

INTERNATIONAL PERSPECTIVES

Constitutional Liberties and Cyberspace: Analysing the Anuradha Bhasin v Union of India Case and its Impact on Fundamental Rights

Abstract: The right to free speech and expression is a fundamental right guaranteed under Article 19 (1) (a) of part III of the Indian constitution. The fundamental rights act as the constitutional restraints over the state's authority to intervene within the protective gamut of civil liberties of the people. However, the Indian judiciary remains the principal enforcer of the constitutional liberties guaranteed as fundamental rights whenever breached by the state. As the interpreters of the constitution and guardians of civil liberties, the Indian constitutional courts have consistently acted to protect people from state-authorized interventions in their respective domains of fundamental rights. To this concept, this research article by **Rebant Juyal** attempts to study the landmark judgment of the Indian Supreme Court in the case of *Anuradha Bhasin v Union of India*, where the court upheld the fundamental right of people to express their speech and expression on the internet.

Keyword: India; Human rights; internet; freedom of expression

INTRODUCTION

Anuradha Bhasin v Union of India stands as a landmark case, marking a distinct position in Indian constitutional history wherein the Supreme Court recognised the role of cyberspace as an instrument for the exercise of free speech and a tool to conduct business. The Court ruled that Article 19 (1) (a) of the Indian Constitution grants constitutional protection to the freedom of speech and expression in cyberspace. It further held that the “fundamental right of freedom to practice any profession or carry on any trade, business or occupation in cyberspace, under Article 19 (1) (g) grants constitutional protection to trade and business operations in cyberspace”.

The landmark ruling expanded the scope of protection of fundamental rights even to the sphere of cyberspace. Further, the expansion of fundamental rights, particularly Article 19 of the constitution to cyberspace, demonstrates extending the scope of applicability of Part III of the Indian constitution as well. Extending fundamental rights to cyberspace remains a subject of great significance; consequently, the *Anuradha Bhasin v Union of India* case warrants a more profound analysis comprising of the study of its facts, issues raised by both the parties in the case, considerations of the point of law put forth before the court in this regard and finally the ruling of the Supreme Court over the case.

FACTS OF THE CASE

The case concerns the internet shutdown and restrictions imposed by the Jammu and Kashmir administration over the movement of people, including journalists, in the state. Internet connections in Kashmir had been restricted since August 2019. The state administration had imposed certain restrictions before the presentation of the resolution enabling the constitutional amendment to dilute the provisions of Article 370 of the constitution and reorganising the State of Jammu and Kashmir into two distinct union territories – one of Jammu and Kashmir and the other of Ladakh, in the Parliament. The petitioner, Anuradha Bhasin, the executive editor of the *Srinagar Times* (one of the oldest English language dailies in Jammu and Kashmir), contended before the court that the internet was an intrinsic part of the modern-day press. Thus, restrictions imposed by the state on the internet violated press freedom under the “fundamental right of freedom to speech and expression under Article 19 (1) (a) and the right to freedom to trade, occupation and profession guaranteed under Article 19 (1) (g) of the constitution”. Therefore, the petitioner argued for recognition of the “right to free speech and expression and freedom to practice any profession or carry on any trade, business or occupation as a fundamental right in cyberspace”.

FACTUAL BACKGROUND: DETAIL NOTE

Before we delve into the nuances of the case, an exploration concerning its background is required. The case draws significance from August 5 2019 when the president of India, via presidential proclamation, issued Constitutional Order 272 (Constitution [Application to Jammu and Kashmir] Order, 2019) to apply all the provisions of the Indian constitution to the state of Jammu and Kashmir. Subsequent to which, the state made the necessary arrangements for the return of tourists, visitors and other people from outside Jammu and Kashmir to their homes. Schools, universities, offices and other similar institutions were also closed by the administration. The district magistrates, posted across various districts of the state, reported “breach of peace and tranquillity, and hereafter-imposed restrictions on movement and public gatherings by invoking Section 144 of the Code of Criminal Procedure”. These steps were adopted on August 5 2019, however, on August 4 2019, internet and mobile services including landline connections were suspended by the administration until further orders. Consequent to these restrictions Anuradha Bhasin filed the “petition W.P. (C) No. 1031 of 2019” before the Supreme Court of India.

