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Section 144: A contemporary analysis questioning the arbitrary imposition of Internet shutdowns in India

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In this article, the author argues how Section 144 of the Civil Procedure Code, when construed in light of recent legal developments, confers an arbitrary and unfettered power in the hands of a Magistrate. Next, the author analyzes the government's position on imposing internet shutdowns under Section 144, as an easy way to deal with possibly hostile situations. It is asserted that even though a total shutdown might be somehow deemed legitimate, the onus lies on the government to show that there was no suitable alternative to restore national security and public order. Lastly, certain relevant legislative reforms are recommended.

Keywords: *section 144, internet, shutdown.*

INTRODUCTION

The abuse and misuse of powers by the government, granted under various statutory provisions is rampant and traceable throughout history. Section 144 of the Criminal Procedure Code, 1973 is one such provision that empowers the District Magistrate, Sub-Divisional Magistrate, or an Executive Magistrate to issue an order against *any* person, with a view of upholding public order and tranquillity. The key element for exercising this power is the

immediate apprehension of danger and its efficacy in the likelihood of being able to prevent harmful consequences. The debate is never-ending on the legal discourse over the constitutional validity of Section 144 and the fundamental rights guaranteed under Part III of the Constitution. Section 144, which was incorporated as a safeguard to quell disturbances in the nation, has (potentially) culminated into a cry for help for persons affected by its arbitrary and unruly implementation. It has been, time and again, used unscrupulously by Executive state actors to further political agendas. However, the provision has fallen short of its intended aim to maintain public tranquillity and peace. There have been substantial changes in the legislative and judicial outlook on the scope of section 144 over the years. Fundamentally, this section empowers the magistrate to issue an order which is both prohibitory and anticipatory. However, the order is temporary, is valid for a period of two months, after which it can be extended by the state government to up to six months if the situation persists.

EVOLUTION OF SECTION 144

The 1882 Code had an analogous provision, and it was for the first time in this revision of the Code that a time limit was introduced for the duration of any order passed by a Magistrate. On a meticulous analysis of how the text was brought into practice,[1] there are four noteworthy observations:

- S. 144 was used to regulate and weaken the civil rights of individuals. The section empowered Magistrates to pass orders prohibiting persons from engaging in lawful acts if they '**considered** that such direction is likely to prevent…..a riot or an affray. On bare scrutiny of the words 'if such Magistrate considers' it is found that the section vests absolute power in a Magistrate that may be exercised *ultra vires.* Therefore, the words of the section are wide enough to be interpreted cynically.
- Prior to the 1898 amendment, the Magistrates passed s. 144 orders for an indefinite time period and framed the restriction in a manner that had the effect of maintaining a

[1] Abhinav Sekhri, 'Section 144 Cr.P.C. — Part II: Origins, Use, And The "Rule Of Law" (From 1861 Till 1901)' (*The Criminal Law Blog*, 3 March 2020) <https://criminallawstudiesnluj.wordpress.com/2020/03/03/section-144-cr-p-c-part-ii-origins-use-and-the-rule-of-law-from-1861-till-1901/> accessed 10 November 2021

permanent injunction against certain acts. [2] This approach was wholly erroneous as the purpose of the provision was to take *immediate* steps to prevent disorder and not *permanently* affect the civil rights and liberties of individuals.

- Magistrates frequently resorted to imposing 144 as a tool for good governance or to stop potential disputes on religious lines, despite there being no *urgent* need or apprehension of danger. Thereby, the vastly construed powers under the CrPC were used irrationally, at the risk of transgressing upon the fundamental rights of people. This boundless, discretionary power was exploited by the Magistrates in arbitrary and illegal ways.
- Lastly, it is pertinent to examine the link between separation of powers and the applicability of Section 144. The provision blended judicial and executive powers in one officer, thereby blurring the distinction between right and wrong, and breaching one of the most fundamental principles of democracy.

The above-mentioned points show how the loosely drafted provision conferred an unfettered power in the hands of certain Executive actors, who subsequently used it to violate basic principles of justice. The argument that the 'rule of law' is merely a myth when subjected to careful analysis holds true in the context of a provision like Section 144, which forms the basis of the repressive laws' toolkit. In *ADM Jabalpur vs Shivkant Shukla,*[3]Justice Khanna mentioned that the "rule of law" can be actualized *only* if there is a harmony between the seemingly opposing notions of public order and individual liberty.

