

The Principle of Proportionality, A Tool to Restrict Administrative Carte Blanche: An Analysis of the Principle with Special Reference to restricted Internet Availability in Jammu and Kashmir

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Abstract

An ongoing debate on the administrative supremacy and principle of proportionality in the backdrop of the orders made by the government of the Union Territory of Jammu and Kashmir suppressing the internet facilities for an indefinite period depriving the citizens of the 'paradise on earth' various fundamental rights has triggered on, once again, the conflicting issue between the administrative arbitrariness and the impact of the principle on such arbitrary action. Although, a writ petition in connection with the same has recently been rejected by the Hon'ble Supreme Court on the ground of warranted situation prevailing in the valley, however, the deprivation of various fundamental rights to the people living, raise this question whether the decision was made complying with the principle of proportionality? This research work has made an attempt to look into the necessity of such order in the light of the four-pronged test of the principle of proportionality.

Key words: *Proportionality, Reasonableness, Restrictions, Constitutionality, Jammu & Kashmir, Administrative Supremacy.*

I. Introduction

With the granting of permission² under the Temporary Suspension of Telecom Services (Public Emergency or Public Safety) Rules, 2017, the Government of

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²Vide order, dated 26th March, 2020, 3rd April 2020 and 15th April, 2020. The first impugned order stated that the government will continue with the ban on the high-speed internet which began since 5th August, 2019. The second impugned order stated "internet speed restrictions have, while enabling access to essential services and sites, not posed any hindrance to COVID-19 control measures or to access online educational content." The third order was also on the same tune as that of the second impugned order with a view to reduce incidents of misuse of social media by way of uploading and circulation of provocative audio/video content, fake news, etc.

Jammu and Kashmir allowing access to use the internet with much slower speed (2G, while rest of the Indian are enjoying 4G facilities with higher speed), a much debated question has been raised against such orders as to its constitutionality on the ground of arbitrary, unreasonable, fanciful, illegal, violating not only of the fundamental right to freedom of speech and expression including the right to carry on any trade and business over the online medium under Articles 19 (1)(a) and 19 (1)(g) respectively, but also other rights as guaranteed under Articles 14, 21 and 21A of the Constitution of India. The orders were as a result of the Hon'ble Supreme Court's judgement made in *Anuradha Bhasin v. Union of India & Ors*³ and *Ghulam Nabi Azad v. Union of India*⁴, declaring that freedom of speech and expression and freedom to practice any profession over the medium of the internet enjoys constitutional protection under the above said Articles. Four days after the judgement of the Hon'ble Supreme Court, the Government of Jammu & Kashmir passed three consecutive orders⁵ (dated 14th January, 18th, January and 24th January, 2020). Although a Writ Petition⁶ was referred to the Hon'ble Supreme Court by the media professional⁷ of the Jammu & Kashmir, challenging the validity of the governmental orders made on different dates, curtailing or restricting various fundamental rights, and on May 11, it was duly rejected by the Hon'ble court, the very pertinent question that exist is

³ W.P. (Civil) No. 1031, 2019 (India). In Ms. Bhasin's case, the newspaper she edits, The Kashmir Times, could not be distributed on 5 August and went entirely unpublished between 6 August and 11 October.

⁴ W.P.(Civil) No. 1164, 2019 (India). Mr. Azad, Leader of the Opposition in the Rajya Sabha, was prohibited from visiting the Valley raised the issue on basic livelihood, tourism, handicrafts, manufacture, construction, cultivation, agriculture and information technology and access to basic healthcare.

⁵ The first order stated that cross-border terrorist elements were using the internet to communicate and spread propaganda, which could cause large-scale violence. In the Second order it stated that there had been no adverse impact after the partial restoration, but reiterated that the internet could be used for incitement, "rumour mongering", and by anti-national elements and in the third order reiterating the twin points stated that there is "no adverse impact" and "apprehension of misuse."

⁶ W.P.(Civil) No.10817, 2020 (India).