ISSUES

1. “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?”
2. “Whether the freedom of the press of the petitioner was violated due to the restrictions?”
3. “Whether the imposition of restrictions under Section 144, CrPC were valid? Whether the government can claim exemption from producing all the orders passed under Section 144, CrPC?”
4. “Whether the government’s action of prohibiting internet access is valid?”

COURT RULING

Issue I: Freedom to speech and expression

The Supreme Court of India, while dealing with the subject of fundamental rights, ruled that these are of a fundamental and permanent nature and cannot be denied unless the constitution itself denies them. To this effect, the court ruled:

“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’.”¹

Reiterating the fundamental character of constitutional liberties guaranteed under Part III, the court further

acknowledged the importance of cyberspace and asserted its significant role in the contemporary order. In this context, while establishing the relationship between cyberspace and fundamental rights, the Court ruled:

“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.² (...) The internet is also a very important tool for trade and commerce. The globalisation of the Indian economy and the rapid advances in information and technology have opened up vast business avenues (...) the freedom of trade and commerce through the medium of the internet is also constitutionally protected under Article 19 (1) (g).³ (...) 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).”⁴

The ruling patently manifests the freedom to trade and business as well as speech and expression in cyberspace as an integral component of the constitutional freedom under Article 19 (1) (g) and Article 19 (1) (a) correspondingly. It specifies that the state, while restricting such freedoms even in cyberspace, is constitutionally bound to ensure the measures of reasonability and proportionality. Resultantly, any suspension or restriction imposed over internet services must be judged on the grounds of justness, fairness and reasonability.

In essence, prohibitions over cyberspace must be justified by the principles of proportionality and reasonability. Inconsistency to such adherence would make prohibition invalid since restrictions limiting the exercise of fundamental rights can potentially violate natural justice. To avoid such violations, the court mandated the application of the ‘proportionality test’, an analytical tool used to ensure that limitations imposed on fundamental rights are proportionate and reasonable. The test warrants careful consideration in evaluating the real objective behind restricting individual freedom by the state, its suitability as an adopted measure, the degree of restraints imposed, and the option for any less restrictive alternatives. This ensures restrictions over rights must be justified by a legitimate aim and be necessary and proportionate.

Recognising access to the internet as a fundamental right is therefore crucial to enabling individuals to enjoy other guaranteed rights, like free speech, access to information, participation in the digital economy for trade, business etc. The court mandate ensures restrictions over cyberspace satisfy the proportionality test and that the state objectives are aligned with the restrictions

imposed on fundamental rights, which are proportionate and reasonable.

PRINCIPLE OF PROPORTIONALITY

National security, territorial integrity and sovereignty are of significant importance for nations. In this context, the Supreme Court upheld the right and authority of the state to restrict free speech in compliance with the prescriptions stipulated under the constitution. The court observed, “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”. Therefore, the court approved that every speech inciting imminent violence and impinging the territorial integrity and sovereignty of the Republic cannot be granted constitutional protection. Consequently, the court cleared this question and clarified that it was not up to the authority to restrict but to determine the extent or degree of such usage.

The constitutional jurisprudence of Article 19 and 21 mandates restrictions imposed by the state must justify five essentials: “(a) backing of a ‘law’, (b) legitimacy of purpose, (c) rational connection of the act and object, (d) necessity of the action, and (e) the test of proportionality”.

To determine the degree and extent of reasonable restriction the court, in the given case, accentuated over the tests of proportionality and reasonability. To this effect, it noted its judgment in *Justice K. S. Puttaswamy & Anr. vs Union of India & Ors*⁵ where it ruled:

“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.”⁶

Further, the court also noted its previous judgment in *CPIO vs. Subhash Chandra Aggarwal*,⁷ where it explained the meaning of proportionality as:

“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.”⁸

Referring to the *R v. Goldsmith case*,⁹ the Court quoted the aphorism, “you must not use a steam hammer to crack a nut, if a nutcracker would do.”¹⁰ to signify the intrinsic and inherent requirement of the principle of proportionality in protecting the civil liberties, fundamental freedoms, individual autonomy and rights of the people impacted by the prohibitive sanctions and suspension orders of the state. However, while focusing the judicial light over the proportionality principle, the Supreme Court also emphasised the need for a cautious

approach while balancing national security with civil liberties by noting:

“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 (...) balancing is a politically dangerous metaphor unless careful regard is given to what is at stake.”¹¹

The above noting postulates that even though the fundamental rights under the Indian constitution are not absolute and are subject to reasonable restrictions, impositions of such restrictions are to be “tested on the anvil of the test of proportionality”. While reasonable restrictions remain indispensable for the actual realisation of fundamental rights since they prevent the excessive and arbitrary limitation of individual freedoms,¹² which may encumber public interests, the principle of proportionality also remains equally significant for the protection of fundamental freedoms from such state interventions and intrusions which may be unauthorised in action. However, the state may raise compelling national security concerns, but the degree and scope of restrictions must remain proportionate to the objectives and situation the administration was trying to address. Thus, the court noted that restrictions over fundamental rights in Kashmir could not remain indefinitely. Consequently, it ruled for a periodic and continuous review of suspension orders by a committee.

Issue 2: “Whether the freedom of the press of the petitioner was violated due to the restrictions?”

The court held that the restrictions imposed by the state did not correspond to suppression or violations of the petitioner’s freedom of the press. The court also observed in the judgement that constitutional liberties guaranteed under the Indian constitution were fundamentally based on the idea of inbuilt restrictions. To this effect it noted:

“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.”¹³

However, while dealing with the fundamental issue of press freedom, the court noted that it remains an indispensable necessity for the effective functioning of a democratic nation. The court pointed out that Indian law fundamentally recognises the importance of press freedom. In this context, it reiterated that freedom of the press remains one of the inherent species of the “fundamental right to freedom of speech and expression” and, thus, was always under constitutional protection. Emphasising the given context, it ruled:

“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.”¹⁴

The petitioner argued that various state-imposed restrictions over the press indirectly violated press freedom in Jammu and Kashmir. Recognising the gravity of the matter and the importance of press freedom, the Supreme Court delved into the jurisprudence of the chilling effect of restrictions on the press. However, the petitioner could not corroborate any evidence that press freedom was being violated because of the state-imposed restrictions. Furthermore, in this regard, the court was informed that several newspapers were still operating in the valley despite restrictions. Resultantly, the court did not delve any further into the issue. However, it directed the state always to uphold press freedom, considering its crucial necessity in strengthening democracy.

Furthermore, the court also ruled: “Journalists are to be accommodated in reporting and there is no justification for allowing a sword of Damocles to hang over the press indefinitely”. The court, therefore, while dispensing the said issue, upheld a fundamentally intrinsic nature of press freedom in the democracy and recognised the state’s obligation to protect it at all times. However, it is pertinent to note that the judicial verdict does not grant *carte blanche* to the administration to impose undue restrictions over the press. Instead, the court has clarified that any restrictions must be reasonable, proportionate, and necessary in light of the specific circumstances. The court’s decision serves as a reminder that press freedom is an inherently intrinsic and integral component of a democratic society, and any attempts to restrict it must be viewed with great scrutiny. It also recognises the state obligation to protect and defend “press freedom”.

Issue 3: “Whether the imposition of restrictions under Section 144, CrPC were valid? Whether the government can claim exemption from producing all the orders passed under Section 144, CrPC?”

The court held, “the power cannot vanquish legitimate expression of opinion or grievance or exercise of any democratic rights. This section can only be imposed in case of an emergency and not for the prevention of

