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COMPETING CONCERNS OF PUBLIC SECURITY AND INDIVIDUAL LIBERTY: A Critique of The Supreme Court Judgement in Anuradha Bhasin v. Union of India

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COMPETING CONCERNS OF PUBLIC SECURITY AND INDIVIDUAL LIBERTY: A Critique of the Supreme Court Judgement in *Anuradha Bhasin* v. *Union of India*[1]

*Priyanka Thakur** & *Shivani Choudhary**

[***Abstract***: *This paper is an attempt to critically examine the function of 'technical judicial standards' to interpret and decide issues relating to, particularly, Article 19 (1) (a) and (g), and the impact of adoption and application of such standards on determination of the scope and extent of restrictions under Clauses (2) and (6), respectively. Further, considerations of social and political developments, and technological achievements, at a given time, necessarily affect the judicial enterprise. In the instant case, status of the medium of internet and exercise of above rights by individuals came up for discussion in Anuradha Bhasin case.*]

I

Introduction

'Once a government is committed to the principle of silencing the voice of opposition, it has only one way to go, and that is down the path of increasingly repressive measures, until it becomes a source of terror to all its citizens and creates a country where everyone lives in fear'.
— Harry S. Truman[2]

The rights, under part III of the Constitution of India, present a unique and carefully crafted balance between the concerns of the state and interests of the individual. Most of the fundamental rights have reasonable limitations expressly mentioned in the corresponding provisions. Where, however, the express limitations on the extent of that right, are not mentioned, it does not mean that the particular right is unlimited or absolute. No right in a liberal democratic constitution can be absolute.[3] Yet specifying express limitations in the constitution

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1 *Anuradha Bhasin* v. *Union of India*, (2020) S.C.C. Online S.C. 25.

2 Harry S. Truman spoke rigorously against the implementation of laws curbing expressions of dissent as a means of combating subversion. Harry S Truman, Special Message to the Congress on the Internal Security of the United States, August 8, 1950. *Available at:* https://www.trumanlibrary.gov/library/public-papers (last visited 30 Sep., 2020).

3 *Supra* note 1, *Anuradha Bhasin* case, at para 62. *See also, Modern Dental College & Research Centre* v. *State of Madhya Pradesh*, (2016) 7 S.C.C. 353, at para 62.

does not place the right beyond controversy. Article 19, of the Constitution, is one such provision. It has been subject matter of, perhaps, the largest number of judicial decisions, establishing several dimensions and derivative rights. The judgement of Supreme Court in *Anuradha Bhasin* v. *Union of India*[4] (hereinafter referred to as the *Anuradha Bhasin case*) is the latest one which settles very few issues argued by parties but leaves open some new aspects of vast magnitudes.

This paper is an attempt to critically examine the function of 'technical judicial standards' to interpret and decide issues relating to, particularly, Article 19 (1) (a) and (g), and the impact of adoption and application of such standards on determination of the scope and extent of restrictions under Clauses (2) and (6), respectively. Further, considerations of social and political developments, and technological achievements, at a given time, necessarily affect the judicial enterprise. In the instant case, status of the medium of internet and exercise of above rights by individuals came up for discussion.

This paper consists of five parts. The first and last are introduction and conclusion respectively. In the II part, the factual backdrop of the case is briefly summarized. Parts III and IV discuss the judicial interpretation and legal developments with reference to the tests of 'reasonableness' and 'proportionality', of the state action which has impact on exercise of the fundamental rights. Part IV in particular also evaluates and discusses the status of internet as a fundamental right under the Constitution of India and its interpretation.

II

Brief Factual Background

Article 370 of Constitution of India acknowledged the special status of the state of Jammu and Kashmir in term of autonomy and its ability to formulate laws for its permanent residents. On August 5, 2019, the Government of Indian issued Constitution (Application to Jammu and Kashmir) Order, 2019,[5] which stripped Jammu and Kashmir of its special status that it had enjoyed since 1954. Constitutional Order was issued by the President, scraping the special status of Jammu and Kashmir and all provisions of the Constitution of India was made applicable through amending Article 367. The Order bifurcated the state and established erstwhile state of Jammu & Kashmir into two Union Territories: Jammu and Kashmir, and Ladakh. The present case concerns the internet and

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4 *Supra* note 1, *Anuradha Bhasin* case.

5 The Constitution (Application to Jammu and Kashmir) Order, 2019, Constitutional Order 272. *Available at*: http://egazette.nic.in/WriteReadData/2019/210049.pdf, (last visited 10 Aug., 2020). *See* also, *supra* note 1, at para 4.

telecom shutdown imposed in the territory, on August 4, 2019, in the wake of imminent danger or threat to public order and security of state. And since then a communication blackout has been in existence.

The crucial constitutional issues raised by petitioners in *Anuradha* are: firstly, does freedom of speech and expression under 19(1)(a) includes to express one's view through the use of medium of internet. Secondly, does freedom to carry on any trade, or business under 19(1)(g) include to carry trade, or business over internet. The court discussed, in detail, the principle of proportionality.