⁷ Foundations for Media Professionals v. Jammu & Kashmir, W.P.(Civil) No. 10817, 2020(India).

whether such impugned orders passed by the government of the Jammu & Kashmir had satisfied the principle of reasonability test in the name of imposing restrictions on the ground enumerated under Clause (2) of Article 19 of the Constitution of India which among other grounds included within it the ground of national security and public order and also under Article 21 of the Constitution of India that lays down the principle 'procedure established by law. Further, whether such orders are proportional in view of the prevailing situation in the various parts of the valley? The debate on principle of reasonability vis-a-vis principle of proportionality in the context of the government passing legislations or exercising any administrative discretion, conferred upon it under the law on the basis of delegation of legislative power is not new. However, many a times it has been seen that while exercising the power of enacting laws or exercising discretionary administrative measures, in the name of reasonability or proportionality, it encroached into the field of such rights which are fundamental for every human being guaranteed under the Constitution of every country causing perennial loss to the right holder. There is no doubt that the judgement has an impact on the rule of law, as it has been alleged that the judgement has rather undermined the rule of law. The principle of reasonability has always been carrying a special impact whenever a constitutional crisis existed where on the one hand, government's decision/order that tried to interfere with or take away the fundamental right of the common people, is claimed to be based on reasonableness having some purpose behind, based on intelligible differentia and creating some nexus with such object to be achieved, on the other, in the plethora of cases decided by various High Courts and Hon'ble Supreme Court, such decisions or laws have considered as vague, unreasonable, unjust or illegal. In the above backdrop, the researcher has made an attempt to trace out the evolution of the doctrine of proportionality in the light of reasonability taking into consideration the various tests under the proportionality principle, its applicability in protecting and safeguarding the fundamental rights of the individual by declaring the law in question as unconstitutional or quashing the decision of the administrative authority on the ground of arbitrariness. Two parallel ongoing debates have been taking place persistently in the field of constitutional law. The first debate concerns the enforceability of fundamental social rights (hereinafter social rights), while the second is about the prevalence

of proportionality as a method of reviewing violations of rights. Proportionality has developed globally into the fundamental method for reviewing rights' infringements, triggering a debate concerning its merits and disadvantages. Is proportionality the ultimate expression of the 'new constitutionalism,' allowing an objective evaluation of rights limitations, or is it a concealed balancing method that multiplies threats to rights⁸?

II. Evolution of the Principle Of Proportionality

The principle of proportionality has been in use and can be found in every aspects of legal regime whether it is the civil laws such as industrial laws, employment laws, company law, or newly developed information technology laws or in the field of various criminal laws. However, its importance in the field of constitutional and administrative laws is undeniable, where while exercising the law making power or discharging administrative function, the fundamental rights of the individuals have been interfered with and to protect and safeguard such rights, the principle of proportionality act as a tool to check such powers. Before dealing with the different tests to justify administrative action let us focus on the evolution of the principle of proportionality.

Proportionality is a very ancient concept. The code of Hammurabi, a Babylonian Law Code dating back to 1722 B.C., incorporated the principle of "An eye for an eye, and a tooth for a tooth". Similarly, the Magna Carta and the English Bill of Rights 1689 also embodied that principle of proportional punishment 'under which punishment must be proportional to crime'.⁹ Later on, in the thought of Aristotle where just is a ratio between two parties mediated by an abstract principle which is a part of contemporary law, nonetheless talks about the

⁸Xenophon Contiades&Alkmene Fotiadou, *Social Rights In The Age Of Proportionality: Global Economic Crisis And Constitutional Litigation*, (April 9, 2011), Int. Jour. of Const. Law (2012), <https://watermark.silverchair.com/>

⁹SWATANTRA SINGH RAWAT, *THE EVOLVING CONCEPT OF THE DOCTRINE OF PROPORTIONALITY IN ADMINISTRATIVE PROCESS*, (2015) <https://shodhganga.inflibnet.ac.in/bitstream/10603/49259/1/swatantra%20thesis%20%20may%202015.pdf>

general principle of proportionality.¹⁰The idea of proportionality as a specific rule of law emerged from Aristotle's though a vague and general but increasingly concrete through and definite proportion of law of self defense¹¹. Subsequently, Cicero, the positive law thinker, while defining the term 'law' described it as the right ratio and proper proportion which was further explained by Thomas Aquinas, the natural law thinker of the medieval period in the law of self-defence of States.

