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Internet access and COVID-19: A constitutional argument to right to internet access in India

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Abstract--With the rapid development in the technology, there has been a greater dependence on the digital information which led to the increase in the communication technology. Further, with the greater dependence there requires a certain understanding of legal and human rights status for internet access as there is astonishing increase in the number of users of the internet. Recently in the case of Faheema Sharini V. State of Kerala¹, the Hon'ble High Court of Kerala opined that the 'right to internet access' should also be a part of Article 21 of the Constitution of India, forming a part of the right to privacy and the right to education. Despite India being considered as one of the largest democracies but the recent internet shutdowns depict a different picture altogether. For instance, the Government while exercising its powers under Section 144 of the Code of Criminal Procedure, 1973, brought the Kashmir valley under complete internet shut down for a period of 5 (five) months. However, in recent judgement of Anuradha Bhasin V. Union of India², also commonly known as the 'Kashmir internet shutdown case', the right to freedom of speech and expression under Article 19(1)(a) of the Constitution of India, and the right to carry on trade or business under Article 19(1)(g) of the Constitution of India using medium of internet, even though is constitutionally protected, however, the same is flourishing in the garb of ambiguity and uncertainty, providing the scope for certain legal loopholes which are exercised by the Government by restricting free speech and movement. The idea of this research is to analyse the scope of freedom of internet access in the State of India, in the light of Anuradha Bhasin's case (mentioned above) along with

¹ *Faheema Shirin V. State of Kerala*, WP(C)No.19716, High Court of Kerala, 2019.

² *Anuradha Bhasin V. Union of India*, W.P. (C) No. 1031, Supreme Court of India, 2019.

certain judicial pronouncements which are relevant to a digitally connected society.

Keywords---internet shutdown, internet access, freedom speech, expression, human right.

Introduction

Liberty to express one's opinions and ideas without any restraint and particularly without fear of retribution or penalty plays appreciable role in the evolvement of that certain society and eventually for that state. Therefore, at all times it should be borne in mind that the first principle of a free society, the citizens of the state should be empowered and bestowed with an unrestricted flow of words in an open congregation. As and when the mankind made development in the landscape in relation to this right, it gave birth to various modes and medium through with such right may be exercised, such as oral communication, or communication through the power of print / writing, or even through lights/ sound/ picture, etc.

Background

The construct of 'Freedom of Speech' has been distinctly protected not only within the directives of states but also by international treaties and conventions, which are including but not limited to: (i) the Universal Declaration of Human Rights ("UDHR")³; (ii) the International Covenant on Civil and Political Rights ("ICCPR")⁴; and (iii) the European Convention on Human Rights and Fundamental Freedoms ("ECHR")⁵. With the development of Information technology and the rapid dependency on the social media, which connects the entire world with the common thread of the most power tool / weapon in the world i.e. the 'internet'. The internet in today's era is regarded as an important tool for exercising the right to free speech and expression which is integral to a democratic state.

Internet access has not been legally recognized by any international legal framework or through any covenant but with recent dependency on the internet has laid the arguments that whether internet which was considered as a luxury at point is now a basic need to human beings. The advocates of this preposition reply on the Article 19(2) of ICCPR which directly does not really protects internet access but it does protect the technology used to communicate. The newest

³ *Universal Declaration of Human Right* (adopted 10th December 1948 UNGA Res 217 A(III) UHHR), Art 19 < https://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf > (last accessed on 12th June 2021).

⁴ Council of Europe, *European Convention on Human Rights and Fundamental Freedoms as amended by Protocols Nos. 11 and 14* (adopted 4th November 1950, entered into force 3rd September 1953) ETS 5 (ECHR), Art 10 < <https://www.refworld.org/docid/3ae6b3b04.html> > (last accessed on 12th June 2021).

⁵ *International Covenant on Civil and Political Rights 1976* (adopted 16th December 1966, entered into force 1976) 999 UNTS 171 (ICCPR), Art 19 < <https://www.ohchr.org/Documents/ProfessionalInterest/ccpr.pdf> > (last accessed on 12th June 2021).

member of the grand old 'Right to Freedom of Speech and Expression' – the 'Right to Internet' was first recognised in the United Nations Special Rapporteur by Fank La Rue in 2011⁶ ("UN Report"). The UN Report is considered to be a first of its kind, wherein right of internet was regarded as an integral part of the Freedom of Expression and as a vital mean of communication in the present-day era. The UN Report also emphasised upon the importance of minimizing arbitrary blocking of internet contents⁷. The UN Report takes a step ahead and also condemned the state, which imposes expressive restriction on the use of technology, specifically internet, which is necessary for functionality of a democratic society. In the case of *Cenzi and Other V. Turkey*⁸, the Hon'ble European Court of Human Right, while referring to the Article 10 of the ECHR, opined that internet blocking must bear a clear justifications and should be aligned with the legitimate purpose of aim pursued thus, recognising the importance of internet and its role in providing accessibility in communication and imparting information. Even such provision, was discussed at the United Nations ("UN") level, wherein the UN Human Right Commission ("HRC") Committee *vide* its updated general comment no. 34 on Article 19 of ICCPR⁹ stated that there exists a need for greater protection to the internet-based mode of communication.

Indian Perspective

The Constitution of India provides its citizens with the fundamental right of 'Freedom of Speech and Expression' enshrined in its Part III under Article 19(1)(a). The Indian Judiciary has always played an active role in interpreting the Fundamental Rights and including unenumerable rights within its ambit. Given the premises of this research work, colloquially speaking, such right includes a gamut of other rights which are including but not limited to: (i) the right to express his opinion; (ii) the right to solicit data and ideas; (iii) the right to receive; and (iv) the right to impart information.

