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IT IS TIME FOR INDIA TO MAKE ACCESS TO THE INTERNET A FUNDAMENTAL RIGHT

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ABSTRACT

The post Covid-19 world is increasingly becoming virtual. Teachers and students are getting used to the idea of a virtual classroom while businesses are either offering their goods and services online or planning to do so, on a permanent basis. Internet access is now more of a necessity than a luxury. However, in the absence of a constitutionally guaranteed access to internet, India tops the list of countries having highest number of internet shutdowns. Government censorship of social media is rampant, while sites and applications are banned or blocked with vague arguments of national security. Contrary to popular belief, the Supreme Court judgement of Anuradha Bhasin v. Union of India does not make access to internet, a fundamental right. Since, none of the counsels had argued for it, the Supreme Court in fact, refrained from making any comment on the matter. It merely decided on the applicability of Article 19(1) (a) and Article 19(1) (g) over the virtual world. In this paper it is argued why we need to go the extra mile and declare access to internet as a fundamental right. The paper also introduces draft legislation after examining several international legislations and literature and calls for its introduction as article 21B. The proposed right addresses the issues of internet coverage and speed, keeping in mind the idea of net neutrality and right to privacy. It touches upon the provisions for reasonable restrictions as well, to ensure balance between national security and interests of the citizens. Finally the paper provides the rationale for introducing this right under article 21 of the Indian Constitution.

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INTRODUCTION

Internet plays a very important role in enabling communication as well as providing access to opportunities that were previously unthinkable to large sections of the population. In fact, the internet can be said to be the great leveller. Anybody with free access to internet has at their disposal the same resources and opportunities as anybody else with the same level of internet access. Social and economic barriers to practicing various trades and commercial activities or to education can be easily overcome with the click of a mouse or a touch on the mobile screen. The Covid-19 pandemic has created a situation where billions of people all over the world are forced to remain indoors. Their only means of accessing education; exercising free speech; carrying on their trade or occupation freely or exercising virtually any right is contingent on free access to internet. Therefore, internet is no longer just an enabler of rights; for quite a few it is the only way to exercise certain human rights and restricting access to internet is akin to restricting those rights. Needless to say, those without a reliable access to internet risk falling behind. Incidentally, it is the already marginalized sections of the society that is at the greatest risk. In this light right to access to internet can be considered an essential human right and the need of the hour.

The Indian Constitution came into force on January 26, 1950 while, January 1, 1983 is considered as the official birthday of the internet as we know it today. So, the fathers of our Constitution could never have imagined a right to access to internet, let alone make it a fundamental right. However, with the advancement of technology and the growing propensity of the government to restrict the free access to internet, it is time for India to make right to access to internet a fundamental right. Before proposing a right to internet, it is imperative to understand the current situation in India which will help in explaining why a separate right to access to internet is needed. The position of the judiciary in this regard will also have to be explored to understand the current legal position on the right in India. After that we can look at the various international positions on this topic before coming up with a suitable legislation.

RELATED LITERATURE

For the purpose of writing this paper we decided to take a look at relevant literature on the topic that was published in the last 10 years. Paul De Hert and Dariusz Kloza in their paper laid down three arguments against making right to internet access a fundamental right.[3] First, they argued internet is merely an enabler of rights and access to it is not a right in itself. Second, they argued that there is a threshold for something to qualify as a human right. Access to internet fails to reach that threshold as it does not qualify as the most essential element for human well-being. Third, they contend that there are existing rights that are flexible enough to protect access to internet. Adding a new right to the long list of rights will only inflate it without contributing much. The authors have also cited various existing policies in the European context which cover several aspects of the right to access to internet and are of the opinion that a rights-based approach is redundant in the face of the policy-based approach already in place.[4] Stephen Tully in his paper has explored the right to access the internet from a general international law and international human rights perspective, elaborating how the proposed right comes within their scope.[5] However, he sounds a cautionary note that free and ubiquitous access to internet could lead to the proliferation of hate speech, racially discriminatory content, child pornography, trafficking and prostitution, incitement to genocide as well as theft of intellectual property and hence the need for regulating such content.[6] Giovanna De Minico in her 2015 paper offers a very interesting perspective on the issue of right to access to internet.[7] She argues that unlike territorial jurisdictions that are clearly defined, the internet is amorphous. With each country exercising their own laws and regulations over the internet, legislation by any single country with respect to the internet may be insufficient in ensuring that the objectives of those legislations are achieved. Therefore, she calls for the organization of a supranational authority that will act as a nodal authority in all matters concerning internet. She also proposes the implementation of a Bill of Rights over the internet similar to the American Bill of Rights.[8]