Before the adoption of the United Nation's Charter in 1945, the Covenant of the League of Nations adopted in 1919 imposed restraints on the liberty of States to resort to war. A system of peaceful settlement of disputes was set up under the Covenant and the resort to force was forbidden without the dispute being first submitted for arbitration, judicial settlement or the league council.¹² It was during the period between the First and the Second World War that the right of self-defense developed and finally took the form that we see today in Article 51 of the U.N. Charter. Necessity and proportionality were part of the developing law of self-defense¹³.

During the modern period, this unwritten constitutional principle is said to originally evolve in Germany and developed thereby by the German Constitutional Courts applying the principle to the public law domain. According to the principle of proportionality, any restriction by the governmental authority, imposed upon the individual freedom, must be reasonable and must touch the corner stone of the objectives sought to achieve within the purview of the law. In other words, such restrictions must not be unreasonable, based on arbitrariness on the part of the authority exercising some discretionary power conferred upon him by the law. Such arbitrary and unreasonable action is prominently used as a ground for judicial review. Proportionality is a long standing doctrine of criminal and to a certain

¹⁰*Id.*

¹¹*Id.*

¹²GARDAM JUDITH, NECESSITY, PROPORTIONALITY AND THE USE OF FORCE BY STATES, MOD. LAW RE.30,(2006) https://www.academia.edu/7449307/Necessity_Proportionality_and_the_Use_of_Force_by_States_by_Judith_Gardam

¹³Contiades, *Supra* note 7 at 115.

extent public international law. It was precisely the Prussian Supreme Court that established the principle in the field of police law and Georg Jellinek's comment was that "the police may not kill a swallow with cannon"¹⁴. Under the Indian Penal Code, 1860 also the doctrine is available where under Section 99¹⁵ of the Code dealing with the right of private defense it has categorically mentioned that the infliction of harm should not be more than what is required. Similarly, the retributive theory of punishments also lays down the same principle of an eye for an eye and a tooth for a tooth. Although the genesis of the principle of proportionality is usually traced to German public law, gradually, it has found its place in the European continents, Canada, Ireland, United Kingdom, New Zealand, Australia and South Africa¹⁶.

In Europe, the principle has been characterised as the most important legal principle in the European Administrative Law. To regulate the exercise of powers by the European Union, reference can be made from Article 5¹⁷ of the Treaty of European Union in which the principle of proportionality has been embodied. The European Court of Justice and Courts of Human Rights began to develop the principle as a criteria for assessing the acts of the governmental authority affecting the rights of the individual by virtue of the power conferred

¹⁴NAMITA VASHISHTHA, *PRINCIPLE OF PROPORTIONALITY: EXTENT AND APPLICATION IN INDUSTRIAL DISPUTES*, 158 (2018) <https://hpnlu.ac.in/PDF/20dba562-1da4-4748-878b-dabbeec715ed.pdf>

¹⁵Indian Penal Code, No. 45 of 1860, PEN. CODE (2019). Section 99 states that ".....Extent to which the right may be exercised.—The right of private defence in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence.

¹⁶CHINTAN CHANDRACHUD, *PROPORTIONALITY, JUDICIAL REASONING AND THE INDIAN SUPREME COURT*, *Anti-Discr. Law Rev.* (2017) http://www.czasopisma.wolterskluwer.pl/images/pdf/ADLRew_2017_01_Chandrachud-Proportionality_Judicia_Reasoning_and_the_India.pdf

¹⁷Treaty of European Union, Article 5(1) states that "the limits of Union competences are governed by the principle of conferral. The use of union competences is governed by the principle of subsidiarity and proportionality." Further, Article 5(4) provides that "under the principle of proportionality the content and form of Union action shall not exceed what is necessary to achieve the objectives of the treaties. The institutions of the union shall apply the principle of proportionality as laid down in the protocol on the application of the principles of subsidiarity and proportionality."

on them by the legislature. Further, Article 10 of the European Convention on Human Rights which confers the right of freedom of expression provides in paragraph 2 that it may be restricted only if there is a pressing social need and if the degree of restriction is proportionate to the importance of social need. This principle has been considering as an important tool for reviewing the constitutional matter in Europe particularly post-war Europe. In the common law countries also the principle has been adopted gradually, for e.g. New Zealand had imported and adopted the principle from Canada and the Canadian themselves lifted the idea of proportionality forms the European Courts of Human Rights¹⁸. Besides, in the United State of America there is no such concept of proportionality principle available, under the Administrative Act, 1946 also the principle did not find place nor have the courts ever developed a judge made principle of proportionality. In the United Kingdom, it was for the first time Lord Diplock suggested the introduction of the principle as a potential fourth ground of review in a case¹⁹ and since then the principle of unreasonableness and its relationship with the principle of proportionality has been at the center of discussion under the English law²⁰.