Recently, in the case of *Anuradha Bhasin V. Union of India*¹⁰ which is also known as the Kashmir internet shutdown case, it was argued by the petitioner that the internet shutdown restricts freedom of speech and expression and also it restricts freedom of trade. One of the issues in the case was whether freedom of speech and expression and freedom of trade over internet comes within the purview of the fundamental rights. Though the Hon'ble Supreme Court of India in its judgement laid down that right to freedom of speech and expression under Article 19(1)(a) of the Constitution of India, and the right to carry on trade or business under Article 19(1)(g) of the Constitution of India using medium of

⁶ Frank La Rue, Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression (16 May 2011), UN Doc A/HRC/26/30.

⁷ The Commissioner's Human Rights Comment, *Arbitrary internet blocking jeopardises freedom of expression*, HRC(2017)<<https://www.coe.int/en/web/commissioner/-/arbitrary-internet-blocking-jeopardises-freedom-of-expression?inheritRedirect=true>> (last accessed on 1st march 2021).

⁸ *Cenzi and Other V. Turkey*, (2015), Application No. 48226/10 and 14027/11, ECHR 376.

⁹ International Covenant on Civil and Political Rights, Human Right Committee General Comment no. 34 (12 September 2011), CCPR/C/GC/34<<https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>> (last accessed on 12th June 2021).

¹⁰ *Faheema Shirin V. State of Kerala*, WP(C)No.19716, High Court of Kerala, 2019.

internet is constitutionally protected. In the case of *Faheema Sharini V state of Kerala*¹¹, the Hon'ble High Court of Kerala opined that the right to internet access should also be a part of Article 21 of the Constitution of India, forming an integral part of right to privacy and right to education.

Internet and COVID -19

In a recent survey conducted by 'Pew Research Centre' (*which is a nonpartisan American think tank based in Washington, D.C. It provides information on social issues, public opinion, and demographic trends shaping the United States and the world*) in April 2020, decipher that a little more than 50% of the population of the United States of America, personally finds internet as essential. Further around 34% of the population describe it as 'important, but not essential'.¹² It can rightly be stated out that when the majority of the world is away from their respective workplaces, internet acts as a tool which e-connects the world with single thread and ensures the physical safety of oneself amidst this pandemic.

Brief Timeline of COVID-19 in India

Date	Event
December 31, 2019	Wuhan Municipal Health Commission, China, reported a cluster of cases of pneumonia in Wuhan, Hubei Province. A novel coronavirus was eventually identified. ¹³
January 12, 2020	China publicly shared the genetic sequence of COVID-19.
January 30, 2020	The first COVID-19 case was confirmed in Kerala's Thrissur district after a student who had returned home for a vacation from Wuhan University in China, tested positive. ¹⁴
February 11, 2020	The World Health Organization ("WHO") named the novel coronavirus disease COVID-19.
March 11, 2020	WHO made the assessment that COVID-19 can be characterized as a pandemic
March 22, 2020	With the upsurge in the number of COVID-19 cases, the Hon'ble Prime Minister Shri Narendra Modi to observe 'Janta Curfew' from 7 AM to 9 PM, wherein no one apart from those involved with essential services were supposed to venture out of home. ¹⁵

¹¹ *Anuradha Bhasin V. Union of India*, W.P. (C) No. 1031, Supreme Court of India, 2019.

¹² Emily a Vogels and others, '53% of Americans Say the Internet Has Been Essential During the COVID-19 Outbreak' (*Pew Research Center: Internet, Science & Tech*, 30 April 2020) <<https://www.pewresearch.org/internet/2020/04/30/53-of-americans-say-the-internet-has-been-essential-during-the-covid-19-outbreak/>> accessed 30 July 2021.

¹³ 'Archived: WHO Timeline - COVID-19' <<https://www.who.int/news/item/27-04-2020-who-timeline---covid-19>> accessed 30 July 2021.

¹⁴ 'COVID-19: A Comprehensive Timeline of Coronavirus Pandemic in India' <<https://www.timesnownews.com/india/article/covid-19-a-comprehensive-timeline-of-coronavirus-pandemic-in-india/579026>> accessed 30 July 2021.

¹⁵ 'PM Addresses Nation on Combating COVID-19' <<https://pib.gov.in/pib.gov.in/Pressreleaseshare.aspx?PRID=1607248>> accessed 30 July 2021.

Date	Event
March 24, 2020	PM Narendra Modi announces a 21-day lockdown in the country in a bid to contain the spread of the novel coronavirus and asserted on social distancing. Further, all transport services – road, rail and air, - were suspended during the lockdown.
April 7, 2020	The death toll in India reached 100.
April 14, 2020	PM Narendra Modi extended nationwide lockdown till May 3, 2020, with certain relaxation in the areas that have been able to contain the spread.
May 1, 2020	The Ministry of Home Affairs, Government of India (“MHA”) further extended the lockdown period to 2 weeks and divide / classified India into 3 zones: (a) red (high coronavirus cases and a high doubling rate); (b) orange (comparatively fewer cases); (c) green (districts without any cases in the past 21 days).
May 17, 2020	National Disaster Management Authority and the MHA extended the lockdown for a period for 2 weeks.

Steps and Measures Undertaken

Every sector of the economy undertook various measures to protect its personnel from this global pandemic.

Steps by Government Department

The Central and the State Government undertook various steps, which are including but not limited to:

- a) Work from Home: The Central and the State Government as far as possible requested their employees and officers to work from home, unless otherwise required.
- b) Guidelines and Advisory: Various ministries under the Central Government in a phased manner released guidelines and advisory to be adhered by the healthcare professionals and other citizens of the country.