[3] Paul De Hert & Dariusz Kloza, Internet (Access) as a New Fundamental Right. Inflating the Current Rights Framework? 3 EUR. J. L. & TECH. 4-6 (2012).
[4] *Id.* at 8.
[5] Stephen Tully, A Human Right to Access the Internet? Problems and Prospects, 14 HUM. RTS. L. REV. 175 (2014).
[6] *Id.* at 191.
[7] Giovanna De Minico, Towards an Internet Bill of Rights, 37 LOY. L.A. INT'L & COMP. L. REV. 1 (2015).
[8] *Id.* at 19-23.

In the Indian context, Kartik Chawla has explored two dimensions of right to access to internet; one as a positive right and another as a negative right.[9] If right to access to internet is introduced as a negative right then it will ensure that the government is obligated to ensure access to internet without any interference except in the most extreme situations. While as a positive right, right to access to internet will ensure that the government is obligated to undertake all possible initiatives to make access to internet possible for all. Therefore, in the first approach the government is under no obligation to ensure internet access for all while the second approach makes things more egalitarian and can ensure universal internet penetration. Also, Directive Principles of State Policy (DPSP) can be a legal basis for the introduction of right to access to internet.[10] Even though DPSPs are not enforceable they are routinely used in judgments and also used to frame new laws. By those rationale articles 38, 39(b), 39(c) and 47 can be used as a basis for a right to access to internet.[11] Now, it might be argued that any ordinary legislation can be used to ensure access to internet. Why the need for access to internet to be declared a fundamental right? While, fundamental rights are very difficult to amend or repeal, the same cannot be said about ordinary legislation. The maxim of *lex posterior derogat legi priori* applies to them and leaves enough room for these laws to be diluted.[12]

THE SITUATION IN INDIA AS OF NOW AND THE POSSIBLE HURDLES TO THE IMPLEMENTATION OF THE RIGHT

When it comes to access to internet India holds several unflattering records. It has consistently topped the list of countries with the highest number of internet shutdowns. Since 2012, India has shutdown internet 531 times, as of now, at the time of writing this article.[13] Of these the internet was shut down some 517 times between now and 2015. India also holds the unenviable record of the longest Internet shutdown in a democracy in the erstwhile state of Jammu & Kashmir which has now been bifurcated into the Union Territories of Jammu & Kashmir and Ladakh, spanning a total of 551 days. Of this, there was total internet shutdown for 213 days between August 4, 2019 and March 4, 2020 and a partial shutdown with internet speed

[9] Kartik Chawla, Right to Internet Access - A Constitutional Argument, 7 INDIAN J. CONST. L. 57, 60-65 (2017).

[10] Anamika Kundu & Anshul R. Dalima, A Case for Recognition of the Right to Internet Access in the Age of Information, 11 J. INDIAN L. & SOC'Y XIII, XXIV (2020).

[11] INDIA CONST. Art. 38, 39(b), 39(c), 47.

[12] Oreste Pollicino, The Right to Internet Access: Quid Iuris, in THE CAMBRIDGE HANDBOOK ON HUMAN RIGHTS: RECOGNITION, NOVELTY, RHETORIC 263 (Andreas von Arnauld et al. eds., 2020).

[13] Internet Shutdowns, https://internetshutdowns.in (last visited July 13, 2021).

restricted to 2G for 338 days between March 5, 2020 and February 5, 2021.[14] Data shows that between January 1, 2012 and March 15, 2020, of the 385 internet shutdowns within India 237 were preventive or anticipatory in nature, imposed for the alleged preservation of law and order situation. While the remaining 148 recorded internet shutdowns were reactionary in nature meant to restore the breakdown of law and order situation.[15] Hence, we are of the opinion that the number of internet shutdowns is disproportionate to the situation on ground and a constitutionally guaranteed right to internet access can help in ensuring citizens of India are not arbitrarily deprived of their access to internet.