III. The Proportionality Test and Its Applicability in India

A clear reading from the judgments of the Hon'ble Supreme Court made in *Puttaswamy I*²¹ and *Puttaswamy II*²² (popularly known as the Aadhaar Judgment) it is now a well settled law that the fundamental rights can only be restricted by the administrative authority that conform to the principle of proportionality. Although there has been no universal test for the principle of proportionality to be applied, however, there existed four-part structured test that has been accepted worldwide and the same has been accepted by the Indian judiciary. In *Modern Dental College and Research Centre &Ors. v. State of MP*,²³ five-judge bench of the Hon'ble Supreme Court has laid down the following test from the book of Aharon Barak (former Chief Justice of the

¹⁸R v. Oakes (1986) 1 S.C.R. 103 (India).

¹⁹Council of Civil Services Union v. Minister for the Civil Service, (1985) A.C. 374 (India).

²⁰RAWAT, *Supra* note 8 at170.

²¹Puttaswamy (Retd.) v. Union of India, (2017) 10 S.C.C. 1(India).

²²Puttaswamy v. Union of India ,(2019)1 S.C.C.1(India).

²³A.I.R. 2016 S.C. 2601 (India).

Supreme Court of Israel) titled *Proportionality: Constitutional Rights and Their Limitation*, stating that a limitation of a constitutional right must be constitutionally permissible. Although, in numerous other cases also the proportionality tests have been applied in order to deal with the constitutionality of the particular law or administrative actions yet the same tests have been discussed herein under in the light of the restricted internet availability in the Union Territory of Jammu and Kashmir:

III.I First Test: Legitimate Goal

Presently, the government is involved in multifarious activities that leads to the welfare of the people at large based on the principles of equality of opportunity, equitable distribution of wealth and public responsibility for those unable to avail themselves of the minimal provisions for a better life. The emergence of the State from the *laissez faire* to the role of social welfare, where the state plays a key role in the protection and promotion of the economic and social well-being, aimed at achieving different goals with a purpose behind. Therefore, the policy or decision which is taken and implemented by the government must be justifiable taking into consideration the goal behind such policy. Further, concern should also be on whether the policies undertaken by the government is for the larger interest of the community or not. The principle of proportionality envisages that a public authority ought to maintain a sense of proportion between his particular goals and the means he employs to achieve those goals, so that his action impinges on the individual rights to the minimum extent to preserve the public interest. This means that administrative action ought to bear a reasonable relationship to the general purpose for which the power has been conferred²⁴. In *R v. Oakes* the Supreme Court of Canada observed that the goal must be 'of sufficient importance to warrant overriding a constitutionally protected right or freedom'²⁵. In the context of the prevailing situation in the Union Territory of Jammu & Kashmir, the orders issued suspending the Internet are not in furtherance of any legitimate state aim. The government's case is that it apprehends that the Internet will be misused by 'anti-national' elements and

²⁴VASHISHTHA, *Supra* note 13, at 158-159.

²⁵(1986) 1 S.C.R. 103 (India).

will lead to a deterioration of 'law and order'²⁶ but not public order as incorporated in clause (2) of Article 19 of the Constitution of India. In this context, it is important to refer the decision made by the Hon'ble Supreme Court in Superintendent Central Prison, Fatehgarh v. Dr. Ram Manohar Lohia²⁷. The Hon'ble Court observed that, the term 'law and order' is not subsumed within 'public order' which is the ground under Article 19(2) of the Constitution of India. Similarly, in Re Ram Lila Maidan Incident²⁸, the court held that "*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*".