instruction or injury to any lawfully employed.” Thus, mere instances concerning the “disturbance of the law-and-order situation” in the state may not necessarily amount to a “breach of public order”. The Court further held, “only the magistrate and the state have the right to decide whether there is a likelihood of threat to public peace. No person should be deprived of his liberty unless it is dangerous and therefore repetition of the imposition of such orders would be a clear abuse of power.” While exploring the relevant statutory provisions under the subjected issue, the court observed that the law itself enacts several safeguards to ensure the power vested within the state under section 144 of Code of Criminal Procedure (CrPC) is not abused which were, “prior inquiry before exercising this power, setting out material facts for exercising this power and modifying / rescinding the order when the situation so warrants”. The Apex court also directed that even though CrPC authorises two months’ limit for magistrate and six months’ limit for the state, the said statutory power must be used for a limited period. The court directed to the state that in cases where the constitutional liberties of the people would be impacted, the power must never be exercised in an arbitrary manner and thus, the exercise of the power must fundamentally rest upon objective reasoning and facts. The court ruled that repetitive usage of such power under section 144 of CrPC would amount to abuse of power and further declared that the State must not invoke the relevant provision to suppress any form of democratic right of the people. The court also ruled:

“The power under Section 144, CrPC, 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.”¹⁵

The Supreme Court thus, while upholding the power and authority of the state as well as declaring that magistrate and state are best judge in ascertaining the subjects of law and order, public order, among others, ruled that it must not be used repeatedly and must be fundamentally based on norms of reasonability, the principle of proportionality and must not intend to suppress any form of legitimate exercise of democratic rights by the people.

Issue 4: “Whether the government’s action of prohibiting internet access is valid?”

The court held that internet suspension for an indefinite period is illegal. It directed the government to review the “Temporary Suspension Rules, 2017” to elucidate a limitation period for internet shutdown. The court further ruled that, “Rule 2(2) of the Telecom Suspension Rules 2017 requires every order passed by the competent authority to be reasoned order”. Thus, the competent

authority issuing the relevant order under this rule is “obliged to state the unavoidable circumstances which warranted its passing”.

While referring to the scope of “reasoned order” the court ruled that Rule 2(2) mandates that the requirement of a reasoned order extends to include within its scope not only the order issued by the competent authority but also, “orders passed by an authorised officer which is to be sent for subsequent confirmation to the competent authority”.¹⁶ The court directed that the said order in addition to including “necessity of the measure must additionally provide unavoidable circumstance” necessitating the passing of such order. It noted that, “purpose of the aforesaid rule was to integrate the proportionality analysis within the framework of rules”.¹⁷

The Supreme Court also highlighted the strategic security challenges extant in the region of Jammu and Kashmir, which has been a “hotbed of terrorist insurgencies for many years”, as noted in the court’s judgment. The court took into account the gravity of the situation, stating that “between 1990-2019, there were a total of 71,038 terror incidents in the region”. It further noted that during the relevant period, “14,038 civilians lost their lives, 5292 security personnel were martyred, and 22,536 terrorists were killed”. This data inherently illustrates the scale of the problem and the intensity of the conflict. It is therefore evident that the security situation in the region poses a significant challenge to the state and its people.

In light of these challenges, the court recognised that it cannot afford to ignore the geopolitical struggle in the region while adjudicating the given case. The court’s acknowledgment of the security challenges highlights the complexity of the issue and the need for a comprehensive and nuanced approach to address the underlying causes of the conflict. Furthermore, the court’s decision to take into account the security challenges in the region underscores the importance of balancing the interests of national security with the protection of individual rights. It is essential to strike a balance between these two competing interests to ensure that the government can effectively address the security challenges while also upholding the rule of law and protecting the rights of individuals.

The court also dealt in-depth with the subject of exploitation of cyberspace by terrorist groups today. It noted:

“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.”¹⁸

The court thus, while adjudicating the given issue, upheld that the security situation in Jammu and Kashmir is critically complex and challenging, yet establishing an

effective balance and adopting a balancing approach for securing the territorial integrity, security of the state and fundamental rights of the people remains indispensable. Therefore, it came up with a test, relying upon the principle of proportionality according to which, “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”. Further for upholding the spirit of individual liberty and fundamental freedoms manifested under the Indian constitutional framework, the court also observed:

“(…) 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’. (...) 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.”¹⁹

Thus the court ruled that the state cannot impose internet suspension in perpetuity and so a continuous review within seven days of the previous review of the same remains vital and of paramount significance to protect the constitutional liberties and human rights of the people.