In the wake of the Presidential Order, District Magistrates, imposed restriction on mobile phone networks, internet service, telecom connectivity, educational institutions, movement and public gathering, under Section 144, Criminal Procedure Code 1973 (Cr.P.C). The internet shutdown and movement restriction (hereinafter restrictions) also resulted into restrains on journalists. Writ petitions, under Article 32, was brought, amongst others, by Ms. Anuradha Bhasin, the editor of a Newspaper Daily. The petitioner argued that the internet is fundamental for the modern press and that by shutting it down, the print and electronic media has come to a grinding halt. The second petition was filed by Mr. Ghulam Nabi Azad, he chiefly, argued that firstly, the restrictions made were not based on objective reasons and merely on conjectures secondly, restrictions on movement must be specific in scope, targeting those who may disturb the peace, and cannot be applied, in a blanket manner, against the public in general.

The contentions of the petitioners were that curtailing internet is a restriction of the right to free speech of the citizens, and must be verified on the ground of reasonableness and proportionality. It was argued that the orders passed by the respondents suffered from non-application of mind. The petitioners further, argued that the order of the Magistrate, under Section 144, Cr.P.C., must be passed explicitly against the assembly from which there is apprehension of disturbance to the peace, and hence, the whole state cannot be brought to a grinding halt. On matters relating to limitations on internet, it was contended that such type of prohibitions not only hampers the right to free speech of individuals (and media) but also on their fundamental right to trade under 19(1)(g) of the Constitution. The orders and restrictions cannot stand the test of proportionality as they are not objective ones but are based merely on conjectures.

The State defended that the Court while determining the issues should, take cognizance of the problematic situation of terrorism in the State. Further, it was submitted that State's primary obligation is to ensure security of its citizens, and protect their lives, limbs, and property. It was also argued that the jurisprudence

on free speech relating to the newspaper cannot be applied to the internet, as the two media has different nature.[6]

Tests for Determining Threat to Public Order/Security of State

At the outset, it may be noted that, Article 19 (1) does not provide unprecedented freedom and the rights therein can be restricted in terms of the corresponding provisions in the Article. Moreover, Article 19 does not confer rights upon the citizen, it merely recognizes the inherent and natural human rights.[7] Article 19(1)(a) of the Constitution, guarantees to a citizen of India, freedom of speech and expression. On this fundamental right, under article 19(2), reasonable restrictions can be imposed by law in the interest of public order, decency and morality, sovereignty and integrity of India, security of state, etc.[8]

Public order is derived from French term *order publique* and it is perceived to be something more than mere maintenance of law and order. It lies not only in the nature or quality of the act, but in the degree and extent of its reach upon society.[9] The rights conferred under Part III of the Constitution have been advisedly set out in broad terms leaving scope for their expansion and adaptation, through interpretation, to the changing needs and evolving notions of a free society.[10] After Article 19(1) has conferred on the citizen the several rights set out in its seven sub-clauses, action is at once taken by the Constitution in clauses (2) to (6) to keep the way of social control free from unreasonable impediment. The *raison d'etre* of a State being the welfare of the members of the State by suitable legislation and appropriate administration, the whole purpose of the creation of the State would be frustrated, if the conferment of these seven rights would result in cessation of legislation in the extensive fields where these rights operate.[11]

The Court's job is to strike out a balance between liberty of an individual and security of the State, so that right to life is enjoyed in best possible manner.[12]

> 'Mere dialogue or even advocacy of a specific issue howsoever unpopular is at the heart of Article 19(1)(a) of the Constitution. It is only when such argument reaches the level of provocation that Article 19(2) steps in. It is at this phase where a law that may be curtailing the speech or expression that tends to cause public disorder or tends to cause or affect the sovereignty & integrity of India, the security of the State,

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6 *Supra* note1, *Anuradha Bhasin* case, at para 16.

7 *National Legal Services Authority* v. *Union of India*, (2014) 5 S.C.C. 438, at para 69.

8 For detailed discussion of Art. 19(1)(a) and 19(2) *See,* M. P. Jain, INDIAN CONSTITUTIONAL LAW 524-535 (1970).

9 *Mrs. Harpreet Kaur Harvinder* v. *State of Maharashtra*, 1992 A.I.R. 979.

10 *People's Union for Civil Liberties* v. *Union of India*, (2004) 2 S.C.C. 476.

11 *Narendra Kumar* v. *Union of India*, (1960) 2 S.C.R. 375.

12 *Id.*, at para 1.

> friendly relations with foreign States, etc.'.[13]

Human rights are an essential feature of every human and there exists no question of the State not providing for these rights. In this regard, the limitations provided under Article 19(2) of the Constitution has a shadow of utilitarian approach wherein individualism gives way for commonality of benefit, if such restrictions are required and demanded by law.[14]

In this context, the test of *direct impact* as laid down in A.K *Gopalan* v. *State of Madras*,[15] has been subsequently widened in *Rustom Cavasjee Cooper* v. *Union of India*,[16] wherein the test of *direct and inevitable consequence* was propounded.

The concept of public order has been explained in several cases by the Supreme Court. In *Arun Ghosh* v. *State of West Bengal*,[17] the Court referred to *Ram Manohar* with approval in the following terms:

> 'In *Dr. Ram Manohar Lohia's* case this Court pointed out the difference between maintenance of law and order and its disturbance and the maintenance of public order and its disturbance. Public order was said to embrace more of the community than law and order.'