III.II Second Test: Suitable Means to Effectuate the Purpose

The principle of proportionality involves that for attaining the desired result the administrative action taken must not be more than what is necessary, in other words, it must not be excessive or disproportion but must be a proportionate response to the aim sought to be achieved. If the action taken is grossly disproportionate the decision is liable to be quashed at the hand of the court. It has to be seen that the means with the help of which such purpose is to be achieve or effectuate should be exercise with proper care and diligence. In *Laxmi Khandasari v. State of U.P.*²⁹, the Supreme Court held that the law is clear on the point that while deciding the reasonableness of the restriction on fundamental rights, the nature of the right alleged to have been infringed, the underlying purpose of the restriction imposed, the extent and urgency of the evil sought to be remedied thereby, disproportion of the imposition, prevailing conditions at the time should all enter into judicial verdict. In *Ranjit Thankur v. Union of India*³⁰, the punishment which was imposed on the appellant under the Army Act

²⁶GAUTAM BHATIA, *THE KASHMIR INTERNET BAN-WHAT'S AT STAKE*, THE WIRE, (2019) <https://indconlawphil.wordpress.com/2019/12/25/guest-post-the-kashmir-internet-ban-whats-at-stake/> .

²⁷A.I.R.1950 S.C. 633.

²⁸(2012) 5 S.C.C. 1(India).

²⁹(1981) 2 S.C.C. 600 (India).

³⁰ A.I.R.1987 S.C. 2386 (India).

was declared by Justice M. N. Venkatachaliah was so strikingly disproportionate with the purpose sought to achieve. It was further observed that the punishment must be appropriate and not to be vindictive or unduly harsh. The power exercising authority should be borne in mind that while applying the means; it should not interfere with the fundamental rights of the individual. In the case of Jammu & Kashmir, the orders imposing the shutdown are not rationally connected to the fulfillment of the supposed purpose, i.e. the prevention of violence. While the state has repeatedly claimed that the Internet will be misused by miscreants and anti-national elements it has provided no actual evidence of such misuse being a real and genuine threat³¹. If the interference with the rights or liberties of an individual, contributes to the achievement of a legitimate goal then the suitability test is satisfied because it has been established that there is indeed a clash of the two values as it was held in *Tennessee v. Garner*³². The measures which are not suitable at all to pursue the stated objective should not be imposed because suitability requires a causal relationship between the measures and its object. The interference must be based on intelligible differentia and such differentia must have a rational relation sought to be achieved, the two essential criteria for judging the reasonability of the discrimination as mentioned under Article 14 of the Constitution of India is similarly applicable while testing the second test of the principle of proportionality.

III.III Third Test: Necessity or No Alternatives

At this stage of the proportionality test, a fact-based test is necessary to find out various alternative measures that can be adopted to achieve the intended goal of the state. In other words, if the same legitimate goal or purpose could be achieved in another way which are alternatives to the option affecting the rights, alternative means should be adopted with least harmful effect on the rights for achieving the goal. Such least restrictive measure must be equally effective to achieve the intended goal of the state. Therefore, the test consisted of two questions. The first is whether there are less restrictive or milder or less harmful measures. The second question that one needs to object is whether the

³¹BHATIA, *Supra* note 22.

³²(1985) 471 U.S.1(United States) .

alternative measures are equally effective in achieving the pursued objective³³. In the Aadhaar case the five-judge Bench of the Hon'ble Supreme Court was of the view that ".....there is no alternative measure with lesser degree of limitation which can achieve the same purpose. In fact, on repeated query by this Court, even the petitioners could not suggest any such method³⁴. Similarly, in Anuradha Vasin's case the three-judge Bench of the Hon'ble court stated that "the authorities must assess the existence of any alternative mechanism" to achieved its goal and therefore, shifted the burden on the State to find out the alternatives first of all with least restrictive affect. However, in the Aadhaar case the Hon'ble court imposes the burden on the petitioner to prove the alternative way in order to achieve the goal. Therefore, it can be concluded that the state must consider the feasibility of selective blocking before limiting it to the 2G service. In *State of Madras v. V. G. Row*³⁵, the Court was deciding the constitutionality of a law that empowered the state government to notify as unlawful, associations that: constituted a danger to public peace, interfered with the maintenance of public order, or interfered with the administration of law. The Supreme Court struck down the law on the basis that it imposed unreasonable restrictions on the exercise of the right to form associations. The Court adopted a necessity test, arguing that a less restrictive means of curtailing rights, setting up a judicial inquiry instead of an advisory board, was available to the state. The situation prevailing in the Jammu & Kashmir could not be said as compelling that there was a need for shutting down of the internet and therefore, the orders also did not satisfied the necessity test. It is submitted that the purported objective could be achieved through least restrictive and least intrusive means.