For instance, the Ministry of Health and Family Welfare (“MoHFW”), released various guidelines and advisories in relation to access of public places such as places of worship, shopping malls, etc. MoHFW *vide* its specialized wings such as ‘Central Drugs Standard Control Organization’, ‘National Pharmaceutical Pricing Authority’. ‘Indian Council of Medical Research’ regulated the pricing and availability of essential medicines (also classified 2ply, 3ply and surgical N95 masks and sanitizers as essential commodities under the Essential Commodities Act, 1955 *vide* notification dated March 13, 2020, bearing reference number F.No. 26(1)/2020-ECR&E¹⁶), strategized the testing mechanism, audio-video training materials, etc. Additionally, the other ministries of the Government including Ministry of Corporate Affairs, Ministry of Chemical and Fertilizers, Ministry of Finance, etc. also released guidelines for smooth functioning of the economy.

¹⁶ ‘218645.Pdf’ <<https://www.mohfw.gov.in/pdf/218645.pdf>> accessed 30 July 2021.

Steps by Indian Judiciary

The Hon'ble Supreme Court of India on April 6, 2020 has passed various directions in a *suo moto* case with respect to guidelines for the functioning of courts *via* video conferencing during the COVID-19 lockdown. A bench comprising of Hon'ble Chief Justice S.A. Bobde, His Lordship Hon'ble Mr. Justice D.Y. Chandrachud and His Lordship Hon'ble Mr. L Nageswara Rao directed NIC officials to assist High Courts with the set-up of infrastructure to handle hearings via video conferencing:

“The Supreme Court of India and all High Courts are authorised to adopt measures required to ensure the robust functioning of the judicial system through the use of video conferencing technologies; and Consistent with the peculiarities of the judicial system in every state and the dynamically developing public health situation, every High Court is authorised to determine the modalities which are suitable to the temporary transition to the use of video conferencing technologies.”

Steps by O.P. Jindal Global University

In line with Government guidelines and other educational institutions. O.P. Jindal Global University (“JGU”) in order to prioritize the health of its pupils and staff has undergone online learning mode since March 2020. Since the aforesaid date, JGU has been effectively managed to undertake online classes and lectures and even the authorities and the learned faculty of JGU is working around the clock to render the class education even through the use of internet.

Role of Internet

All the initiatives as explained in Paragraph 2, wouldn't have been successful and the whole economic activities and the educational activities would have collapsed if we wouldn't have the most important tool in this time i.e. the internet.

A situation like these, make us realize the true and real importance of internet and how crucial it is to be classified as a part of Article 19(1)(a) of the Constitution of India and how important it is required to be continuously preserved and developed.

Historical outlining of internet access

Introduction

The relevance of Freedom of Speech and Expression was discussed in the earlier chapter which defines it as right through which an individual express and communicate its view. Moreover, Freedom of expression also include right to express opinion through different medium. Internet Access outlined in the UN Report was drawn from already exiting rights of “*Right to Communication*” and “*Right to seek, receive and impart information*”. The right to seek, receive and impart information was drawn from Article 19(2) of the ICCPR. This chapter of the research tries to study the historical background of the above-mentioned rights.

Right to communicate

The idea of right to communicate was first articulated by late UN Official Jean d'Arcy in 1969. This right was later given much importance by the United Nations Educational, Scientific and Cultural Organization ("UNESCO"), which brought the idea to right to communicate in 1980 in the general conference in Belgrade. It was recognized as "*right of the public, of ethnic and social groups and of individuals to have access to information sources and to participate actively in the communication process*"¹⁷ and this was further recognised in 1981 and 1983. But this right couldn't succeed in getting a better support for recognition from other international organisation thus the movement to codify it as a right internationally failed. One of the reasons for this to become a failure was the needs for a positive recognition for this right and also the implementation of this right require obligation on state to provide a means for communication which was not supported by many states due to lack of resources. However, the failure of this movement provided a stepping stone for internet access right as given importance in the UN Rapporteur.

Right to Seek, Receive, and Impart Information

The central idea for the UN Report 2011 was the right to seek, receive and impart information which was drawn from Article 19(2) of the ICCPR¹⁸ which is:

*"...Everyone shall have the right to hold opinions without interference and everyone shall have the right to freedom of speech and expression; the right shall include freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers either orally or the form of writing or print, in the form of art, or through any other media of their choice..."*¹⁹

In order to understand the right to seek, receive and impart information, it is important to study the historical background. This right has its origin from the free flow paradigm of information.

History and Background Free Flow Paradigm of Information

The freedom of information and expression was given importance post world war II which lays its influence from the draft of International covenant and bill of right. The original idea behind the freedom of information was with regards to first Amendment and The US Congress values with growing of American media. The basis for this idea was with regards to freedom of press and exchange of idea which would help in finding and preserving the truth and would also promote

¹⁷ Records of the General Conference of UNESCO (*published on 4th October 1949, Paris*) 4 C/Resolutions 153 < <https://unesdoc.unesco.org/ark:/48223/pf0000114590>> (last accessed on 13th June 2021).

¹⁸ International Covenant on Civil and Political Rights 1976 (*adopted 16th December 1966, entered into force 1976*) 999 UNTS 171 (ICCPR), Art 19< <https://www.ohchr.org/Documents/ProfessionalInterest/ccpr.pdf>> (last accessed on 12th June 2021).

¹⁹ *Ibid.*

other fundamental rights. Also, in the early 1945, the American society of newspaper editors travelled around the world in order to create awareness with regards to the free exchange of ideas and information which they termed as “free flow doctrine”.²⁰ However free flow of information was not just propagated by the American media values but also as the both the first world war and the second world threatened the peace and tranquillity of the world.