In S. *Rangarajan* v. *P. Jagjivan Ram*[18], the Court remarked:

> 'The problem of defining the area of freedom of expression when it appears to conflict with the various social interests enumerated under Article 19(2) can be touched here. There does undeniably have to be a compromise between the interest of freedom of expression and special interests. But we cannot simply try to balance the two interests as if they are of equal weight. Our commitment of freedom of expression demands that it cannot be suppressed unless the situations created by allowing the freedom are pressing and the community interest is endangered. The anticipated danger should not be remote, conjectural or far-fetched. It should have 'proximate and direct nexus' with the expression. The expression of thought should be intrinsically dangerous to the public interest.'[19]

A prohibition implemented with law and order is a fine one, but nevertheless vivid. When a restriction is implemented with law and order would be less capturing into constitutionally provided freedom public order may necessitate a relatively greater degree of prohibition as once public order kicks in matters of

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13 *Shreya Singhal* v. *Union of India*, (2015) 5 S.C.C. 1, at para 13.

14 *Supra* note 1, *Anuradha Bhasin*, at para 157.

15 A.I.R. 1950 S.C. 27: (1950) 51 Cri. L.J. 1383.

16 (1970) 1 S.C.C. 248.

17 (1970) 3 S.C.R. 288, at para 3.

18 (1989) 2 S.C.C. 574, at para 45.

19 *Id*., at para 45.

grave social concern.[20]

In *Arun Ghosh* v. *State of West Bengal*,[21] the Court observed that, the question while accessing whether any action is likely to cause a disturbance of the public order, is largely related to the question accessing of degree and the extent of the reach of the act upon society. The court in another important judgement, *Ashok Kumar* v. *Delhi Administration*,[22] held that the dissimilarity between the two realms of public order and law and order is a very fine one but this doesn't mean that there can be no overlapping between the two. In the judgement of *Brij Bhushan* v. *State of Delhi*,[23] the Supreme Court ruled out that public order may well be paraphrased in the context of public tranquility.

In the instant case, *Anuradha Bhasin,* the counsel for the State argued on the volatile history, nefarious secessionist activities and provocative statements of public leaders that created a compelling situation demanding passing orders under Section 144 Cr. P.C. The Court observed that:

> 'The scope of 'law and order', 'public order' and 'security of state' are distinct legal standards and the Magistrate must apply the prohibitions conditional on the facts and circumstances of the situation. Let say there are two small groups that has a quarrel over irrigation water, it may amount to breach law and order, but in a given condition where two communities fight over the same, the condition may surpass into a public order circumstance. However, it has to be pointed out that a similar method cannot be taken to handle the above two distinct situations. The Magistrate cannot apply a strict formula without measuring the depth of the on-going facts circumstances; the limitations must be balanced as per the situation concerned.'[24]

Wide ranging arguments were raised against the said shutdown. It was argued by the petitioners that the restriction provided under Article 19 (2) could not mean complete prohibition. Further, it was argued that prohibition of exercise of a right must be distinguished from restriction on the exercise of the right. In other words, the underlying argument was on the extent of imposing restriction of freedoms given under Article 19(1). The constitutional position, on this aspect, has been already reiterated by the Apex Court in its various pronouncements. For the first time, however, the question whether prohibition of the exercise of a right was within the meaning of restrictions on the said right was raised before the Court in *Saghir Ahamad* v. *State of U.P.*[25] and in *State of Bombay* v. *R.M.D.*

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[20] *Ramlila Maidan Incident, In re,* (2012) 5 S.C.C. 1, at para 44. *See also, supra* note 1, *Anuradha Bhasin* case, at para 122.

[21] *Arun Ghosh* v. *State of West Bengal*, (1970) 3 S.C.R. 288.

[22] (1982) 2 S.C.C. 403.

[23] A.I.R. 1950 S.C. 129.

[24] *Supra* note 1, *Anuradha Bhasin,* at para 131.

[25] (1955) 1 S.C.R. 707.

Chamarbaugwala[26] but the Court did not express its final opinion in the matter and left the question open.

Subsequently, in *Madhya Bharat Cotton Association* v. *Union of India*,[27] the Court had to consider the constitutionality of an order which in effect prohibited a large section of traders, from carrying on their normal trade in forward contracts. In holding the order to be valid, Bose, J., delivering the judgment of the court said '…it is reasonable to have restrictions which may, in certain circumstances, extend to total prohibition for a time…'.[28] Hence, clarifying the position, the Supreme Court in, *Narendra Kumar* v. *Union of India*,[29] observed:

> 'It is clear that the real question to be whether the interference with the fundamental right, was reasonable or not in the interests of the general public and that if the answer to the question was in the affirmative, the law would be valid and it would be invalid if the test of reasonableness was not passed.'