III.IV Fourth Test: Proportionality *StrictoSensu* or the Balancing Test

The "balancing test" means scrutiny of excessive onerous penalties or infringements of rights or interests and a manifest imbalance of relevant

³³RAWAT,*Supra* note 8 at 126.

³⁴*Id.* Para 280.

³⁵ A.I.R. 1952 S.C. 196 (India).

considerations³⁶. Proportionality *stricto sensu* or balancing is a situation where it is to be considered whether the law adequately balances the social benefits and harms caused by the law. If the restriction/derogation justified in the overall interest of a democratic society and human dignity then a balance could be maintained between the restriction and the rights invaded. While passing any impugned order the administrative authority must look into as to how a balance could be maintained between individual rights and societal needs because such authority has the primary responsibility to decide what would be the best judgment on the basis of which action would be taken. In *Canara Bank v. V.K. Awasthy*³⁷, while explaining the applicability of the doctrine of proportionality, the Court observed that in situations where no fundamental freedoms are involved, Court will only play a secondary role while primary judgment will remain with the administrative authorities. In *Allahabad Jal Sansthan v. DayaShanker Rai*³⁸, the Supreme Court opined that while protecting interest of the workman interest of the employer and the societal needs must be taken into consideration because complete detriment of the employer would only lead towards skewing investment away from labour intensive market, thus strangling economic development. In *Om Kumar and Ors. v. Union of India*³⁹ JJ M. Jagannadha Rao and U. C. Banerjee observed that the Court will act as a primary reviewing authority while dealing with the merits of the balancing action on the part of the administration. In the case of *Jammu & Kashmir*, obviously, at the first instance the national security is said to be fundamental justifying the community interest and there is no harm in imposing the reasonable restrictions (and not draconian) on the fundamental rights of the people living there, however, the test requires balancing the marginal social benefit against the marginal social harms caused by the change in status quo that the law brings about⁴⁰. The *Maharashtra Dance Bars* case⁴¹ offers another example of the adoption of necessity and balancing within reasonableness

³⁶ *FOUNDATIONS OF REVIEW IN LEGITIMATE EXPECTATION IN INDIAN LAW*, 256, (2020) https://sg.inflibnet.ac.in/bitstream/10603/39836/11/11_chapter%205.pdf.

³⁷ (2005) 6 S.C.C. 321(India).

³⁸ (2005) 5 S.C.C. 124(India).

³⁹ (2001) 2 S.C.C. 386(India).

⁴⁰ M. P. JAIN, *INDIAN CONSTITUTIONAL LAW*, 375, (8th ed., 2018).

⁴¹ *Anuj Garg v. Hotel Association of India*, A.I.R. 2008 S.C. 663 (India).

review. In 2005, the legislature of the state of Maharashtra enacted a law imposing a ban on dance performances in bars, except in certain establishments such as hotels rated 'three stars' and above. The state's rationale for the ban was that many such dance performances were obscene, promoted prostitution and the exploitation of women, undermined the dignity of the dancers, and corrupted public morals. The ban resulted in the closing down of dozens of bars across the state and widespread unemployment. It was challenged on the basis that it violated the right to equality and the freedom of trade. The Supreme Court struck down the law and ordered that the dance bars be allowed to reopen. Two aspects of the Court's judgment are of particular interest. First, the court reasoned that if the primary purpose of the law was to ensure the safety and security of women, many less restrictive options were available to achieve the same objective. Second, the Court explicitly balanced the social benefits of the law against its social costs. It held that the social costs of the law were alarming – it prompted the closing down of dance bars and unemployment of over 75,000 women.