In both first world war and the second world war, states were using censorship to restrict free flow of information and were also using war propaganda to ensure that they get support from the citizens of the country. Thus, the post war international community were concerned with regards to the peace and stability between nations. These concerns were looked into and were supported by the US and the Allies which supported the free and unrestricted flow of information and ideas globally²¹. Also, this would in turn promote both unrestricted flow of information and would also keep a check of war propaganda as freedom of expression between foreign frontiers would probably make these war propagandas ineffective. Thus, the free flow of information not only promoted peace and stability but also laid down foundations for other rights which is linked to freedom of information and expression, progress and peace²².

Free flow principles for other Rights

As discussed earlier that free flow paradigm promotes freedom of information and also promotes others rights such as freedom of expression, progress and peace thus more emphasise was paid in promoting the free flow of information across borders. This idea was mentioned in the UN’s First declaration in the resolution 59(I) which was cited as “gather, transmit, and disseminate news anywhere and everywhere without fetters”²³. Thus, freedom of information was regarded as a foundational right and it recognised all the other fundamental right which are stated in the UN²⁴. This principle was also acknowledged by the UNESCO founding constitution of 1945.

The second conference which was held with regards to freedom of Information in 1948 in Geneva by the UN Economic and Social council. The Purpose of this conference was with regards to the improvement means of sending information across frontiers. Thus, this conference laid minor changes with regards to the earlier version of freedom of information which is “freedom of information carries the right to gather, transmit, and disseminate”²⁵ this being the early version of right to seek, receive and impart information. This draft also laid emphasise of

²⁰ Cees J. Hamelink, *The Politics of World Communication: A Human Right Perspective*, Human Right Law Review 1994 Pg 293-98

²¹ *Ibid*

²² *Ibid*

²³ United Nation Declaration on Freedom of Information (published on 14th December 1946) General Resolution no.59 (I), U.N. Doc. A/RES/59/1 <<https://research.un.org/en/docs/ga/quick/regular/1>> (last accessed on 13th June 2021).

²⁴ *Ibid*

²⁵ *Ibid*.

linking with freedom of expression which is a logical connection given that freedom of press would also require free flow of information, ideas and expression so this should be considered as fundamental human right. Thus, it can be seen that this principle is linked to other rights and promote unrestricted dissemination of information²⁶.

UDHR and ICCPR

The right to seek, receive and impart information have its foundation from the early draft of the free flow of information paradigm. The UN Economic and Social Council established a commission which was responsible for the drafting of the early version of the “International bill of rights” and “International declarations or covenants” on civil liberties which formed the basis of UDHR and ICCPR. In 1947, the sub-commission set up by the Commission of Human Right on “Freedom of Information and Press” which studied both the documents of the UN General Assembly Resolution 53/(I). The language of these resolutions formed a basis for the drafting of UDHR and ICCPR which was. The language of the 1948 Conference draft on freedom of information states that:

“Everyone shall have the right to freedom of thought and expression: this shall include freedom to hold opinions without interference; and to seek, receive and impart information and ideas by any means and regardless of frontiers...”²⁷

Also, the draft for right to seek, receive and impart information also took reference from the of “Draft Declaration on Human Right” which was discussed in the conference. Article 17 and 18 of the Draft was majorly adopted by the UDHR in its official text with some minor changes to it. Article 19 of the UDHR states that:

“Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”²⁸

According to Article 19 of International Covenant on Civil and Political Rights (“ICCPR”) ²⁹states that:

“...Everyone shall have the right to hold opinions without interference and everyone shall have the right to freedom of speech and expression; the right shall include freedom to seek, receive, and impart information and ideas of all kinds, regardless

²⁶ *Ibid*

²⁷ *Ibid*

²⁸ Universal Declaration of Human Right (adopted 10th December 1948 UNGA Res 217 A(III) UHHR), Art 19< https://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf> (last accessed on 12th June 2021).

²⁹ International Covenant on Civil and Political Rights 1976 (adopted 16th December 1966, entered into force 1976) 999 UNTS 171 (ICCPR), Art 19< <https://www.ohchr.org/Documents/ProfessionalInterest/ccpr.pdf>> (last accessed on 12th June 2021).

of frontiers either orally or the form of writing or print, in the form of art, or through any other media of their choice...".³⁰

Hence, we can notice a striking similarity with the two drafts. Thus, we can conclude that the Conference draft for the Free flow of Information Paradigm laid the foundation for Article 19 of UDHR and Article 19 of the ICCPR which was later essential for the Report 2011. There were three principles which laid the foundation and forged the language of right to seek, receive and impart information which are:

- The first principle emphasised freedom of information which is linked to freedom of expression, "*freedom . . . to seek, receive, and impart information and ideas*" is included in the broader right to "*freedom of opinion and expression.*"
- The second principle Free Flow of Information, is reflected in the language codifying the "*freedom*" to "*seek, receive and impart information and ideas.*" The use of "seek," "receive," and "impart" in unison aptly reflects the multidirectional and communicative nature of information flows that are free and unrestricted.
- The third and the last principles of free flow paradigm recognise the importance of "free and accessible mass media" to freedom of expression and information. Also, the term "*through any media*" and "*regardless of frontiers*" gave importance to mass media as it is an important medium for the disseminating free flow of information.

Reading the UN Report 2011 in the light of Right to seek, receive and impart information (Free Flow of Information Paradigm)

As discussed in the earlier section that Article 19 of ICCPR and UDHR is traced from the free flow of information paradigm which was codified in the Report. Thus, the principles of free flow of information can be seen in the Report and forming the conception of the Internet Access Right.

