

Infringement of Right to Privacy by Naming and Shaming of Accused

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Abstract

In what was broadly termed by the Government as the panacea for tackling the alleged rogue elements of the society, the Uttar Pradesh State Government decided to display the photographs, names and addresses of those accused of vandalism in Lucknow in December 2019 in the wake of the enactment of the controversial Citizenship (Amendment) Act 2019. The public display of the personal data of the accused was supposedly intended at 'naming and shaming' and thus deterring the accused from committing crimes, an act which certainly flies in the face of human dignity. The role of human dignity in our constitutional scheme is essentially a normative one. It ensures the unity of Human Rights into one bracket. While human dignity serves as the normative basis for the constitutional rights, it also serves as the foundation of parameter that determines the scope of all the constitutional rights.

Keywords: *Privacy, Posters, Doctrine of Proportionality*

I. Introduction

A State that does not take rights seriously, shall never take the law and order seriously and in order to rein in the Executive of such State, what a democracy like India needs is an activist court, a court that has the ability to frame and answer the issues of political morality. Thankfully, the Hon'ble High Court of Judicature at Allahabad made an exception to the prevalent approach of indifference of the Constitutional Courts and took *suo moto* cognizance of the matter and what followed was one of the boldest judgments defying the totalitarian tendencies of the State during our times.² A failure on the part of the Court to act against the blatant assault on the right to dignity of the individual, a right which has been repeatedly termed as the edifice of the lungs of constitutional culture, would have resulted in gargantuan loss to its credibility.³ The case at hand represents perhaps the first instance in the aftermath of the

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² In Re, Banners On Roadside In The City Of Lucknow, PIL No. 532 of 2020.

³ Dworkin, TAKING RIGHTS SERIOUSLY, Harvard University Press, 1977.

Aadhar judgment where a constitutional court in the country has adopted the Doctrine of proportionality test to ensure the sanctity of the right to privacy as a fundamental right.

II. The Activist Court: Widening the Scope of PIL

The Advocate General raised objection to the invocation of the public interest jurisdiction while relying on the guidelines laid down in *State of Uttaranchal v. Balwant Singh Chaufal*⁴ and contended that the issue at hand did not involve a question of larger public interest. It may be noted that the guidelines laid down in *Chaufal* were intended to weed out unnecessary PILs and the same do not have any application when the cognizance is taken *suo motu* by the Constitutional Court and hence the argument was devoid of merit.

*where there is gross negligence on part of public authorities and government, where the law is disobeyed and the public is put to suffering and where the precious values of the constitution are subjected to injuries, a constitutional court can very well take notice of that at its own. The Court in such matters is not required to wait necessarily for a person to come before it to ring the bell of justice. The Courts are meant to impart justice and no court can shut its eyes if a public unjust is happening just before it.*⁵

The powerful excerpt of the judgment reaffirms the activist character of the Constitutional Courts which doesn't look the other and shy away from its duties when the constitutional values are under attack. Further, it was acknowledged that the cause of action in the instant case was not the personal injury caused to the persons whose personal details are given in the banner but the injury caused to the precious constitutional value and its shameless depiction by the administration to justify the extra-territorial invocation of the jurisdiction.

III. The Issue of Privacy

The evolution of the right to privacy as an inherent aspect of the right to life has been dealt with elsewhere and need not be reiterated in its entirety. The Court

⁴ State of Uttaranchal v. Balwant Singh Chaufal , (2010) 3 SCC 402 (India).

⁵ In Re, Banners On Roadside In The City Of Lucknow, PIL No. 532 of 2020 (India).

referred to a catena of judgments to underscore the importance of right to privacy as an aspect of ordered liberty while relying on the judgment in *Kharak Singh v. State of U.P.*

“If physical restraints on a person’s movements affect his personal liberty, physical encroachments on his private life would affect it in a larger degree. Indeed, nothing is more deleterious to a man’s physical happiness and health than a calculated interference with his privacy. We would, therefore, define the right of personal liberty in Article 21 as a right of an individual to be free from restriction or encroachments on his person, whether those restriction or encroachments are directly imposed or indirectly brought about by calculated measures.”⁶

The right to privacy was expressly recognized as an intrinsic part of Part III of the Constitution by the Hon’ble Supreme Court in the landmark case of *K S Puttaswamy v. Union of India*⁷ and any debate as to whether the unwarranted inferences in the privacy would amount to infringement of fundamental rights was put to rest. However, like most of the fundamental rights, the right to privacy too is not an absolute right and is subject to restrictions. But what we are concerned with is the sufficiency of the restrictions. This brings us to the pressing issue of determining the cases in which infringement of the fundamental rights can be justified.

IV. Doctrine of Proportionality

It is nobody’s case that the constitutional rights are absolute rights. There is a substantial degree of consensus amongst the legal theorists that, in the light of the larger public interest, these rights may be curtailed. The key elements that have an undeniable influence over the development of the modern constitutional theory of recognizing positive constitutional rights along with its limitations are the notions of a liberal democratic society and respect for the rule of law. It has been repeatedly observed that the very concept of a democratic society is based upon striking a balance between the public interest and the constitutional rights.⁸

⁶ *Kharak Singh v. State of U.P.*, (1964) 1 SCR 332 (India).