In the above scenario, it is submitted that the orders from the Jammu & Kashmir government, could not clear the proportionality test and hence unconstitutional and void and the judgement of the Hon'ble court is bad under the following grounds:

- a. Firstly, the orders for shutting down of the internet are vitiated by law because although the government has the power to pass subordinate laws in the name of orders, by-laws, rules etc., the same must be based on reasonable grounds and should be brought to the public notice, however, both such conditions for making a valid order has failed to substantiate it. Moreover, the same orders were presented through the Inspector General of Police who is not the competent authority to release the order.
- b. Secondly, the orders also did not comply with the first test, i.e. legitimate goal of the government. The misuse of the internet by the anti-national elements lead to a deterioration of law and order situation claimed by the government is not maintainable. It is submitted that law and order has never made a ground of restriction under Article 19(2) for internet shutdown. Public order, which is one of the grounds for

imposing restrictions, must not be equated with the law and order. Both the terms are having different interpretations, in the context it is to be used. Before the introduction of this modern communication technology to the whole world, had there been no anti-national activities? Therefore, the ground of imposition of restriction is not tenable on the ground of unreasonableness.

- c. Thirdly, the imposition of restriction also does not have any rational nexus with the object sought to achieve by the government through the orders. Despite such shutdown, it has been seen that there is never stoppable violence continuing in the valley till yesterday. On the contrary, the shutdown might raise a kind of dissatisfaction among the people of the valley resulting in protests and demonstration (as has been witnessing by the country) that itself is a ground to shake the public order with a reversing effect.
- d. Fourthly, the orders could not also pass the necessity test. As it was the contented on the part of the government that not the whole community of the Jammu & Kashmir were/are involved in the anti-national activities, it is only a meager section of community(minuscule) involved in such activities, therefore, the orders did not take into account the larger section of the community who have been deprived from their various fundamental rights to health, education, expression etc. due to such shutdown. Therefore, least restrictive measures, which are one of the requirements of the principle of proportionality, could not be ensured and hence the orders are unconstitutional and void.
- e. Fifthly, the setting up of a 'Special Committee' consisting of Union home secretary and the Union communications secretary and the chief secretary of Jammu & Kashmir to decide whether the internet restrictions are necessary or not, also vitiated by law on the grounds of violation of the principle of natural justice (*nemo judex in causa sua*- no one should be judge of its own cause). It is nothing but the declination by the court to abide by the principle of checks and balances itself strengthens the hands of administration to take decision arbitrarily.

IV. Conclusion

The principle of proportionality is *sine qua non* to the principle of executive supremacy where at the time of peril i.e. whenever there has been a loggerhead between fundamental rights and the security of the state, the question thus arises as to what remedy would be the most preferable one with least friction so that neutrality could be maintained with adequate security and sufficient liberty. It is like a pendulum situation where the preference should not swing in either extreme direction resulting in one preference compromises the other. The principle of executive supremacy providing a *carte blanche* holds that civil liberties must be subordinate to the interest of the state because the objective of depriving a few from liberties for a temporary period has to be to give many the perennial fruit of freedom. However, such supremacy must not be by way of overpowering the proportionality principle applied as a controlling mechanism to check the abuse of power. The principle of proportionality essentially signifies that any action on the part of the executive or administrator to reach to a particular goal should not be excessive or harsh than that is required. The executive or legislative wings of the government should keep in mind that they are under the microscope of proportionality surveillance and therefore, should exercise the specific power in accordance with the principle or else such exercise of power would be declared as arbitrary and disproportionate and is subject to quash. It is true that fundamental rights are not absolute; however, the restriction imposed must not be unreasonable, illegal, evasive and biased. Proportionality is not just a rational principle; it is a principle of positive law as well. The principle finds place in international instruments like Universal Declaration of Human Rights (item 29, para 2 and 3) International Pact in regard to economical, social and political rights (item 4 and 5), European Convention for Human Rights Protection of fundamental freedoms (item 8-12) and several other⁴² and being a universal principle it is imposed or applied against the legislative and executive arbitrary action on the basis of its being embodied in the constitution of every country either implicitly or explicitly. The peculiarity in the *Foundation For Media Professionals v. Union Territory of Jammu & Kashmir & Anr.* judgment is that despite agreeing with the petitioners

⁴²RAWAT, *Supra* note 8 at 132.

contentions, surprisingly the court refused to invalidate the suspension of the internet specially social media websites on the ground of spreading terrorism in the valley which is in gross violation of the principle of proportionality, contradictory and undermining the rule of law which is resorted as a safeguard for protecting various fundamental rights to freedom of speech and express, trade and profession, right to life and liberty including the right to health, right to education and many more.