without such evidence having been placed on record, it would be impossible to distinguish a legitimate claim of chilling effect from a mere emotive argument for a self-serving purpose. On the other hand, the learned Solicitor General has submitted that there were other newspapers which were running during the aforesaid time period. 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.

I. CONCLUSION

152. In this view, we issue the following directions:

a. The Respondent State/competent authorities are directed to publish all orders in force and any future orders under Section 144, Cr.P.C and for suspension of telecom services, including internet, to enable the affected persons to challenge it before the High Court or appropriate forum.

b. We declare 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). The restriction upon such fundamental

rights should be in consonance with the mandate under Article 19 (2) and (6) of the Constitution, inclusive of the test of proportionality.

c. An order suspending internet services indefinitely is impermissible under the Temporary Suspension of Telecom Services (Public Emergency or Public Service) Rules, 2017. Suspension can be utilized for temporary duration only.
d. Any order suspending internet issued under the Suspension Rules, must adhere to the principle of proportionality and must not extend beyond necessary duration.
e. Any order suspending internet under the Suspension Rules is subject to judicial review based on the parameters set out herein.
f. The existing Suspension Rules neither provide for a periodic review nor a time limitation for an order issued under the Suspension Rules. Till this gap is filled, we direct that the Review Committee constituted under Rule 2(5) of the Suspension Rules must conduct a periodic review within seven working days of the previous review, in terms of the requirements under Rule 2(6).
g. We direct the respondent State/competent authorities to review all orders suspending internet services forthwith.
h. Orders not in accordance with the law laid down above, must be revoked. Further, in future, if there is a necessity to pass fresh orders, the law laid down herein must be followed.
i. In any case, the State/concerned authorities are directed to consider forthwith allowing government websites, localized/limited e-banking facilities, hospitals services and

other essential services, in those regions, wherein the internet services are not likely to be restored immediately.

j. The power under Section 144, Cr.P.C., being remedial as well as preventive, is exercisable 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.

k. The power under Section 144, Cr.P.C cannot be used to suppress legitimate expression of opinion or grievance or exercise of any democratic rights.

l. An order passed under Section 144, Cr.P.C. should state the material facts to enable judicial review of the same. The power should be exercised in a *bona fide* and reasonable manner, and the same should be passed by relying on the material facts, indicative of application of mind. This will enable judicial scrutiny of the aforesaid order.

m. While exercising the power under Section 144, Cr.P.C., the Magistrate is duty bound to balance the rights and restrictions based on the principles of proportionality and thereafter, apply the least intrusive measure.

n. Repetitive orders under Section 144, Cr.P.C. would be an abuse of power.

o. The Respondent State/competent authorities are directed to review forthwith the need for continuance of any existing orders passed under Section 144, Cr.P.C in accordance with law laid down above.

153. The Writ Petitions are disposed of in the afore-stated terms. All pending applications are also accordingly disposed of.

.....J.
(N.V. RAMANA)

.....J.
(R. SUBHASH REDDY)

.....J.
(B. R. GAVAI)

NEW DELHI;
JANUARY 10, 2020