

MHA Order dated March 29, 2020: Proportionality and Necessity Arguments
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Proportionality Analysis of MHA Order Dated March 29, 2020

Amidst the COVID-19 pandemic, one of the widely discussed topics is the legal validity of the order[1] dated March 29, 2020 ("Order") issued by the Ministry of Home Affairs ("MHA"). It is pertinent to note that the MHA has issued the Order vide its powers conferred under Section 10(2)(1) of the Disaster Management Act, 2005 ("DMA") mandating the employers to pay wages to their workers on the due date without any deduction for the period of lockdown. As of May 02, 2020, there are nine petitions filed before the Supreme Court of India (SCI/Court") challenging the Order with the Court refusing to grant an interim stay.

The Court in all these petitions had issued notice to the Union of India to file its reply within two weeks (with the hearing last listed on April 27, 2020). Recently, the Bombay High Court in *Align Components Private Limited and Another vs. Union of India*[2] has acknowledged this but went on to clarify in cases where workers who voluntarily remain absent in the areas where the lockdown restrictions are lifted, the employer/management would be at liberty to deduct the wages subject to the procedures laid down under the law.

Two common contentions in these petitions raised by the critics are a) powers of the Central Government in issuing Order for the private establishments on the subject matter i.e., employer-employee/workman relationship, and b) legal validity of section 10(2)(1) of the DMA (i.e., whether the section is ultra vires to Article 19 (1) (g) of Constitution of India). Primarily, the concern roots in the proportionality standards contemplated by courts. In light of this background, it would be interesting to analyze the recent decisions of SCI on the Doctrine of Proportionality and its views of the Doctrine of Necessity.

Doctrine of Proportionality

The Doctrine of Proportionality is a constitutional doctrine, relied upon by the courts in resolving conflicts and achieving a balance when there are competing rights. There are several decisions worldwide where the courts have invoked this doctrine and have resolved the conflict by holding that rights and limitations must be interpreted harmoniously to facilitate coexistence[3].

The doctrine which originated in Germany as *Verhältnismäßigkeit* (or

proportionality), was adopted subsequently by the European Court of Justice and the European Court of Human Rights[4]. From the latter, it migrated to Canada, where it has received a particularly careful and influential analysis, and from Canada, it spread to several other common law jurisdictions including India[5].

The SCI has applied this doctrine in many cases (particularly in balancing the rights in Article 19 (1) and restrictions contained in Article 19(6) of the Constitution)- *Chintaman Rao v. State of Madhya Pradesh*[6] *State of Madras v. V.G. Row*[7]; *Mohammed Faruk v. State of Madhya Pradesh*[8]; *Om Kumar v. Union of India*[9]; *Justice K.S. Puttaswamy and Ors. v. Union of India (UOI) and Ors*[10]; *Anuradha Bhasin and Ors. vs. Union of India (UOI) (Internet Ban Case)*[11] and *Internet and Mobile Association of India vs Reserve Bank of India ("Cryptocurrency Case")* [12]. The test laid down by the Court in these decisions are summarised below[13]:

1. A measure restricting a right must have a legitimate goal (legitimate goal stage);
 2. There must be a suitable means of furthering this goal (suitability or rational connection stage);
 3. There must not be any less restrictive but equally effective alternative (necessity stage).
 4. The measure must not have a disproportionate impact on the right-holder (balancing stage) (together referred to as the "Test of Proportionality").
- At this juncture, it is pertinent to note two significant decisions of the SCI. Firstly, in *Cryptocurrency Case*, the Reserve Bank of India ("RBI") issued a circular dated April 6, 2018, directing the entities regulated by it (i) not to deal in virtual currencies nor to provide services for facilitating any person or entity in dealing with or settling virtual currencies and (ii) to exit the relationship with such persons or entities, if they were already providing such services to them. A petition was filed challenging the validity of the circular.

After hearing the stakeholders at length, the three-judge bench set aside the circular issued by the RBI. While most of the contentions by the RBI were accepted by the Court, it, however, held that the circular did not meet the standards of the Test of Proportionality. In specific, the Court opined that RBI has not provided empirical data about the degree of harm suffered by the regulated entities (after establishing that they were harmed). SCI held that to pass the Test of Proportionality, the regulator needs to show at least some semblance of any damage suffered by its regulated entities. The relevant extracts are reproduced herewith:

"While we have recognized elsewhere in this order, the power of RBI to take pre-emptive action, we are testing in this part of the order the proportionality of such measure, for the determination of which RBI needs to show at least some semblance of any damage suffered by its regulated entities. But there is none"[14]

The findings of the Court in acknowledging RBI's powers in regulating in any area that may pose a threat to or have an impact on the financial system of the country and striking the circular merely on the lack of the empirical data was termed by some commentators to be a case of the RBI losing the battle but winning the war[15].

Secondly, it is important to analyze the findings of SCI in the *Internet Ban case*. The genesis of the issue is the promulgation of the Constitutional

Order 272 by the President of India, applying all provisions of the Constitution of India to the State of Jammu and Kashmir, and modifying Article 367 in its application to the State of Jammu and Kashmir ("J&K"). In light of circumstances, mobile phone networks, internet services, and landline connectivity were disconnected and restrictions were imposed on the movement of people by the government in J&K.