In the present case, it was noted (*Anuradha Bhasin* case), that the orders passed under Section 144, Cr.P.C. must have straight impact upon the fundamental rights of the society in general. If such a power exercised in an unplanned and careless manner, it may result in grave illegality. This power must be used responsibly, and only as a measure to preserve law and order. It also becomes pertinent to stress on the fact that such an order is very well open to judicial review, such that anyone aggrieved by a decision can always move to the competent forum to challenge the same. However, the aforementioned means of judicial review would be paralyzed and rendered ineffective if the order itself is unreasoned or un-notified. The court observed that the State authorities and its machineries are well placed to make an evaluation of any threat to public tranquility or law and order. Yet, the law demands them to put before the material facts for coming to such a conclusion.

III

Judicial Standards: Reasonableness and Proportionality

Legal questions never arise out of vacuum or neutral spaces or just mere legal spheres. These questions and issues arise out of complex socio-political realms. These questions are responses to social and more importantly individual needs. These are responses to social exigencies. In a socially, culturally and historically

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[26] (1957) S.C.R. 874.

[27] A.I.R. 1954 S.C. 634

[28] *Also see*: *Chintaman Rao* v. *State of Madhya Pradesh* (1950) S.C.R. 759; *Cooverjee B. Barucha* v. *Excise Commissioner, Ajmer* (1954) S.C.R. 873, 879.

[29] (1960) 2 S.C.R. 375, at para 15.

diverse country like India the situation gets a lot trickier. The framers of the Indian constitutions were aware of these situations and decided to restrict the application of fundamental rights in a negative manner. Therefore, the Court is obligated to maintain the constitutional morality which is fundamental to such negative treatments.

In, *Anuradha* petitioners contended that the print media has come to an oppressive close in the state because the internet services were not available, which they argued, is indisputably crucial for the modern press to work. Curbing of the internet, is a restraint on the right to free speech, that should be verified and carefully balanced on standards of reasonableness and proportionality. It is to be noted that in its earlier judgements the Court has have upheld applicability of the test of proportionality.[30] Accordingly, the proportionality of a decision must be accessed while keeping in mind the limitations which are executed by the State upon the fundamental rights of its citizens.

Under Article 19(1), the rights have few exceptions, and the State can impose reasonable restrictions in suitable conditions. The essentials of Article 19(2) of the Constitution are as follows:

a. The act should be permitted by law;
b. The planned decision should impose reasonable restraint;
c. And such a limitation should be in line with the sovereignty and integrity of India, security of the State, friendly relations with foreign States/nations, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence.

While dealing with the validity of legislation infringing fundamental freedoms enumerated in Article 19(1) of the Constitution of India, the Court has to consider, whether the restrictions imposed by legislation were disproportionate to the situation and were not the least restrictive of the choices. The burden of proof to show that the restrictive orders were reasonable lay on the State. 'Reasonable restrictions' under Article 19(2) to (6) could be imposed only by legislation .[31] It is imperative to see, here, that reasonability is used in qualitative, quantitative and relative sense.

The learned senior counsel in the case emphasized that not only the legal and physical restrictions that must be analyzed. But the Court must also take note of the fact that, the fear that these sorts of restrictions stimulate among the public, while testing the proportionality of such procedures. Particularly after, 1950, the

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[30] *Also see, K.S. Puttaswamy* v. *Union of India*, (2017) 10 S.C.C. 1, at para 310.

[31] *Om Kumar* v. *Union of India*, A.I.R. 2000 S.C. 3689, at para 53 (hereinafter referred to as *Om Kumar case*).

principle of 'proportionality' has been applied continuously, to legislative (and administrative) actions in India.[32]

In *Chintaman Rao* v. *State of UP*,[33] Mahajan J., observed that 'reasonable restrictions', which the State could execute on the fundamental rights, 'should not be arbitrary and excessive. Therefore, the principle that legislation relating to restrictions on fundamental freedoms could be checked on the anvil of 'proportionality' has never been doubted in India. This is known as the 'primary' review, by the Courts of the legitimacy of legislation which offended fundamental freedoms.[34]

The development of the principle of 'strict scrutiny' or 'proportionality' in Administrative Law in England is not so old. Traditionally, an administrative action of legislature was being tested on *Wednesbury*[35] grounds. In the past few years, if there is an administrative order which disturbs the freedom of expression or liberty, it is declared to be not valid in several cases applying the principle of 'strict scrutiny'.[36] Particularly, when it comes to administrative decisions that engage fundamental human rights, there is need for a more intense and anxious judicial scrutiny. Therefore, such cases demand a more rigorous scrutiny than traditional scrutiny is required.[37]

While the administrative authorities exercise power or discretion in imposing prohibitions in individual situations, questions that are frequently considered that whether the decision restricting the right is wrong? or whether in making such a decision the state authorities has not properly balanced the fundamental right and the requirement for imposing such prohibition? or whether he has imposed the least restrictive measures were taken or the reasonable quantum of restriction? etc.

In such cases, the administrative action in our country, in our view, has to be tested on the principle of 'proportionality'. As far as proportionality is concerned the Supreme Court of Israel recognises three elements:

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[32] *Id*., at para 310. *Also see, CPIO* v. *Subhash Chandra Aggarwal*, (2019) S.C.C. Online S.C. 1459, at para 229.

[33] (1950) S.C.R. 759.