However, people can feel the effects of internet shutdowns only when they have access to internet. As of April, 2021, the internet penetration rate for India stands at 45%.[16] So, of the 1.37 billion people living in India more than half of them have no access to internet. When we look at the data provided by the 75th National Sample Survey, we find there is a clear divide between internet access in rural and urban areas. According to it only 24% of the households in India had internet access. The figures went down to 15% for rural households while it went up to 42% for urban households.[17] Needless to say, remote locations and mountainous regions of India have little to no access to internet. Which is why during the pandemic as education moved online many students had to drop out of schools and colleges or travel to distant places to gain access to classrooms and sit for examinations. In light of these facts when right to internet access is declared as a fundamental right the government will be obliged to provide internet to those who are suffering due to the lack of it.

Since, internet penetration is quite low in India; the government might make the contention that providing for internet connection for such a large country can be a huge burden on the state exchequer. It must be mentioned here that the government has already made significant plans and efforts to increase internet penetration in India. In 2018 the Indian government came up with the National Digital Communication Policy which replaced the National Telecom Policy, 2012. The aim of this policy is to provide universal access to broadband internet at speeds of 50 Mbps within India; while, all Gram Panchayats were to be connected by 1 Gbps broadband

[14] #KeepItOn update: who is shutting down the Internet in 2021, ACCESS NOW (June 7, 2021, 2:00 AM), available at: https://www.accessnow.org/who-is-shutting-down-the-internet-in-2021.
[15] *Supra* note 11.
[16] Internet penetration rate in India from 2007 to 2021, STATISTA, AVAILABLE AT: https://www.statista.com/statistics/792074/india-internet-penetration-rate (last visited July 13, 2021).
[17] NSS Report No. 585(75/25.2/1), Statement 7.1, vi, available at: https://mospi.nic.in/sites/default/files/publication_reports/Report_585_75th_round_Education_final_1507_0.pdf (last visited July 13, 2021)

internet by 2020 and 10 Gbps broadband internet by 2022. To achieve this lofty goal, the government has adopted the National Broadband Mission. Under this Mission, all Gram Panchayats are to be connected to the internet through BharatNet also called Bharat Broadband Network Limited. At the time of writing this article 01, 73,079 Gram Panchayats are connected with optical fibre cable while 1, 60,076 Gram Panchayats have operational internet connectivity.[18] To ensure that the village community also benefits from the internet connectivity these Gram Panchayats can install Wi-Fi hotspots at important centres within the community to enable free access to internet. People can connect to these hotspots using their own devices and access internet. RailTel, is already providing free Wi-Fi to major railway stations in India, in partnership with Google. A similar public private partnership model can be adopted to provide internet to the needy if the government alone cannot provide free internet to all.

Internet is an economic good in India as of now. There can be an apprehension from the private internet service providers that with the declaration of internet as a fundamental right their commercial interests might be hampered. They might also feel threatened by the notion that the government might nationalize the sector to fulfil their obligation to provide internet access to its citizens. We would like to point out that such fears might be unfounded, as evidenced by the right to food and right to education. Just as right to food ensures the marginalized sections of the society have access to food and nutrition through the public distribution system, the government can provide free or highly subsidized internet access to the marginalized sections of the society through the expansion of BharatNet. In the meanwhile, internet service providers can continue to provide their services to those that can afford them. The internet provided by the government can be of the minimum stipulated speeds fixed under the proposed right to access to internet. Additionally, the government can adopt a Fair Usage Policy where each user will have a fixed quota of high-speed data for internet access per day. For usage beyond the limit, internet speeds would be throttled. Private internet service providers can differentiate their services from that offered by the government by offering higher bandwidths with greater internet speeds, higher data limits per day or offer unlimited high speed internet services for those that can afford them. In this way internet can be provided by the government to a wider population without requiring a lot of bandwidth and without being overly detrimental for the private internet service providers.

[18] *Bharat Broadband Network Limited*, available at: https://bbnl.nic.in (last visited July 13, 2021).

Therefore, in our opinion the government can realistically ensure access to internet for all. A right to access to internet as a fundamental right is completely feasible and is the need of the hour.