Thereafter, the District Magistrates, apprehending breach of peace and tranquillity, imposed restrictions on movement and public gatherings by the virtue of powers vested under Section 144, Code of Criminal Procedure. Due to the aforesaid restrictions, a petition was filed claiming that the movement of journalists was severely restricted and Kashmir Times Srinagar Edition could not be distributed. While SCI looked into multiple issues, from the perspective of this article, it is important to point out the following observations. The SCI stated:

".....b) Freedom of speech and expression and the freedom to practice any profession or carry on any trade, business, or occupation over the medium of the internet enjoy 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.....e) Any order suspending rights is subject to judicial review d) Orders not in accordance with the law laid down above, must be revoked.....g) Further, in future, if there is a necessity to pass fresh orders, the law laid down therein must be followed"[16].

The doctrine of Necessity? Is there an argument at all?

While SCI reiterated satisfaction of proportionality standards for any restrictions in orders/legislations, it is important to analyze Order from the perspective of the Doctrine of Necessity. The doctrine of Necessity means administrative actions which are designed to restore order, within the constitutional limits.

Though not mentioned expressly, the Courts have applied the doctrine in numerous instances and held that the orders/acts of State in times of necessity (emergency) are legal. SCI observed the doctrine of necessity to be a common law doctrine and is applied to tide over the situations where there are difficulties[17]. In the case of the *Election Commission of India and Ors. vs. Subramanian Swamy and Ors*, [18] it held that the Necessity shall be applied to cases where there is an absolute need for its invocation. The relevant extracts are reproduced herein below:

"We must have a clear conception of the doctrine. It is well settled that the law permits certain things to be done as a matter of necessity which it would otherwise not countenance on the touchstone of judicial propriety. Stated differently, the doctrine of necessity makes it imperative for the authority to decide and considerations of judicial propriety must yield. It is often invoked in cases of bias where there is no other authority or Judge to decide the issue. If the doctrine of necessity is not allowed full play in certain unavoidable situations, it would impede the course of justice itself and the defaulting party would benefit therefrom. Take the case of a certain taxing statute which taxes certain perquisites allowed to Judges. If the validity of such a provision is challenged who but the members of the judiciary must decide it. If all the Judges are disqualified on the plea that striking down of such legislation would benefit them, a stalemate situation may develop. In such cases, the doctrine of necessity comes into play. If the choice is

between allowing a biased person to act or to stifle the action altogether, the choice must fall in favour of the former as it is the only way to promote decision-making”

Similarly, few commentators are of the view that the Supreme Court recently in *M. Siddiq (D) thr. L.Rs. vs. Mahant Suresh Das and Ors*^[19] popularly referred to as the Ayodhya case exercised its extraordinary jurisdiction under Article 142 of the Constitution and applied the Doctrine of Necessity to grant relief. It may be pertinent to note the joint reading of its observations, which are interspersed below:

“The extraordinary constitutional power to pass any decree or order which, in the opinion of this Court is necessary for doing complete justice embodies the idea that a court must, by necessity, be empowered to craft outcomes that ensure a just outcome.....Whether a belief is justified is beyond judicial inquiry. Once faith is established, courts should defer to it”

Even in the Internet Ban case, one can argue that the SCI has acknowledged the Necessity principle. It is pertinent to note the following paras in the SCI’s order:

“75. The Respondent-State has vehemently opposed selective access to internet services based on a 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 the 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 that burdens freedom of speech in a minimalist manner.

The Court, however, went on to hold that an order suspending the rights can be for a temporary period provided it should pass the Test of Proportionality.

“c) An order suspending internet services indefinitely is impermissible. Suspension can be utilized for the temporary duration only d) Any order suspending rights must adhere to the principle of proportionality and must not extend beyond necessary duration”

CONCLUSION

With the MHA easing the lockdown restrictions vide its orders dated April 15, 2020, and May 03, 2020, permitting private employers (except in containment zones) to operate with 33% staff strength, the Bombay High Court’s clarification in *the Align Components Private Limited and Another vs. Union of India* will be viewed positively by the employers. In parallel, it would be interesting to wait for the Centre’s response to the petitions filed in the SCI and the SCI’s decision. Given the fact that the Order issued by the MHA is temporary in nature and with a public interest involved (i.e., to protect crores of wage workers amidst the Covid 19 pandemic), the said factors would be given due weightage by the SCI in arriving at the decision.

Footnote:

- [1] No 40-3/2020/-DM-I (A)

- [2] Writ Petition No 10569 of 2020, before the High Court of Bombay (Aurangabad Bench)
 - [3] Modern Dental College & Research Centre v. State of Madhya Pradesh, MANU/SC/0495/2016
 - [4] Bank Mellat v. HM Treasury (No. 2) [2013] UKSC 39
 - [5] Lord Reed dissent in Bank Mellat v. HM Treasury (No. 2) [2013] UKSC 39
 - [6] MANU/SC/0008/1950
 - [7] MANU/SC/0013/1952
 - [8] MANU/SC/0046/1969
 - [9] MANU/SC/0704/2000
 - [10] MANU/SC/1044/2017
 - [11] Writ Petition (Civil) Nos. 1031 and 1164 of 2019; MANU/SC/0022/2020
 - [12] MANU/SC/0022/2020
 - [13] Modern Dental College & Research Centre v. State of Madhya Pradesh, MANU/SC/0495/2016
 - [14] Para 6.173 (Page 177)
 - [15] <https://thewire.in/law/supreme-court-cryptocurrency-ban-analysis>
 - [16] Para 152
 - [17] Lalit Kumar Modi vs. Board of Control for Cricket in India and Ors. (26.09.2011 - SC): MANU/SC/1114/2011
 - [18] (23.04.1996 - SC): MANU/SC/0459/1996
 - [19] MANU/SC/1538/2019
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