[34] *Supra* note 31, *Om Kumar case*, at para 35. *Also see, R.* v. *Secretary of State for the Home Department, ex p. Brind (1991 (1) A.C. 696); Council for Civil Services Union* v. *Minister of Civil Service, (1983(1) A.C. 768)* (called the *GCHQ case).*

[35] *Supra* note 31, *Om Kumar case*, at para 37. *See also*, *Associated Provincial Picture Houses* v. *Wednesbury Corporation* 1948 (1) KB 223). As per Wednesbury rule, a reasoning or decision is unreasonable (or irrational) if it such that no reasonable person acting reasonably could have made it.

[36] *Id*., at para 37. Also see, *Derbyshine Country Council* v. *Times Newspapers Ltd*., (1993 A.C. 534).

[37] *R.* v. *Lord Saville Ex pt.* (1999(4) ALL ER 860 (870.872) C.C.A.).

> '*First,* the means adopted in using its power should rationally fit the purposes
> *Second*, the authority should adopt such measures that do not individual more than required, and
> *Third,* the harm done to the individual should not be disproportional to the benefit which accrues to the general public.'[38]

As far as the proportionality is concerned as how to determine whether a restriction is reasonable or not, there are few points that must be taken into consideration. There should not be any unreasonable prohibition on free speech, that is provided as a fundamental right. Even in a situation where complete blanket prohibition is executed, the government has to vividly clarify as to why any other lesser alternatives would be inadequate.[39] The second facet of the test, where the Courts find out that whether the prohibition imposed was least intrusive, being capable of harmonizing and balancing the two competing rights. The principle of proportionality can be easily summarised by Lord Diplock's aphorism, '*you must not use a steam hammer to crack a nut, if a nutcracker would do?*[40] In a sense, the test of proportionality is concerned with means and ends.

In the *Modern Dental College case*,[41] court had explained the and observed that:

> '…On the one hand is the right's element, which constitutes a fundamental component of substantive democracy; on the other hand, is the people element, limiting those very rights through their representatives. These two constitute a fundamental component of the notion of democracy, though this time in its formal aspect…… The best way to achieve this peaceful coexistence is through balancing between the competing interests. Such balancing of competing interest permits each side to develop alongside the other factors, not in their place. …… This balancing is to be done keeping in mind the relative social values of each competitive aspects when considered in proper context.'[42]

In *Anuradha Bhasin*, the petitioners argued for application of the necessity test, which have been developed by the German courts demanding a lesser restrictive measure which at the same time is equally effective. It is to be noted that the necessity for effectiveness is not required in the Canadian 'Oakes test'[43] of which the condition of least infringing measure forms an integral part.

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38 *Supra* note 31, *Om Kumar* case, at para 56.

39 *State of Gujarat* v. *Mirzapur Moti Kureshi Kassab Jamat*, (2005) 8 S.C.C. 534.

40 *R* v. *Goldsmith*, [1983] 1 W.L.R. 151, 155.

41 *Modern Dental College & Research Centre* v. *State of Madhya Pradesh*, (2016) 7 S.C.C. 353.

42 Id., at para 62.

43 As per Oakes test, a rational nexus must exist between a measure overriding constitutionally guaranteed freedom and the object sought to be achieved. The means must be least restrictive and there must be proportionality, between effects and objects of such measure. this doctrine was propounded by Dickson, C.J., of the Supreme Court of Canada in *R* v *Oakes*,(1986)1 S.C.R. 103 (Can) S.C.

The argument of David Bilchitz,[44] discussed in the judgement, focuses on the problems coming from 'German test' and the 'Oakes test'. The German test requires all decisions to be important by specifying that the other possible substitutes may not be equally effective, while its counterpart, the Canadian test requires the minimal impairment test limiting the constitutionally allowable guidelines and puts a burden on the Government to clarify its decisions.[45]

It was directed by the court in *Anuradha Bhasin*[46] case, to ponder over the options that are available under Article 19(2), so that the burden of necessities is in such a fashion that restricts the freedom of speech to a possible minimal extent. At the first stage it was required to determine the possible goal for such restrictions. Such a determination requires that before the authorities must access alternative mechanism for the possible goal.

Now, in the context of the *Anuradha Bhasin*, the procedure for restricting internet is clearly given under the Temporary Suspension of Telecom Services (Public Emergency or Public Service) Rules, 2017. But, it is pertinent to contemplate that the suspension must be of temporary nature. It was argued by the petitioners that the orders were not in harmony with the Suspension Rules and in addition to this, no reasoning was provided for the imposed suspension. There can be some limitations on the availability of internet but in any case, if there be blanket orders, it would amount to complete ban infringing the fundamental rights. As far as the freedom of press is disturbed it was contended by the counsels for the petitioners that, the said orders had a chilling effect on their rights.

Chilling effect (doctrine) in Indian Jurisprudence, is of recent development. Therefore, it becomes imperative to consider the argument of chilling effect which has been used in numerous contexts. This principle is primarily applied where the State action, that may be constitutional, but that places a huge burden on the freedom of speech. It was observed in *Anuradha Bhasin* case, that this rule of chilling effect, if not applied judicially and methodically, would result in a self-proclaiming tool.[47] The chilling effect doctrine is seen with judicial skepticism. Also, the court cautioned that to say that the said prohibitions were unconstitutional and casted a chilling effect on the fundamental right of freedom of press as under Article 19, would mean nothing unless some concrete evidences are brought before the Court. The court only said that to establish a strong base for such a doctrine there has to be sufficient evidences, which are not placed on record in the present case.

