

# THE VIRTUAL EFFACEMENT OF CIVIL LIBERTY

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A study of India's civil liberties record will only desiccate its status as a republican democracy. Even given that narrative, the ongoing repression of freedom in the Kashmir Valley is extraordinary. Not since August 4, 2019, have most residents in the region had access to the Internet. On that fateful day, in the lead up to India's unilateral decision to revoke its compact with the State of Jammu and Kashmir, a total communication and information blockade was placed on the region. The exercise was so clinically executed that even the orders imposing the restrictions were kept under wraps.

On the ensuing day, the Indian government went about dramatically altering its relationship with Jammu and Kashmir. Article 370 of the Constitution, which granted the State elements of administrative autonomy, was, for all practical purposes, severed. But with a complete curfew placed on movement in the region, Kashmiris were deprived even of any means of finding out what was actually transpiring. Remarkably, this state of affairs has scarcely changed since. While certain limited channels of communication have been opened up, access to the web remains elusive. By many accounts, this might well be one of the longest bans imposed on the Internet by an ostensibly democratic government.

It is these facts — and the devastating consequences that they have had on daily life in the region — that form the backbone of Anuradha Bhasin and Ghulam Nabi Azad's challenges in the Supreme Court of India. A three-judge Bench, which has heard oral arguments in the case, will sometime during the course of the coming weeks pronounce its verdict. Although, in answering the constitutional questions raised, the judges will heed to their past decisions, the case presents the court with its first real opportunity to rule decisively on the purport and reach of the right to access the Internet. The ultimate ruling, therefore, is likely to serve as a precedent of some value. And given the growing ubiquity of the Internet, and the state's increasingly whimsical use across India of blockades on the web, how the judgment goes will also doubtless have a bearing on the endurance of the constitutional promises of liberty and equality.

Ms. Bhasin's arguments rest on a simple premise: that the blackout of the Internet impinges on her right to freedom of expression. In her case, the force of the communications ban was almost instantly felt. The *Kashmir Times*, a daily newspaper which she edits, which has been in regular circulation for more than five decades, went altogether unpublished between August 6 and October 10. Today, despite the partial lifting of some restrictions, with journalists hamstrung by the absence of the Internet, only a pruned version of the newspaper is published. These facts, Ms. Bhasin argues, evince how a denial of access to the web poses a direct threat on the liberties of the press.

The impact that the Internet ban has had on free expression is, however, only the tip of the iceberg. As Mr. Azad, the Leader of the Opposition in the Rajya Sabha, highlights, there are also other deleterious results that have emanated out of the measure. These include a denial of the right to health care caused by people's inability, among other things, to access government schemes such as Ayushman Bharat, and a withdrawal of education to students at different levels, occasioned by the seemingly interminable closure of institutions. What is more, the shutdown has inflicted startling economic damage on the region. Even conservative estimations released by the Kashmir Chamber of Commerce and Industry show that the State economy has suffered a loss of no less than 15,000 crore since the dilution of Article 370.

In its defence, the government makes two primary arguments: first, it claims, that there is no obligation on it to disclose the orders through which the restrictions have been imposed; and, second, it contends that judges must grant the state substantial leeway in matters of national security; that once the executive believes on the basis of “some material” that freedom ought to be restricted, the court must not review the validity of such measures, even when those actions involve a wholesale blocking of the Internet.

On any reasonable examination, however, the state’s arguments fail. Its order imposing the Internet ban, we now know, was made under the Temporary Suspension of Telecom Services (Public Emergency or Public Safety) Rules, 2017. This law requires the executive, among other things, to provide a reasoned order when it directs the withdrawal of the Internet. That such a direction exists, in and of itself, must make it clear that access to the web cannot be shut out through the issuance of furtive instructions. In a democracy, orders are made to be published.

There is here, of course, an even greater principle at stake: the promise of free speech preserved in Article 19(1)(a) of the Constitution. As the Supreme Court has held, this guarantee contains both an inherent and an instrumental value. The first because it is important to respect every individual’s equal right to personal autonomy and dignity, and the last because of the consequences of promoting free speech, that is that better dialogue stimulates a more informed polity. It was the instrumental value of speech that prompted the court, in *Sakal Papers* (1961), to hold that no policy of the state can so much as regulate the circulation of a newspaper, as any such programme will directly impinge on the right to freedom of expression.

Today, publishing a newspaper without access to the Internet is almost a Sisyphean task. Hence, much like the restrictions that were struck down in *Sakal Papers*, a blanket ban placed on the web will also transgress the guarantee of free speech. And in this case, the human costs go even further. For instance, a report in *The Hindu* (‘Ground Zero’ page, “In a land without Internet”, December 7, 2019) shows that, with jobs already hard to come by, there has been a staggering 80% loss of employment among start-ups in Kashmir that rely on the Internet.

Now none of this means that there can be no restrictions ever placed on the web, or that terrorism does not require counteractive actions. But what the law demands is this: that any measure taken by the state in restricting a fundamental right is necessary and proportionate to the goal that it seeks to achieve. To determine whether the limitations imposed in Kashmir meet this test, the court need not, as the state warns, perform the role of a super-executive. It merely needs to scrutinise whether a wide-ranging ban on the Internet on an entire populace is justifiable, when, even according to the government, it is only a “minuscule minority” who are likely to commit violence.

Indeed, the state has, in the past, segregated people possessed of a potential to terrorise from others, based on their registered mobile phone numbers. In these circumstances, to permit a blanket closure of the Internet, given its impact not only on free speech, but also on other rights, including on people’s rights to livelihood and health, would amount to a virtual effacement of civil liberty.

Stifling the mere hint of dissent through bans on the Internet will only send us racing towards a bottomless pit. Already, as a recent report in *Live Mint* underscores, 67% of the documented cases of web shutdowns around the world last year took place in India. Should these bans be upheld, we will be entering an abyss from which there can be no return. When that happens, our Constitution, and the hallowed promises it enshrines, will be found withering by the wayside.

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