INTERNET SHUTDOWN UNDER SECTION 144

It is common practice for the Government to disrupt internet services after contestable legislation (such as the Citizenship Amendment Act) is passed. An internet shutdown is a blanket restriction on the use of internet-based communications, rendering them ineffective or inaccessible, for a specific population, or location often invoked to exert control over the flow of such information. Governments all over the world have legitimized this practice of censorship, hiding behind the façade of 'preserving public order and national security. The

[2] *Ibid*
[3] *ADM Jabalpur v Shivkant Shukla* (1976) 2 SCC 521

court in *Union of India vs Association for Democratic Reforms*[4] had held that the right to freedom under Article 19 encompasses the right to communicate freely through media, whether print, electronic or audio-visual. [5] Freedom of speech and expression covers the right to disseminate information and voice an opinion and extends to the right to "criticize the dispensation running the administration of the country, be it the government or the Executive."[6]

The Calcutta HC, *in Sanmay Banerjee,*[7] opined that "Even the Judiciary and the Legislature are not exempt from fair criticism. This is what the freedom of speech and expression, as enshrined in the Constitution is all about. It is the criticism which helps in good governance and keeps a leash on public functionaries, providing a touchstone for the Executive to test the worth of their public endeavors." The cumulative effect of these judgments, when interpreted considering Section 144 is that every citizen has a manifestly inherent right to critique the *status quo*, without being under a constant threat of the magisterial power. However, the right is subject to reasonable restrictions [as enshrined under 19 (2)], and "any such restriction can be imposed if the danger bears a direct nexus with the expression sought to be restricted and must not be remote and far-fetched."[8] In *Kishori Mohan vs State of West Bengal*,[9] the apex court held that "mere criticism of the government does not tantamount to public disorder."On a bare perusal of these statements, it is debatable whether a blanket ban on internet services bears a direct nexus with public order and security of the State.

In India, internet shutdowns are declared under the Temporary Suspension of Telecom Services (Public Emergency or Public Safety) Rules, 2017, and Section 144 of the Criminal Procedure Code. While the former is a relatively new law, section 144 has been imposed aggressively over time. In fact, amidst the chaos and terror of the novel coronavirus, India

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[4] *Union of India v Association for Democratic Reforms* (2002) 5 SCC 294

[5] Columbia University, 'Union Of India v Association for Democratic Reforms And Another; with People's Union for Civil Liberties and another v Union of India and another' (*Global Freedom of Expression*) <https://globalfreedomofexpression.columbia.edu/cases/union-india-uoi-v-respondent-association-democratic-reforms-another-peoples-union-civil-liberties-pucl-another-v-union-india-uoi-another/> accessed 10 November 2021

[6] *Sanmay Banerjee v State of West Bengal and Others* WP No 21526 (W) of 2019

[7] *Ibid*

[8] *S Rangarajan Etc v P Jagjivan Ram* 1989 (2) SCR 204

[9] *Kishori Mohan v State of West Bengal* AIR 1972 SC 1749

imposed close to 110 internet shutdowns in 2020.[10] India has repeatedly deprived its citizens of open, reliable, and vital information. The internet curfew', as termed by journalists, has pushed every stratum of the society into digital darkness as it involves disabling both mobile internet and broadband services. Interestingly enough, around 16,000 hours of internet shutdowns over the period 2013-2018 cost the Indian economy approximately $3 billion.[11]It is abundantly clear that internet shutdowns have far-reaching consequences which are not just confined to freedom of speech. We must now question -- why is an activity which has an adverse impact on the economy as well as the larger democratic landscape, still sought after by the government? An internet shutdown may be considered as the government taking the easy way out to deal with *possibly* hostile situations.

The Prime Minister's dream of a Digital India is incongruous with the arbitrary imposition of internet shutdowns. This is because there is a significantly large number of people using the digital space for their banking needs, ordering food, trading, investing, etc. A total clampdown on the internet would clip the wings of the already subservient rural class.