- The first principle which is freedom of information is the foundation for other fundamental rights which is freedom of expression has been apparent throughout the report. It also links freedom of expression and right to seek, receive and impart information through the medium of internet. Thus, the exchange of ideas and information through different means is a way to freedom of expression.
- The second principle which focuses on unrestricted flow of information globally is also apparent in the report. The special rapporteur recommends that:

"There should be as little restriction as possible to the flow of information via the Internet, except in few, exceptional, and limited circumstances prescribed by international human rights law. He also stresses that the full guarantee of the right

³⁰ *Ibid.*

to freedom of expression must be the norm, and any limitation considered as an exception, and that this principle should never be reversed."³¹

- The third principles which lays emphasis on the accessible mass media for free flow of information has been the focal point of the report. The report lays down that internet is considered as an important instrument in the 21st century and it is an important means of accessing information, for facilitating active citizen participation among democratic country thus linking the idea of exchange of idea and free expression thus considering internet as a revolutionary medium for communication. Furthermore, producers of traditional media can also use the Internet to greatly expand their audiences at nominal cost.

Thus, we can conclude that all the principles of the free flow of information paradigm was accessible in the Report. With the advancement in technologies this language was later modified which was adjusted linking it which the freedom of speech and expression mentioned in UDHR and ICCPR thus creating a link between freedom of expression.

The right to communication and right to seek, receive and impart information forms the basis for the special rapporteur and forming a ground work for the right to internet access. Thus, it can be seen in this chapter that freedom of speech and expression is recognised as fundamental right and in the light of growing use of internet as a means of communication and right to seek, receive and impart information lays the basis for freedom of expression.

Internet access and international law

Introduction

Freedom to internet access has no international legal framework or conventions but as discussed in the earlier chapters that it was first mentioned in the UN Report 2011 by Special Rapporteur Frank La Rue on the promotion and protection of freedom of opinion and expression. The report emphasized on the importance of internet access thus laying a ground for a possible recognition for this right. This chapter tries to analyze internet access from the lens of international law.

Need for the Internet Access to be Possible Human Right

Internet has become a vital tool for communicating and expressing ideas and opinion through which people exercise their right to freedom of speech and expression. Internet has provided people with a medium through which they are connected even with physical barriers. The UN Human Right Committee has acknowledged free speech through internet as a medium for communication and also states should take all necessary measures in enhancing this new mode for communication. Also, Article 19 of UDHR and Article 19(1) of ICCPR also provides

³¹ Frank La Rue, Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression (16 May 2011), UN Doc A/HRC/26/30 Para 19.

for freedom of speech and expression even in case of internet. However, internet is not only regarded as just a medium for communication but it is also considered as a source of information, global business and social platform.

- Internet has been regarded as a vital source of information which provide people with wide range of resources thus helps in promoting education.
- Internet plays a crucial role in promoting one global economy as it eliminates the hindrances caused due to physical boundaries.

Need for internet access as a separate right has also been recognized by international institutions. United nation has always been upfront in supporting internet access.

World Summit on Information technology

In 2001, the UN general Resolution 56/183 proposed on holding world summit on information technology in (“WSIS”) in two phases³². The two-phase conference which was held in Geneva in December 2003 (“WSIS-I”) ³³and Tunis in November 2005 (“WSIS-II”). ³⁴The objective of WSIS-I was to establish and foster the foundation for building an information society. These principles were to establish to promote the information society for development of the goals mentioned in the UN Millennium Declaration which aims at sustainable goal development³⁵. The WSIS-II of the summits its focuses more on bringing the objectives of the WSIS-I into motion and also create awareness regarding internet governance and financial mechanism which is important for the development of a sound Information and communication technology.

The WSIS promotes the importance of information society and also laid down that states should develop Information Communication Technology. Further, it also aims at building a more inclusive society, wherein there is accessibility of information at an affordable cost. Furthermore, it also promotes development of information society in such manner that it respects human dignity which on the lines of Article 29 of the UDHR³⁶. The action plan of the WSIS also focuses on the problem of digital divide which occur due to the inaccessibility of the technology.

³² United Nation General Assembly on World Summit on the Information Society (held on 21st December 2001), A/RES/56/183, < https://unctad.org/en/PublicationsLibrary/ares56d183_en.pdf> (last accessed on 13th June 2021).

³³ World Summit on the Information Society, Geneva Plan of Action phase-I (held on 12th December 2003), WSIS-03/GENEVA/DOC/5-E, Geneva< <https://www.itu.int/net/wsis/docs/geneva/official/poa.html>> (last accessed on 13th June 2021).

³⁴ World Summit on the Information Society, Tunis Commitment phase II (held on 18th November 2005) WSIS-05/TUNIS/DOC/7-E, Tunis < <https://www.itu.int/net/wsis/docs2/tunis/off/7.html>> (last accessed on 13th June 2021).

³⁵ Millennium Summit of the United Nations (held on 6-8 September 2000) A/RES/55/2 New York< <https://www.un.org/en/development/devagenda/millennium.shtml>> last accessed on 13th June 2021).

³⁶ Universal Declaration of Human Right (adopted 10th December 1948 UNGA Res 217 A(III) UHHR), Art 29< https://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf> (last accessed on 12th June 2021).

This problem was addressed in the Geneva action plan of Para 27 which mentions Digital Solidarity Agenda which states that³⁷:

“...to overcome the digital divide, we need to use more efficiently existing approaches and mechanisms and fully explore new ones, in order to provide financing for the development of infrastructure, equipment, capacity building and content, which are essential for participation in the Information Society...”.³⁸

Thus, promoting technology at affordable cost.