POSITION OF THE JUDICIARY WITH REGARD TO RIGHT TO INTERNET

As of now, right to internet is not a recognized fundamental right in India. Two important judgments, one by the Supreme Court and the other by Kerala High Court, are pivotal in understanding the position of judiciary when it comes to right to access to internet.

First, we will refer to the Supreme Court case of Anuradha Bhasin v. Union of India[19] delivered by the bench of Justice N.V. Ramana, R. Subhash Reddy and Justice B.R. Gavai.

Following the abrogation of Article 370 of the Indian Constitution, which removed the special status to the erstwhile state of Jammu & Kashmir, internet access was restricted in the region, in anticipation of law and order breakdown. In response, the executive editor of Kashmir Times, Anuradha Bhasin filed a writ petition in the Supreme Court alleging that the internet shutdown is impeding her press activities as internet is essential to her trade. She contended that through the internet shutdown the government was essentially infringing on her right to freedom of speech and expression guaranteed under Article 19(1) (a) and her right to carry on any trade or business guaranteed under Article 19(1) (g), through the medium of internet.

Two of the main issues before the Court on which it decided was whether Article 19(1) (a) and Article 19(1) (g) is applicable over the internet and whether the government's act of restricting the internet was valid or not.

The Court ruled that as per the precedent laid down in the Supreme Court judgment of Indian Express v. Union of India[20], freedom of expression under Article 19(1) (a) also protects freedom of press. Since, internet has emerged as one of the primary medium of dissemination of news, Article 19(1) (a) applies over the internet as well. However, this is subject to the restrictions imposed by Article 19(2). Similarly, several businesses are now completely dependent on access to internet and it plays a very crucial role in many other businesses as well. Hence, internet is a vital medium of trade and commerce. Restricting access to internet is therefore akin to restricting freedom of trade or business under Article 19(1) (g). Thus, Article

[19] Anuradha Bhasin v. Union of India & Ors., (2020) 3 SCC 637.
[20] Indian Express Newspapers (Bombay) Pvt. Ltd. & Ors. v. Union of India & Ors., (1985) 1 SCC 641.

19(1) (g) is also applicable over internet, subject to the restrictions laid down under Article 19(6).[21]

The Court then used the judgment delivered in Modern Dental College & Research Centre v. State of Madhya Pradesh[22] to reiterate that none of the fundamental rights are absolute in nature and proportionate restrictions apply to them just as insightful speech is not protected under the First Amendment of the U.S. Constitution. The Court then reviewed the proportionality tests of Indian, Canadian and German Courts and made a comparative analysis to come up with a set of proportionality tests which are as follows:

- The purpose of the restriction must be legitimate.
- The restrictions should be necessary.
- All possible alternatives to the restrictions must be considered.
- The measures adopted must be least restrictive in nature.
- The restrictions have to be open to judicial review.[23]

The Court further added that, 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… The concept of proportionality requires a restriction to be tailored in accordance with the territorial extent of the restriction, the stage of emergency, nature of urgency, duration of such restrictive measure and nature of such restriction.[24]

Therefore, the Court laid down a very clear and modern set of restrictions that apply to fundamental rights in general.

On the other issue of validity of the restriction on internet imposed by the government, the government's argument that they had to impose a total ban on internet because they lacked the technology to selectively ban content didn't pass muster with the Court. However, the Court did find merit in the government's claim that the sovereignty and integrity of India could be hampered by the terrorism propagated through internet. It therefore used the test of proportionality established earlier to determine the scope of the internet ban in restricting free speech.[25]

[21] *Supra* note 17 at 666-67 ¶ 32-34.
[22] Modern Dental College & Research Centre and Ors. V. State of Madhya Pradesh & Ors. (2016) 7 SCC 353.
[23] *Supra* note 17 at 643.
[24] Id.
[25] *Supra* note 17 at 644.