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[44] David Bilchitz is a professor in Faculty of Law at the University of Johannesburg. He is known for his work in Advanced Constitutional, Public and Human Rights law.

[45] *Supra* note 1, *Anuradha Bhasin* case at para 66.

[46] Id., at para 76.

[47] Id., at para 147.

The court while observing the merit of the contention that the internet could be used to proliferate terrorism and thus posing a threat to the security and sovereignty of the nation, pointed out that to maintain peace and tranquility in the State, demands a multifaceted method without any burden on the freedom of speech and expression. The court clarified that the any restriction anticipated under the Suspension Rules is just temporary in its operation and should not exceed beyond the time period which is necessary.[48]

IV

Status of Internet: Rights under Article 19

The Court in *Anuradha*, observed that it becomes imperative to understand the distinction between the internet as a tool or just as a mere instrument and the freedom of expression through the internet.[49] Over the past few years, judicial creativity, wisdom and craftsmanship have broadened the ambit of freedom of speech and expression by expounding its various aspects. The case of *Romesh Thappar* v. *State of Madras*,[50] was one of the earliest cases, to be decided by the Supreme Court, affirming freedom of press as a part of freedom of speech and expression. In addition to this, Supreme Court in *Indian Express* v. *Union of India*,[51] observed that the Press plays a very crucial role in the democratic machinery.

The judgement of *Tata Press* v. *Mahanagar Telephone Nigam Ltd*[52] held that a commercial advertisement or commercial speech is a part of the freedom of speech and expression, that could be prohibited within the limitation of Article 19(2). Further, in *Union of India* v. *Assn. for Democratic Reforms*,[53] the Court laid down that the right to speech and expression includes right to information also. In *Secretary, Ministry of I & B* v. *Cricket Association, Bengal*,[54] the Supreme Court extended the scope of freedom of speech and expression. It was held that airwaves also fall in the category public property and held that the freedom of speech and expression has its application not only to print media but also to electronic media. The jurisprudential development in defending the medium for exercising fundamental right of speech and expression can be traced back to the famous case of *Indian Express* v. *Union of India*.[55] In this case, the Apex Court had established that

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48 *Id*., at para 100.

49 *Id*., at para25.

50 (1950) S.C.R. 594; A.I.R. 1950 S.C. 124.

51 (1985) 1 S.C.C. 641.

52 (1995) 5 S.C.C. 139.

53 (2002) 5 S.C.C. 294.

54 A.I.R. 1995 S.C. 1236.

55 (1985) 1 S.C.C. 641.

the freedom of print medium is very well taken up under the freedom of speech and expression. In this context, we may safely conclude that the in a catena of judgements, the recognition of free speech as a fundamental right over diverse media of expression.

In the era of globalization, the importance of internet as a medium for trade and commerce has increased exponentially. And more so, expression through the medium has currency in the contemporary times as one of the major means of information diffusion. Hence, in *Anuradha*, the Court, held that freedom of speech and expression through the medium of internet is an integral part of Article 19(1)(a), and if there is any restriction on it, the same shall be in consonance with Article 19 (2) of our Constitution.[56] It is noteworthy that *S. Rangarajan* v. *P. Jagjivan Ram*,[57] had held that in Article 19 (1) freedom of speech and expression specifies that every citizen has the right to express his or her opinion by words of mouth, writing, printing, picture or *'in any other manner'*. The Court in this case has explicitly laid that the communication of ideas *could be made, through a medium, newspaper, magazine or movie*.

In the present case the Supreme Court has laid down that the freedom of speech and expression under Article 19(1)(a), and the right under Article 19 (1)(g) to carry on any trade or business, using the medium of internet is Constitutionally protected.[58] Therefore, it can be argued that the freedom of speech and expression under Article 19 is a medium neutral right.[59] The *Anuradha Bhasin* judgement has only concretized the idea that the freedom of speech and expression is a medium neutral right be it the medium of internet or any other media.

Law and technology seldom mix like oil and water. Over the time, the progress in the field of technology is not accompanied by an equivalent crusade in the realm of law. In this milieu, it becomes imperative that law, as per the growing needs of the society, should absorb the technological advancements and consequently direct its rules and regulations so as to serve the ever-changing needs of society.[60] The negative aspect of the right to access internet is merely an obligation on the State to allow its citizens to access any and all content on the internet, without unreasonable, undue or illegal prohibitions. It is basically a right against blocking

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56 *Supra* note 1, *Anuradha Bhasin* case, at para 33.

57 (1970) 3 S.C.R. 288, at para 8.

58 *Supra* note 1, *Anuradha Bhasin* case, at para 34.

59 Kartik Chawla, Right to Internet Access - A Constitutional Argument, 7 Indian J. Const. L. 57 (2017). *Available at:* https://ijcl.nalsar.ac.in/wp-content/uploads/2020/07/7IndianJConstL57_Chawla.pdf. (last visited Aug. 10, 2020).