UN Report 2011

The UN Report was one of the first report which recognized the importance of internet access and also laid the founding stone to be a part of freedom of speech and expression. The report laid that *“the Internet has become an indispensable tool for realizing a range of human rights”*. The report has laid emphasis to the negative and positive aspect of a right. The Report emphasized that human rights law applies to the internet as to any other medium of communication³⁹. It is also the duty of state to promote freedom of expression and provide proper infrastructure so that individual can have access to internet which can be affordable to all.

Negative aspect of a Rights is those aspect where state cannot interfere or restrict the enjoyment of a right-holder unless established by law where as positive rights are those right where the state needs to actively participate in promotion of the right. Right to internet access would probably involve both these dimension as the negative dimension of the right protects state intrusion while the positive aspect also involves in the promotion of this right⁴⁰. This has also been illustrated in the UN Rapporteur which supports people’s right to unrestricted content on the internet but also there is an obligation on state that it provides proper infrastructure for the better accessibility and connectivity to people.⁴¹ Thus, the report lays emphasis to:

- Access to Online Content (Negative aspect)
- Access to Internet Connection (Positive aspect)

³⁷ World Summit on the Information Society, Tunis Commitment phase II (held on 18th November 2005) WSIS-05/TUNIS/DOC/7-E Para 27, Tunis < <https://www.itu.int/net/ws/s/docs2/tunis/off/7.html>> (last accessed on 13th June 2021).

³⁸ *Ibid.*

³⁹ UN Special Rapporteur Frank La Rue, Report on the Promotion and Protection of the Right to Freedom of Opinion and Expression (published on 16 May 2011), A/HRC/17/27 at para 26.

⁴⁰ Penney, Jonathon W., Internet Access Rights: A Brief History and Intellectual Origins, (2011) William Mitchell Law Review 38.

⁴¹ Frank La Rue, Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression (16 May 2011), UN Doc A/HRC/26/30, at Para 9-16.

Right to internet access is linked rights of Freedom of Speech, Opinion and Expression, of Information, of Press, the Right to Association⁴². Also, in the case of *Irwin Toy Ltd. v. Quebec (Attorney General)*,⁴³ which states three values of free speech i.e. *“the value of seeking and attaining truth, participating in social and political decision making and individual fulfilment and human flourishing”*.⁴⁴ According to UN Special Rapporteur, 1998 by Abid Hussain on promotion of Freedom of Speech and Expression emphasized that *“all government should take necessary steps in promoting internet access to rural and underserved areas”*.⁴⁵ The rapporteur consistently urges States to promote universal internet access and cautions against rules limiting internet content⁴⁶.

There are certain hinderances, such as the Internet’s potential to promote the flow of information is impeded by firewalls or registration requirements, blocked websites, and ISPs interfering with the rights of Internet users⁴⁷. Many individuals have no or limited Internet access: pricing structures exclude them, rural customers are not connected, support for public access is limited and poor or elderly communities are inadequately trained⁴⁸. As freedom of expression has an obligation on state to promote and facilitate universal internet access and it is the duty of state to provide regulations for the unhindered internet access by providing better infrastructure, better pricing regime for better access to all, creating awareness about the benefits of internet use.

UN Report 2016

The UN Human Rights Council passed a non-binding follow-up report on the 2011 report criticizing the internet disruption by the governments. It has also laid importance to the rights which are given offline should also be protected online. It has also stated that, *“the importance of applying a comprehensive human rights-based approach when providing and expanding access to the Internet”*. It has also

⁴² Kartik Chawla, ‘Right to Internet Access - A Constitutional Argument’ (2017) 7 *Indian J Const L* 57.

⁴³ *Irwin Toy Ltd. v. Quebec* (1989) 1 S.C.R. 927.

⁴⁴ *Ibid.*

⁴⁵ UN Special Rapporteur Abid Hussain, Report on the Promotion and Protection of the Right to Freedom of Opinion and Expression, (published on 28 January 1998), E/CN.4/1998/40, at Recommendation 4.

⁴⁶ UN Special Rapporteur Abid Hussain, Report on the Promotion and Protection of the Right to Freedom of Opinion and Expression (published on 30 January 2002), E/CN.4/2002/75, at 6.

⁴⁷ UN Special Rapporteur Frank La Rue, Report on the Promotion and Protection of the Rights to Freedom of Opinion and Expression, 25 March 2010, A/HRC/14/23/Add.2, Addendum, Joint Declaration by the UN Special Rapporteur on the Right to Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples’ Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information, Ten Key Challenges to Freedom of Expression in the Next Decade, at para 9.

⁴⁸ International Telecommunications Union, Geneva Declaration of Principles, World Summit on the Information Society, 10 December 2003, <www.itu.int/wsis/docs/geneva/official/dop.html> (last accessed 21st March 2021).

emphasized that there should be formulation of “national Internet-related public policies that have the objective of universal access and enjoyment of human rights at their core.”⁴⁹

International Initiatives for Promoting Internet Access

Internet Governance Forum

The Internet Governance Forum (“IGF”) is to bring multi stakeholder as equals and discuss the problems in relation to public policy on internet governance⁵⁰. As internet governance was one of the aims of the WSIS-II hence the Secretary General of the United Nation in the year 2006, announced the establishment of the IGF for a period of 5 (five) years which from 2006 to 2010. The tenure of this IGF was further renewed for a period of additional 5 (five) years i.e. till the year 2015. The mandate of IGF was according to the provisions mentioned in Paragraph #71 to 80 of the ‘Tunis Action Plan’ of WSIS⁵¹.