For the determination of the procedural aspect of the validity of the internet ban, the Court relied upon the provisions in the Information Technology Act, 2000, The Code of Criminal Procedure, 1973 and The Indian Telegraph Act, 1885. The Court heavily relied upon the Telegraph Act to determine that even though the government could restrict access to internet under section 7 of the Act, they had to first clearly establish that a public emergency was prevailing or the safety of general public was at stake and no other form of emergency existed. However, an indefinite restriction was contrary to the rules of proportionality and was therefore open to judicial review.[26]

The Court had not passed any remarks or judgment on the aspect of declaring access to internet as a fundamental right since none of the parties raised the issue before the Court.[27] Thus, *Anuradha Bhasin v. Union of India* did establish crucial limits on the power of the government to impose restrictions on internet and extended the applicability of Article 19(1) (a) and Article 19(1) (g) over the internet. However, it stopped far short of declaring access to internet as a fundamental right. Which is why, as of now Right to Internet is not a fundamental right in India.

The other important judgment that is important for understanding the position of judiciary on the right to internet in India is *Faheema Shirin v. State of Kerala*[28] delivered by Justice P.V. Asha.

A second-year undergraduate student of a college affiliated under the University of Calicut, Kerala Faheema Shirin was expelled from her college hostel due to non-compliance with the orders imposed by the hostel authorities which prohibited the usage of mobile phones by the hostel inmates within the designated hours of 6 PM and 10 PM. The hostel authorities reasoned that the orders were imposed upon the request of the parents of several hostel inmates during a meeting. However, Faheema alleged that her parents were not informed of any such meeting before the imposition of the restriction. She also contended that the orders were contrary to the Kerala Government's policy of Digital Kerala Vision where mobile based approach to e-governance was emphasized upon. The prohibition on the usage of mobile phones hampered her access to the digital learning programs undertaken by the State and education department. Faheema filed a petition before the Kerala High Court challenging the order imposed by the

[26] *Supra* note 17 at 685-691.
[27] *Supra* note 17 at 667 at ¶ 35.
[28] Faheema Shirin R.K. v. State of Kerala and Ors. AIR 2020 Ker 35.

hostel authorities, on the grounds that her right to freedom of expression, right to privacy and right to education were infringed upon.

Faheema contended that the United Nations Human Rights Council recognized the fact that the human rights which apply in the real world must also be protected in the virtual world of internet.[29] Based on the Supreme Court judgment in *Vishaka v. State of Rajasthan*[30], the Kerala High Court recognized that under Article 51(c) and Article 253 of the Indian Constitution, in the absence of any related domestic laws, the international conventions and norms are to be read into the fundamental rights protected under Indian Constitution. Hence, the Kerala High Court declared that the right to access to internet was part of right to education as well as right to privacy under Article 21 of the Indian Constitution.

Thus, in the state of Kerala right to internet is recognized as a fundamental right. However, it must be noted that the Kerala High Court interpreted right to access to internet as a part of the right to education and right to privacy and not as a stand-alone right. Therefore, this right is limited in scope and other rights like freedom of expression, freedom to carry on any trade and business and freedom to assemble peacefully, over the internet may not be protected under this interpretation. Also, the judgment passed by the Kerala High Court is binding only within the jurisdiction of Kerala High Court; other State High Courts might pass a judgment contrary to it.

From the two judgments we can conclude that right to access to internet in India is far from being recognized as a fundamental right all over India in the true sense.

INTERNATIONAL POSITION ON THE RIGHT TO ACCESS INTERNET

Mr. Vinton G. Cerf, who is widely regarded as the "father of internet" has been a staunch critic of a right to internet. In his famous 2012 op-ed in The New York Times, he stated that internet access cannot be a right in itself; it can merely be considered as an enabler of rights.[31] However, many others disagreed with his views including the authors of this article.

[29] Human Rights Council Res. 26/13, U.N. Doc. A/HRC/RES/26/13, (July 14, 2014) available at: https://www.article19.org/data/files/Internet_Statement_Adopted.pdf.
[30] Vishaka & Ors. V. State of Rajasthan & Ors., AIR 1997 SC 3011.
[31] Vinton G. Cerf, Internet Access is Not a Human Right, N. Y. TIMES, (Jan. 4, 2012) available at: https://www.nytimes.com/2012/01/05/opinion/internet-access-is-not-a-human-right.html?_r=1&ref=opinion.