⁷ *Puttaswamy v. Union of India*, (2017) 10 SCC 1 (India).

⁸ *Id.*

An express recognition of the theory can be traced in Article 19 of the Constitution which empowers the state to impose reasonable restrictions in the larger public interest. Constitutional rights being related to each other (as per this theory), have an implied constitutional license to place limitations on all the constitutional rights, where such curtailment is necessary for enhancing the public interest. This phenomenon gives birth to the enduring tension between the two fundamental components of a democratic society, namely the Rights and the People element (public interest).

In this respect, the Apex Court rightly held that:

*“while examining as to whether the impugned provisions of the statute and rules amount to reasonable restrictions and are brought out in the interest of the general public, the exercise that is required to be undertaken is the balancing of fundamental right to carry on occupation on the one hand and the restrictions imposed on the other hand. This is what is known as ‘doctrine of proportionality’.”*⁹

The object of invocation of the doctrine of proportionality is to ensure that the competing interests of a democracy coexist harmoniously without replacing each other. The balancing is usually done while keeping the relative social values of each social value in the backdrop. It is certain that one facet cannot give way to the other for this would amount to a subversion of the very notion of a society governed by rule of law.¹⁰ Instead, the tension has to be resolved by balancing the competing facets and for all practical purposes, this act of balancing is termed as the doctrine of proportionality.

V. **Relevance**

The doctrine of proportionality, as adopted by the Supreme Court in *KS Puttaswamy (II)* involves a four-fold test. The Allahabad High Court examined the issue in the instant case on the touchstone of these guidelines to do the balancing exercise in order to examine whether the interference with the fundamental right to privacy (displaying the posters with personal data) is

⁹ In *Re, Banners On Roadside In The City Of Lucknow*, PIL No. 532 of 2020.

¹⁰ V. Jeevalaya, *The Concept of Right to Privacy and Constitutional Validity of Aadhaar*, 8 *Indian Journal of Research* 7, (2018).

justified. It ought to be noted that all the four limbs must be satisfied in order to justify the infringement.

A. Whether the State is pursuing a legitimate aim?

The aim should not be legitimate just in the normative sense, instead it must be one sanctioned by the law. With no law in place, permitting the display of the banners disclosing the personal data of the individuals, fails the first prong of the test. The only way in which a proclamation can be issued is through the order of the court and that too only in the cases where all methods of ensuring the presence of the accused have been exhausted.¹¹

Is there a rational connection between the means adopted and the pursued aim?

The Court failed to find any rational connection between the selective publication of the names of the few chosen individuals when the personal data of millions of people facing charges of commission of offence has not been subjected to publicity. To the contrary, all the State needed to meet its objective of deterring criminals was to follow the due process instead of indulging in high-handedness.¹²

Necessity Stage:

This stage entails an enquiry into whether this was the least restrictive way of achieving the same objective? The answer to this question was perhaps the easiest one. The action under question was one of the most restrictive ways of achieving the said objective.

Balancing Exercise:

The stage involves an assessment of the impact that the measure has on the right holder. The Court found that the infringement of fundamental right to privacy, on the account of failure of the three limbs of proportionality was disproportionate and highly unjust.¹³

The question looms large that do your fundamental rights get waived once you are accused of violence by the State?

¹¹ Puttaswamy v. Union of India, (2017) 10 SCC 1.

¹² Puttaswamy v. Union of India, (2017) 10 SCC 1 (India).

¹³ *Id.*

Today, while challenging the Order of the High Court to remove the posters, the Solicitor General argued that the moment people indulge in violence, they waive their fundamental rights. It is submitted that the argument is based on a flawed notion that everyone who has been accused of vandalism has already been proven guilty, which is just not the case.¹⁴ Fundamental rights are based on a moral theory that the citizens have rights against the State and as per the argument of the State, all that the State will have to do in order to deny the citizens these rights is to accuse them of an offence!

VI. Conclusion

Is it not amusing to note that the justifications of regressive acts of an authoritarian State fall apart the moment the Constitutional Courts start performing their duties. These posters are no different from the CRIMESTOP propaganda posters of the dystopian society which are aimed at stifling dissent. If the other High Courts and most importantly, the Supreme Court fails to take a leaf out or two from this judgement, the conception of an Orwellian State in all probabilities will become a reality.¹⁵ While, the Supreme Court has refused to put a stay on the order of the High Court and the matter has been referred to a larger bench, the damage that these posters have done to the dignity of the individuals is irrevocable and immeasurable.

The application of the doctrine of proportionality for upholding the right to privacy as well as dignity of the accused represents a welcome and commendable approach by the Indian Judiciary. It has to be reckoned that the individual dignity is an inherent aspect of right to life, a life that is more than mere animal existence. Such flagrant use of state machinery to name and shame the accused may conform to the political truism of the times that we live in however such practices have no place in a society governed by rule of law.

¹⁴ *Id.*

¹⁵ Chakravarty, The government has stopped even trying to justify mass surveillance as necessary for the public good, (Mar. 19, 2020). <https://scroll.in/article/956586/the-government-has-stopped-even-trying-to-justify-mass-surveillance-as-necessary-for-the-public-good> .