CONCLUSION

The ruling of the Supreme Court in the case of *Anuradha Bhasin v Union of India* granted freedom to trade and freedom to speech a constitutional protection under “Article 19 of the constitution”. The court recognised cyberspace as a medium aiding in the enablement of “Freedom of expression”. It recognised the fundamental freedom of expression in cyberspace and beyond cyberspace as one right. Thus, a person has the liberty to express himself as widely as possible, and if such liberty is to be restricted, then the state is obliged to justify its action. Furthermore, taking reference from its previous rulings the court reiterated the constitutional protection to the press under “Article 19 (1) (a) that is freedom of speech and expression”.

The bench recognised the vital role played by cyberspace, particularly the internet, in contemporary times on account of the technological revolution to provide the medium for exercising free speech, a constitutional liberty guaranteed under the constitution. As such, it granted cyberspace and the electronic media present in it the sphere of constitutional protection. While refraining from expressing the “right to access the internet as a fundamental right”, the court acknowledged trade and occupation and free speech in cyberspace falls under the purview of “Article 19 (1) (g) and (a) correspondingly”. It

confirms cyberspace's indispensable necessity in business operations and the upkeep of livelihoods, as well as its significance as an important platform for exercising speech and expression.

However, the right to access the internet is still not recognised as a fundamental right by the court. This is a significant limitation, as cyberspace is an indispensable tool for exercising various other fundamental rights, including the right to information, education, and expression. Recognising this right would have, therefore, been a significant step in safeguarding these rights in the contemporary digital age.

Further, recalling the exploitative abuse of cyberspace by terrorists and recognising the use of it as a modern tool of terror exploitation, restrictions over cyberspace in these circumstances must, therefore, remain a continuous test of proportionality. Thus, relaxations over cyberspace in critically sensitive areas must be a subject matter of continuous review, as had also been held by the

Supreme Court. While the court fulfilled its constitutional obligation by recognising the fundamental rights of people, it concurrently also established an effective balance by looking at the security challenges of the Kashmir valley and enabling the administration to take steps to tackle the challenge while ensuring the rule of law is maintained and liberties guaranteed to people in the region are protected. Furthermore, recognition of the security challenges in Jammu and Kashmir resultantly highlights the need for a holistic approach to address the underlying causes of the conflict. It also underscores the importance of balancing the interests of national security and individual rights, a task that requires a careful and nuanced analysis of the situation. Thus, the court's decision stands as a reminder of the inherent complexities associated with the issue, which requires a comprehensive solution that considers the geopolitical, social and also economic factors contributing to the severe discord and friction in the region.

Endnotes

¹ Anuradha Bhasin v Union of India, AIR 2020 SC 1308, para 20

² Ibid para 15

³ *Id.*, para 27

⁴ *Id.*, para 152(b)

⁵ (2017) 10 SCC 1

⁶ Ibid para 310

⁷ (2019) SCC OnLineSC 1 459

⁸ Ibid para 225

⁹ [1983] 1 WLR 151, 155 (Diplock J)

¹⁰ Ibid

¹¹ Anuradha Bhasin v Union of India, AIR 2020 SC 1308 [Para 49]; Lucia Zedner, 'Securing Liberty in the Face of Terror: Reflections from Criminal Justice', (2005) 32 Journal of Law and Society 510

¹² Chintaman Rao v State of Madhya Pradesh, AIR 1951 SC 118. The court ruled:

"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."

¹³ Anuradha Bhasin v Union of India, AIR 2020 SC 1308 [Para 51]

¹⁴ Ibid para 146

¹⁵ Ibid para 140(i)

¹⁶ Anuradha Bhasin v Union of India, AIR 2020 SC 1308 [Para 86]

¹⁷ Ibid para 86

¹⁸ Ibid para 36

¹⁹ Ibid para 99

Biography

Rebant Juyal, Faculty at Assam (Central) University, Silchar. He is LLM (Gold Medallists) from Rastriya Raksha University, Gujarat and holds BA LLB(Int.) degree from Guru Gobind Singh Indraprastha University, Delhi. He has authored more than 26 research based manuscripts for national and internationally indexed journals including Scopus and UGC CARE Listed.