In July, 2014, the United Nations Human Rights Council adopted a non-binding resolution declaring those rights which people have offline must also be upheld online.[32] In June, 2016, the United Nations Human Rights Council adopted another non-binding resolution that condemned internet shutdowns by governments and deliberate disruption to internet access. It reiterated that those human rights that people enjoyed offline must be upheld online as well.[33] This UN Human Rights Council resolution effectively made free access to the internet a human right. However, this resolution is non-binding on its member and only holds persuasive value. Thus, the United Nations Human Rights Council has also recognized the importance of free internet access in upholding human rights and it can be argued that they talked of right to access to internet in the same manner they did for other freedoms and rights mentioned in the International Covenant on Civil and Political Rights (ICCPR). So in essence they de facto talked of a right to access to internet without mentioning it as a right per se.

France is the only other country in the world where the Constitutional Council, the highest constitutional court in the country declared access to internet as a basic human right or a fundamental right.[34] In 2008 the French government adopted a controversial law named HADOPI Law or Creation and Internet Law. Under this law users who shared unauthorized versions of copyrighted material would get three warnings for sharing such material. Upon fourth such violation the user would have their internet access revoked. The law was challenged before the Constitutional Council.[35] The Court ruled that access to internet is a fundamental right and can only be taken away by a court of law after it has established the guilt of the accused. The Court struck down majority of the law. It upheld the provisions for imposition of fine and other penalties for violations and made judicial review mandatory for the revocation of internet access.

Several countries in the European Union like Estonia, Spain and Finland have put in place legislation that enables access to internet under the Universal Service Directive, 2002. The aforementioned directive obligates the member states to implement universal access to telecommunication and internet subject to technological feasibility.[36] However, the Universal

[32] Supra note 27.
[33] Human Rights Council Res. 32/1, U.N. Doc. A/HRC/32/L.20, (June 27, 2016) available at: https://www.article19.org/data/files/Internet_Statement_Adopted.pdf.
[34] Ian Sparks, Internet Access is a Fundamental Human Right, Rules French Court, DAILY MAIL, (June 12, 2009) available at: https://www.dailymail.co.uk/news/article-1192359/Internet-access-fundamental-human-right-rules-French-court.html. (Page 71 Kartik Chawla paper for judgement)
[35] Conseil Constitutionnel [CC] [Constitutional Court] decision No. 2009-580 DC, June 10, 2009, Rec. 107 (Fr.).
[36] Council Directive 2002/22, art. 39, 2002 O.J. (L 108) (EC).

Service Directive has now been repealed and subsequently subsumed under the European Electronic Communications Code, 2018.[37] Thus, most of the European Union countries have adopted a policy-based approach to internet access rather than a rights-based approach.

It is our contention that the European countries have taken a policy-based route to free them from the obligation of providing internet access to all its citizens. As per the Universal Service Directive the signatories were obligated to provide internet to all its citizens through domestic legislation which in essence made internet access a fundamental right. This necessitated costly infrastructure investments and maintenance expenditure on the part of the respective governments. By adopting a policy-based approach they have freed themselves from that obligation and have weakened the right to access to internet. In our opinion this is a regressive step.

RATIONALE FOR A SEPARATE RIGHT TO ACCESS TO INTERNET AS A FUNDAMENTAL RIGHT

These days' remote surgeries are being performed by doctors through advanced surgical robots. The whole process happens over the internet, which is as important as the surgeon in the whole procedure. It can be contended that restriction of internet can potentially deprive somebody of a chance to lead a healthy life as they cannot access such medical intervention otherwise. Such a person might approach the Courts seeking remedy for the violation of their right to life though restriction on internet access.

It is not uncommon for people to form groups over the internet nowadays. Such groups are run almost entirely online. They interact and keep in touch with each other over the internet as well as carry out important functions of the group over the medium. People also, hold protests online and have virtual assemblies to protest against perceived injustices or to express their solidarity towards an issue. Many religious congregations, sermons and preaching are being conducted online as it offers greater reach. So, depriving all these people of unrestricted access to internet in effect deprives all these people of their right to freedom to form associations, freedom of peaceful assembly and even freedom of practicing their religion. Even, court hearings and filing of cases and PILs are being done online. Restricting access to internet can potentially deny people access to justice.

[37] Council Directive 2018/1972, 2018 O.J. (L 321).