60 *Supra* note 1, *Anuradha Bhasin* case, at para 31.

of internet without any reasonable restriction. Therefore, by this view Internet is just only a technology, nothing less but certainly nothing more.[61]

The idea of a Right to Internet Access has broadly two recognized aspects: one, the right to access the internet with no restrictions, except in the few cases wherein such restrictions are allowed by law, and, two, the availability of the infrastructure and technologies that would reasonably allow citizens to connect to the internet.[62]

As far as the right to access internet is concerned, the Court didn't ponder over this issue as it was not contended by none of the counsels. The court confined itself only to internet as a medium of speech and expression.

According Vinton G. Cerf,[63] internet plays a crucial role in today's world, it cannot be raised up to the level of human right. In his argument Cerf, says that, technology and internet is just only an enabler (means) of rights and not a right in and of itself. Thus, a distinction is drawn between putting technology from the exalted category of the other human rights, such as the right to life, food, education and freedom of equality etc. Thus, according to this view internet may be categorised as a means to an end but not surely an end in itself: *at one time if you didn't have a horse it was hard to make a living. But the important right in that case was the right to make a living, not the right to a horse*.[64]

If we talk about right to access internet as a positive right, it creates an additional duty for the State to provide, at least bare minimum means to its citizens so that they can access the internet. But there comes into play various socio-economic problems while creating an environment for right to internet access in India. And moreover, cost of such a project increases exponentially in a large social setting like India. Therefore, it would create a legal problem of 'digital divide', which is defined as *the gap between people with effective access to digital and information technologies, in particular the Internet, and those with very limited or no access to it*. This digital divide doesn't exist only vertically but horizontally also, which includes wealth, gender, geographical and social lines within States, especially in India due to the low Internet penetration.[65]

Such a positive right is not all easy for the Indian government to execute, considering the vast size and demography. Even more, India as country is already

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[61] Paul De Hert & Dariusz Kioza, Internet (Access) as a New Fundamental Right, Inflating the Current Right Framework, 3 EUR. J. L. & TECH. 3 (2012). *Available at*: http://ejlt.org/index.php/ejlt/article/view/123/268. (last visited Aug. 10, 2020).

[62] *Supra note* 59, Kartik Chawla.

[63] Supra note 1, *Anuradha Bhasin* case at para 30. Vinton G. Cerf, is an American Internet pioneer and is recognised as the one of the '*fathers of internet*'.

[64] *Supra* note 61, Paul De Hert.

[65] *Supra* note 59, Kartik Chawla.

struggling to achieve a good standard of basic education under Right to Education (a positive right). In such prevailing circumstances considering the socio-economic realities the right to access internet will be catastrophic for the Indian government.[66] But nevertheless, Indian Government has launched various programs and schemes promoting digital education, such as *Digital India* and promoting cashless transactions for better e-governance.

However, right to internet has been gaining recognition on the international platform, as positive or negative dimension in the last few years. Even more, right to seek, receive and impart information are also enshrined in Universal Declaration of Human Rights[67] (UDHR; non-binding) and International Covenant on Civil and Political Rights (ICCPR)[68]. As far as the nation states are concerned, Estonia was one of the first nations to acknowledge right to internet access as a basic right. The Estonian Parliament (Rizjgkogu) added Internet access to its universal service list, an acknowledgement of the positive dimension of the right to internet access.[69] Following Estonia, Greece[70] in 2001, amended its Constitution adding both positive and negative dimensions giving right to participate in the internet society and creating an obligation for the state. In France, the Constitutional Council recognized the right to internet access in *Haute Autorité pour la Diffusion des Œuvres et la Protection des Droits sur Internet* (HADOPI)[71] laws upholding as negative right.[72] Subsequently, the HADOPI laws which aimed at

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66 *Id*., Paul De Hert.

67 Article 19, Universal Declaration of Human Rights. It provides for the right to freedom of opinion and expression regardless of frontiers. *Available at:*https://www.un.org/en/universal-declaration-human-rights/, (last visited Aug. 10, 2020).

68 Article 19, International Covenant on Civil and Political Rights, *Available at:* https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx, (last visited Aug. 10, 2020).

69 Telecommunications Act (Act No. 56/2000), (Estonia). It was the initial step towards enabling the right to internet. Now, Estonia has number of legislations related to communication, free access and regulations related to internet.

70 Article 5A (2) of the Constitution of Greece, states all persons have the right to participate in the Information Society. Constitution of Greece, *available at:*

https://www.hellenicparliament.gr/UserFiles/f3c70a23-7696-49db-9148-f24dce6a27c8/001156%20aggliko.pdf(last visited Aug. 10, 2020).

71 In June 2009, the Constitutional Council, France's highest court, declared access to the Internet to be a basic human right in a decision that struck down parts of the HADOPI laws, which has been repealed in 2013. *See also,* https://www.theguardian.com/technology/2013/jul/09/france-hadopi-law-anti-piracy (last visited Sept. 9, 2020).