"Absolutism is the greatest enemy of Rationality"

In a recent Supreme Court judgment,[12] the court held that freedom of trade and commerce through the internet was also covered under Article 19 (1)(g). Next, the Hon'ble court observed that it was the duty of the Magistrate to balance the rights of citizens juxtaposed with the restrictions sought therein, using the principle of proportionality.[13]However, there are several inconsistencies in the present definition, scope, and applicability of Section 144, which are:

[10] 'Over 100 Instances Of Internet Shutdown In India In 2020, Says New Report' (*The Wire,* 4 March 2021) <https://thewire.in/tech/over-100-instances-of-internet-shutdown-in-india-in-2020-says-new-report > accessed 10 November 2021

[11] Karishma Mehrotra, 'Over 16,000 Hours Of Internet Shutdowns Cost India Over $3 Billion In Five Years' (*The Indian Express,* 26 April 2018) <https://indianexpress.com/article/technology/tech-news-technology/internet-shutdown-costs-economy-over-3-billion-in-last-five-years-5151015/> accessed 10 November 2021

[12] *Anuradha Bhasin v Union of India* Writ Petition (Civil) No 1031 of 2019

[13] *Ibid*

- It vests unconditional, absolute powers in a Magistrate. An immediate relief against a 144 order is a revision application to the Magistrate himself/herself. The effective result is inexcusably futile.
- The ambit of the section is too wide and does not cater to specific kinds of dangers.
- Directly infringes upon fundamental rights such as the right to assembly peacefully [Article 19(1)(b)], the right to freedom of speech [19 (1)(a)] and the right to practice any profession, occupation, trade, or business[14] [19 (1)(g)].
- The nature of a 144 order is anticipatory, i.e. it is passed to restrict certain actions before they even occur. However, a complete ban lasting more than 18 months in Jammu and Kashmir does not seem to be anticipatory at all, but rather prohibitive and illegal.

RE-DEFINING SECTION 144: THE ROAD AHEAD

The Ramlila Maidan case[15] clarified that orders under Section 144 are prohibitive, hence, it is the *sine qua non* that a 'lesser restrictive alternative' must be searched. In stark contrast, when the world's longest internet shutdown lasting 18 months (in J&K) was finally brought up for contention in the Supreme Court, the apex court *still* did not order restoration of internet services in the valley.[16] . Not only does the government blatantly violate the litmus test of proportionality as was laid down by the Supreme Court,[17] but it also fails to publicize the orders passed under s. 144.[18] Applying the standards set out in the landmark *Puttaswamy*[19] judgment, an internet shutdown lasting more than 18 months seems neither proportionate nor rational. Even if a total clampdown on the internet is somehow deemed legitimate, the government must bear the brunt of proving that there was no suitable alternative for restoring national security and public order.

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[14] When construed in the context of e-commerce businesses
[15] *In Re-Ramlila Maidan Incident Dt. 4/5.06.2011 v Home Secretary, Union of India & Ors*.; Suo Motu Writ Petition (CRL.) No 122 of 2011
[16] Gautam Bhatia, 'The Devil's in The (Future) Detail: The Supreme Court's Internet Shutdown Judgment' (*MediaNama,* 11 January 2020) <https://www.medianama.com/2020/01/223-supreme-court-internet-shutdowns-kashmir/> accessed 10 November 2021
[17] *Justice KS Puttaswamy (Retd) v Union of India* (2017) 10 SCC 1
[18] Gautam Bhatia (n 16)
[19] *Justice KS Puttaswamy (Retd) v Union of India* (2017) 10 SCC 1

In a democracy, every citizen has an indisputable right to discuss and critique the existing state of affairs. Considering the same, the author proposes the following changes to the current regime:

- No absolutism: A system of checks and balances must be implemented, as elaborated in the IT Act.[20] The current definition suffers from the vice of arbitrariness and a lack of adequate safeguards.
- An order under Section 144 must be invoked with utmost diligence. This order must be further subjected to judicial review.
- Transparency: All orders passed under this section must be made public, to maintain transparency and unaccountability.
- A proportionality and necessity test must be conducted before passing such an order.
- The existing law allows the order to extend to an entire state. This is problematic since public order and security is a highly localized concept and the whole state must not, as a whole, suffer from such an order.

Conclusively, Section 144 is a useful instrument when dealing with emergencies. However, in absence of a lucid definition, the unrestricted and extraordinary power this provision vests with the Executive, coupled with limited judicial oversight, makes it highly susceptible to misuse by the ruling government.

[20] Information Technology Act 2008, s 69(a)