The Anuradha Bhasin judgment of the Supreme Court or the Faheema Shirin judgment of the Kerala High Court does not cover these scenarios. With more internet shutdowns we can sooner or later expect people to file petitions before the High Courts and Supreme Court seeking remedy for the violations of the aforementioned freedoms due to some restriction on access to internet. In all these scenarios the Courts will have to decide on these issues separately. It will be a time-consuming process and in the end the Courts might not rule in favour of the petitioners. This does not bode well for a democracy like India. To pre-empt such a situation, it is time for India to make right to access to internet as a fundamental right.

PROPOSED RIGHT TO ACCESS TO INTERNET AS A FUNDAMENTAL RIGHT

For the proposed right to access to internet we have consulted the Charter of Human Rights and Principles for the Internet[38] by the Internet Rights and Principles Coalition. It is a network of several individuals and organizations that is based out of United Nations Internet Governance Forum and work towards upholding of human rights over the internet. For now, we are interested in the right to access to internet hence we shall consult the right to access to the internet given in the Charter. The relevant right reads as follows:

The right to access to, and make use of, the Internet shall be ensured for all and it shall not be subject to any restrictions except those which are provided by law, are necessary in a democratic society to protect national security, public order, public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Charter. The right to access to, and make use of, the Internet includes:

(a) Quality of service

The quality of service to which people are entitled access shall evolve in line with advancing technological possibilities.

(b) Freedom of choice system and software use

Access includes freedom of choice of system, application and software use. To facilitate this and to maintain interconnectivity and innovation, communication infrastructures and protocols should be interoperable, and standards should be open.

[38] Internet Rights and Principles Coalition, The Charter of Human Rights and Principles for the Internet 4th ed., 2014, available at: https://www.ohchr.org/Documents/Issues/Opinion/Communications/InternetPrinciplesAndRightsCoalition.pdf.

(c) Ensuring digital inclusion

… Active support shall be available for self-managed and other community-based facilities and services. Public Internet access points shall be made available, such as at tele-centres, libraries, community centres, clinics and schools. Access to the Internet via mobile media must also be supported.

(d) Net neutrality and equality

The Internet … architecture must be protected and promoted for it to be a vehicle for free, open, equal and non-discriminating exchange of information, communication and culture. There should be no special privileges for, or obstacles against, any party or content on economic, social, cultural, or political grounds. This does not preclude positive discrimination to promote equity and diversity on and through the Internet.[39]

The right to access to internet as given in the Charter of Human Rights and Principles for the Internet is pretty self-explanatory. They can be adopted by the Indian Constitution easily with a few changes that make it more suitable for the Indian society.

Under the clause of quality of service, a minimum internet speed can be added for an internet connection to be considered broadband. Latency and internet downtime can also be fixed within reasonable parameters to ensure quality of service. The clause of net neutrality can ensure that any particular social media platform or media aggregator is not favoured or discriminated against on flimsy grounds. We do not feel that a separate clause for data protection or privacy needs to be included in this right as they will be extensively covered under the proposed Personal Data Protection Act.

Thus, the proposed right ensures that those with internet access can continue to access internet with minimum interference from the government and also ensures that those that don't have access to internet yet are also provided with the means of doing so. Therefore, the right proposed by us is a positive right that promises to be egalitarian and non-discriminatory in its approach.

The Right to Access to Internet can therefore be included within the Indian Constitution as Article 21B with five clauses as opposed to the four clauses given in the charter. The fifth clause should include the proportionality tests as laid down in the case of *Anuradha Bhasin v.*

[39] *Id.* at 13.

Union of India. This will bring clarity to the restrictions that can be imposed by the government on the exercise of this right and prevent any arbitrary deprivation of this right.

NEED FOR INCLUDING THE PROPOSED RIGHT UNDER ARTICLE 21

As argued by Oreste Pollicino, if internet access is sought to be protected under ordinary legislation there remains a scope for such laws to be diluted by subsequent governments.[40] In the Indian context such a scenario is not too far-fetched given the frequent internet shutdowns and government censorships of sites and social media. Therefore, it is imperative that right to access to internet is introduced as a fundamental right. Hence, the proposal of inclusion of the right under article 21.