72 Supra note 61, Paul De Hert.

ensuring copyright protection online, were dropped in 2013. In Costa Rica,[73] the Constitutional Court declared that access to information technology and communication is a way to participate in society and access services. Finland,[74] by an amendment included functional internet in its *universal service*. It provides that every person was to have one megabit per second broadband connection by 2010. By 2015 every person was to have 100 Mbit/s connection. Further the long-term goal is to increase the speed to 10 Mbps by 2021. Thereby creating a positive legal right.[75] In 2011, Spain,[76] through Article 52 of its Sustainable Economy Act 2011 recognized the positive aspect of broadband access as *universal service*.

Some scholars have warned that recognition of internet access as a human right would inflate human right cases, and divide its focus on claims per se.[77] However, such an argument undermines to appreciate centrality of internet in the contemporary age. Unlike magazines, newspapers, and television, internet is not merely a medium to broadcast information, but it also fosters, economic participation, and social inclusion. For that matter, internet in Covid-19 pandemic, enabled people to procure food, education, medicine, without hampering the norms laid to contain pandemic.

Position after the Judgement

The Supreme Court in its latest order in *Foundation for Media Professionals* v. *Union Territory of Jammu and Kashmir*,[78] dated May 11, 2020, directed the government to

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73 Judgement 2010-012790, Supreme Court (Sala IV) Costa Rica. The Constitutional Court, recognised the fundamental right of access to technologies, in particular, the right of access to the Internet or World Wide Web. *See also*, https://www.technollama.co.uk/costa-rican-court-declares-the-internet-as-a-fundamental-right. (last visited Aug. 10, 2020).

74 Communications Market Act (Act. No. 393/2003), § 60 (c)(1)(Fin.). In 2010, by an amendment in Communications Market Act, Finland recognised internet as a legal right. The amendment entered into force on 1 July 2010. The relevant provision is Section 60 C of the Communications Market Act, and the duty falls upon the Finish Telecommunications Regulatory Authority (FICORA). *See also,* Country Information-Finland, *available at:* https://ec.europa.eu/digital-single-market/en/country-information-finland (last visited Aug. 10, 2020).

75 *Supra* note57, Kartik Chawla.

76 In 2011, Act 2/11 of March, Spain added broadband service to its universal service, The Spanish Minister of Industry, Trade and Tourism, Miguel Sebastián, had announced the measures in November 2009 at the opening of the *Forum Internacional de Contenidos Digitales* (FICOD)clarifying broadband to be of universal access from 2011. *See also*, https://www.reuters.com/article/spain-telecoms/spain (last visited Aug. 10, 2020).

77 *See,* B. Skepys, *Is There a Human Right to Internet?* 5 J. POL. & L. 25, (2012).

78 *Foundation for Media Professionals* v. *Union Territory of Jammu and Kashmir*, (2020) S.C.C. Online S.C. 453. (herein after referred as *Foundation for Media Professionals* case).

ease the internet restriction in the Union Territory of Jammu & Kashmir. The petitioners submitted that in the prevailing circumstances of pandemic due to the spread of novel Covid-19, internet has become even more indispensable to people. It was contended that restriction on internet speed not only violated the peoples' right to information but also denies them right to health, education, business and the right to freedom of speech and expression.

While the Solicitor General, argued for a balancing approach, i.e. fundamental rights of citizens need to be balanced with national security concerns. The Court elaborated the various orders and their implications in different areas of Jammu and Kashmir. Further, it also elaborated the incidents indicating significant rise in militancy, which as per the government, indicates that cyber terrorism is on rise in the valley.[79]

The court observed that the modern terrorism heavily relies on internet, citing from Anuradha Bhasin's case court observed, that, 'the degree of restriction and the scope of the same, both territorially and temporally, must stand in relation to what is actually necessary to combat an emergent situation'.[80]

V

Conclusion

In this paper, we examined *Anuradha Bhasin* and *Foundation for Media Professionals* to understand the function of 'technical judicial standards' to interpret and decide issues relating to, particularly, Article 19 (1) (a) and (g), and the impact application of such standards in light and extent of restrictions under Clauses (2) and (6), respectively. We emphasized the stand of Court in regard with Section 144 Cr.P.C. that the section cannot be imposed merely to suppress the legit expression of opinion and exercise of democratic right. This will establish foundation for jurisprudence to ensure that Freedom of Speech and expression is not violated for some political gain or by mere whims of authorities. We also argued that if the Court had delved into the validity of the orders, then the clouds of doubt over the administration of the Respondent-State would have been cleared. Right to information that is also included under right to freedom of speech in Article 19 is not only a normative expectation but is essential as per the natural law. We then argued that with rapid growth of information technology, internet has become necessity have become necessity for gaining education, medical facilities, etc., both

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79 *Supra* note 60, *Foundation for Media Professionals* case, at para 13.

80 *Id*., at para 16.

in pandemic and otherwise, a complete prohibition does create a chilling effect on the freedom of speech and expression of citizens.

As we have explained, that as far as the restriction and fundamental right of Speech and expression is concerned, the territory of Jammu and Kashmir still seems to be sailing in an unchartered sea. But the Court has performed it duty to custodian of rule of law, though in the least way, has improved the slightly the status quo. In conclusion, this judgement has opened the gateway for the judicial review of restrictions, orders and decision of the administration. The judgement is a step in the right direction but its execution requires continuous monitoring, and a follow up action to ensure the direction and the procedurals safeguards along with the progressive principles laid in the present case are duly followed.