The IGF while focusing on the issues in relation to internet governance, which is important for building a robust information society by developing efficient internet services, provides for:

- discourse between different organization engaged in internet governance;
- expert knowledge and information thus facilitating exchange of information;
- mechanism which can be use and misuse of internet that could affect the everyday use of internet. ⁵²

The annual meetings of the IGF were conducted as a regular event. Despite of the fact that there were no conclusive outcomes which resulted from these meeting, it still provided a platform wherein the discussion in relation to on-going issues pertaining to internet were conducted. In the meeting held in Vilnius in 2010, the freedom of internet freedom was elaborately discussed thus recognizing the importance of unrestricted flow of information would require freedom to internet access. There were 12 principles which were laid down which emphasize the importance of “freedom of Internet” and “net neutrality”.

⁴⁹ UN Human Rights Council, ‘The Promotion, Protection and Enjoyment of Human Rights on the Internet

(18 July 2016), UN Doc A/HRC/RES/32/13.

⁵⁰ Internet Governance Forum (established on 16th December 2006) <<https://www.intgovforum.org/multilingual/>> (last accessed on 13th June 2021).

⁵¹ World Summit on the Information Society, Tunis Commitment phase II (held on 18th November 2005) WSIS-05/TUNIS/DOC/7-E Para 71 to 80, Tunis <<https://www.itu.int/net/wsis/docs2/tunis/off/7.html>> (last accessed on 13th June 2021).

⁵² Internet Governance Forum (established on 16th December 2006) <<https://www.intgovforum.org/multilingual/>> (last accessed on 13th June 2021).

G8 Summit of Deauville

The idea of transparent, openness and freedom of internet was discussed in the G8 submit which was held in May, 2011 in France⁵³, wherein the delegates realized the importance of internet and pondered upon how it has become an integral part of individual lives and also for global economy. The Paragraph #11 of the report prepared vide this summit, emphasized upon the implementation of universal internet access. Such internet access should: (i) involve broader framework on the lines of: (a) rule of law, (b) human rights, (c) freedom of expression (which are integral for a robust democratic society); and (ii) be against arbitrary blocking or censorship by the states. Thus, initiatives should be taken for the promotion of internet freedom for better society.

International Telecommunications Union's 'Connect the World' Initiative

In addition to the above, there have been numerous policies, which seeks to provides internet access through government schemes like the International Telecommunications Union's 'Connect the World' initiative, and access of information and communication technology to around one billion people living in remote areas by the year 2015⁵⁴. "The UN Development scheme supports a 'One Laptop per Child' scheme for developing States and administers the Sustainable Network Development scheme to extend Internet access".⁵⁵

State Recognition

As mentioned earlier that it is apart from international communities, there are many states which has given recognition to internet access as a right. The following is the non-exhaustive list of countries which has provided recognition with regards to the same.

Estonia

Estonia is considered as one of the states to recognize the right to internet access. In 2000, the Estonian Parliament passed a legislation which is the Telecommunication Act which recognized the electronic communication and included within its ambit. The electronic communication network included cable, radio and another means of electronic communication giving a recognition to wireless communication⁵⁶. Thus, creating a robust and seamless wireless network

⁵³ G8 Declaration Summit of Deauville, Renewed Commitment for Freedom and Democracy (held on May 26-27 2011) <https://www.nato.int/nato_static_fl2014/assets/pdf/pdf_2011_05/20110926_110526-G8-Summit-Deauville.pdf> (last accessed on 3rd June 2021).

⁵⁴ United Nation International Telecommunication Union, Connect the World < www.itu.int/ITU-D/connect> (last accessed 21st February 2021).

⁵⁵ Stephen Tully, A Human Right to Access the Internet? Problems and Prospects (2014) 14 Human Right law review 2 Pg 175-195.

⁵⁶ Section 5 and 8, Telecommunication Act 2000(Estonia).

within the state. However, the dissemination of information is restricted to that information which are in public domain only. ⁵⁷

Finland

Finland passed a new Telecommunication Market Act in 2011 which gave recognition to internet access. Section 60(c) of the aforementioned Act, ⁵⁸internet was recognized as universal service, wherein every service provider has to provide access to every permanent residence and business with a broadband connection along with speed of at least 1mb/ps and also the internet connection provided should at reasonable and affordable rate. Thus, Finland gave a positive dimension of right to internet and also laid down duties for the services provider for the access to this right recognizing the importance of internet in this new digital era.

France

In 2009, France passed a law with regards to the online copyright infringement named La Haute autorité pour la diffusion des œuvres et la protection des droits sur Internet (“HADOPI”). HADOPI restricts the user from downloading illegal copyrighted material after two warnings. Thus, this act protects the online copyrighted material. However, HADOPI was later quashed by the Conseil Constitutionnel (“Constitutional Council”). The Constitutional Council viewed that HADOPI was a restriction on the freedom of speech and expression and it goes against the spirit of the Declaration of rights to Man and Citizen 1789 ⁵⁹which led to the amendment of the HADOPI law and thus, recognizing right to internet access with reasonable restrictions and proper judicial review.

European Union

The European Union has passed directives related to Universal Service and User’s Right in the year 2009 which was enforced on 2011. These rights were in relation to electronic communication and network services. The directives state that all European states to provide reasonable and functional internet access⁶⁰. It was mandated that these directives should be enacted into national laws within 2011. The European Union has been recognizing the importance of internet access because of which in 2011, the European Commission launched a ‘digital agenda action plan’ which ensures that by the 2020 all states should have internet access.

⁵⁷ Section 44, Constitution of Estonia 1992 amended in 2015.

⁵⁸ Section 60(c), New Telecommunication Market Act 2011.

⁵⁹ Decision No.580DC (2009) Conseil Constitutionnel, JO9675< www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/2009/decisions-pardate/2009/2009-580-dc/decision-n-2009-580-dc-du-10-juin-2009.42666.html> (last accessed on 3rd May 2021).