So, there might be a question as to why we should introduce the new right under 21 and not under article 19, which lays down the various freedoms. To answer this question, we will first refer to the Supreme Court judgement of *Maneka Gandhi v. Union of India*[41] delivered by a 7-judge bench of Chief Justice M. H. Beg, Justice Y. V. Chandrachud, Justice V. R. Krishna Iyer, Justice P. N. Bhagwati, Justice N. L. Untwalia, Justice S. Murtaza Fazal Ali and Justice P. S. Kailasam. The landmark judgement of Maneka Gandhi immensely widened the scope of right to life and personal liberty under Article 21. This judgement also distinguished Article 21 from Article 19. The first distinction that the Court made between Article 19 and 21 was that Article 19 was available only to the citizens of India while Article 21 applied to all people within the jurisdiction of India. The second important distinction was that, while article 19 provided for the various freedoms, the freedoms could be curtailed by the state. Whereas, Article 21 imposed limitations on what the state can do and, in a sense, prevents the state from arbitrarily curbing this right.[42] Thus, the proposed right introduced under Article 21 will cover the widest range of the population as well as make it much harder for the state to suspend even during an emergency. If it is absolutely necessary to curtail the proposed right the state can apply the test of proportionality laid down in Anuradha Bhasin which we propose to incorporate into clause 5. In this way, the people residing within India can be assured that their right to access to internet is truly secure without making any compromises with law and order or national security.

[40] *Supra* note 10.
[41] Maneka Gandhi v. Union of India and Anr, (1978) 1 SCC 248.
[42] *Id.* at 363 at ¶ 139.

Further, in the Supreme Court case of *Francis Coralie Mullin v. Administrator*[43] delivered by *Justice P. N. Bhagwati* and *Justice S. Murtaza Fazal Ali*, it was stated that right to life isn't merely limited to protection of life and limb. Right to live with human dignity also comes within its ambit and hence involves the bare necessities that are involved with having a dignified existence.[44] Thus, internet being a basic necessity in today's day and age should come under Article 21.

A further question might arise with regards to the inclusion of the proposed right under 21B. In the *Bandhua Mukti Morcha v. Union of India*[45] the Supreme Court of India held that right to education comes under article 21. In *Mohini Jain v. State of Karnataka*[46] the Court elaborated on it and held that right to education was essential for enjoyment of the rights under Article 19.[47] Subsequently, right to education again came up in *Unni Krishnan v. State of Andhra Pradesh*[48] where the Court looked at the right through the lens of directive principles of state policy. All these judgements laid the foundation for the 86th Amendment Act, 2002 which introduced Article 21A into the Indian Constitution as right to education. In the same vein, it can be argued that right to access to internet is essential not just for the enjoyment of the rights under Article 19 but also other essential rights like right to equality. Moreover, the judgements of Anuradha Bhasin and Faheema Shirin have laid the foundation for right to access to internet just as the aforementioned judgements laid the same for right to education.

Considering all the above, in our opinion, the most appropriate way of introducing a separate right to access to internet is through Article 21B.

CONCLUSION

India takes pride in being a modern democratic country with rule of law. A separate right to access to internet will only bolster that image. Citizens will be at ease knowing that they can have an assured and reliable access to internet. This will not only make the citizens more productive but also attract businesses that require a reliable internet connection for its operations. Needless to say, a fundamental right to access to internet is not just socially beneficial but economically beneficial as well.

[43] Francis Coralie Mullin v. Administrator, Union Territory of Delhi and Ors, (1981) 1 SCC 608.
[44] *Id.* at 618 at ¶ 8.
[45] Bandhua Mukti Morcha v. Union of India and Ors, (1984) 3 SCC 161.
[46] Mohini Jain (Miss) v. State of Karnataka and Ors, (1992) 3 SCC 666.
[47] Id. at 673.
[48] Unni Krishnan, J. P. and Ors. V. State of Andhra Pradesh and Ors, (1993) 1 SCC 645.

As it is, the National Digital Communication Policy can be said to be a policy-based approach taken by the government with regards to the access to internet. It just needs to walk the extra mile and bring in the legislation thus enshrining the right in the Indian Constitution. Judging from the Supreme Court and High Court verdicts it will not be long before they pass a judgment making right to access to internet a fundamental right. Therefore, legislation in this regard will not only win the government brownie points with its citizens but also endear it to other democracies which might have been questioning India's democratic credentials.

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