⁶⁰ Directive 2009/136/EC Of The European Parliament And Of The Council of 25 November 2009 Amending Directive 2002/22/EC On Universal Service And Users' Rights Relating To Electronic Communications Networks And Services.

Thus, we can conclude by saying that these international laws are only applicable, if states around the world takes measures in implementing them and international policy do fall short in implementing these rights.

Freedom of internet access: Indian perspective

Introduction

This part of the research will understand that the “right to internet access” has been interlinked by the Indian judiciary with the much talked about Article 19(1)(a) of Constitution of India, dealing with the ‘right to freedom of speech and expression’. The horizon and ambit of such fundamental right, as provided under Article 19(1)(a) has been widened in past *vide* inclusion of certain additional rights, which are including but not limited to: (a) ‘Right to Know’⁶¹; (b) ‘Right to Publish’⁶²; (c) ‘Right to Disseminate and Circulate Information’⁶³, (d) ‘Right to Communicate’⁶⁴, etc.

Further, to put light on such wide scope of Article 19(1)(a), the Hon’ble Supreme Court of India in a landmark case of People’s Union Civil Liberties & Anr. V. Union of India⁶⁵, opined that:

*“...the fundamental rights enshrined in the Constitution of India such as, right to equality and freedoms have no fixed contents. From time to time, this Court has filled in the skeleton with soul and blood and made it vibrant. Since last more than 50 years, this Court has interpreted Articles 14, 19 and 21 and given meaning and colour so that nation can have a truly republic democratic society. This cannot be undone by such an Ordinance/Amended Act..”*⁶⁶

To corroborate the aforementioned obiter dictum, the Hon’ble Supreme Court also made reliance on one of the most talked judgement in the history of development of Constitutional Law i.e. Kesavananda Bharati V. State of Kerala⁶⁷, wherein Hon’ble Justice (Mr.) K.K. Mathew opined that:

*“...fundamental rights themselves have no fixed content, most of them are empty vessels into which each generation must pour its content in the light of its experience...”*⁶⁸

The issue of judicial expansion of fundamental rights was also discussed at length by the Hon’ble Supreme Court of India in the case of Pathumma V. State of Kerala.⁶⁹

⁶¹ *State of U.P V. Raj Narain & Ors.* A.I.R. 1975 865; (1975) 3 S.C.R. 333.

⁶² *Sakal Papers (P) Ltd., and Others V. The Union of India* A.I.R. 1962 S.C. 305.

⁶³ *Secretary, Ministry of Information and Broadcasting, Government of India V. Cricket Association of Bengal* 1995 (2) S.C.C. 161.

⁶⁴ *Ibid.*

⁶⁵ *People’s Union Civil Liberties & Anr. V. Union of India* A.I.R. 2003 S.C. 2363.

⁶⁶ *Ibid.*

⁶⁷ *Kesavananda Bharati V. State of Kerala* (1973) 4 S.C.C. 225.

⁶⁸ *Ibid.*

Drawing an analogy from the judicial pronouncements cited above, we may note a trend that the Indian Judiciary has time and again emphasised that new rights need to be incorporated and given recognition as it is capable of reading into new law with changing times and needs of the society at large.

Purpose of Freedom of Speech and Expression

To understand the incorporation of new rights we need to analyse the purpose of right to freedom of speech and expression. The concept of free speech can be compartmentalized under 2(two) broad heads i.e. (a) First: Speech which is instrumentalist; and (b) Second: Speech which is non- instrumentalist.⁷⁰ The former talks about the values and benefits that revolves around free speech whereas the latter talks about the importance of free speech is sufficient enough irrespective of benefits and harms. We have noted a trend that the Indian jurisprudence is much more inclined towards instrumentalist approach, wherein the arguments should be made emphasising the need, it will do. The sub-sets of Article 19(1)(a), as discussed in the first paragraph of this Chapter is further elaborated hereinbelow:

Right to Know: Right to know is also considered as one of the many sons of the mother provision i.e. Article 19(1)(a). The courts have explicitly dealt with this right under various judgments, such as in the case of *Indian Express Newspapers (Bombay) (P) Ltd. & Ors. V. Union of India & Ors.*,⁷¹ the Hon'ble Supreme Court of India, opined that:

*"...Freedom of expression, as learned writers have observed, has four broad social purposes to serve: (i) it helps an individual to attain self-fulfilment, (ii) it assists in the discovery of truth, (iii) it strengthens the capacity of an individual in participating in decision-making and (iv) it provides a mechanism by which it would be possible to establish a reasonable balance between stability and social change. All members of society should be able to form their own beliefs and communicate them freely to others..."*⁷²

In this way the Hon'ble Court expanded the purview of freedom of speech and expression and included 'Right to Know' within the ambit of Article 19(1)(a) and this lays more emphasis to the instrumentalist side. This can also be extended to right to internet access as internet is a medium through which an individual can acquire a plethora of information and it is also important to have unrestricted flow of information which would help an individual in making an informed decision.

⁶⁹ *Pathumma V. State of Kerala* (1978) 2 S.C.C. 1.

⁷⁰ Udai Raj Rai, *Fundamental Rights and Their Enforcement*, 32 (2011). Also see Gautam Bhatia, *Karnataka's Amendments to the Goonda Act Violate Article 19(1)(a), Indian Constitution and Philosophy blog* (published on Aug. 5, 2014) <<https://indconlawphil.wordpress.com/2014/08/05/kamatakas-amendmentsto-the-goonda-act-violate-article-191a/>> (last accessed on 2nd June 2021).

⁷¹ *Indian Express Newspapers (Bombay) (P) Ltd. & Ors. V. Union of India & Ors* (1985) 1 S.C.C. 641.

⁷² *Ibid.*

Freedom of Speech and Expression: A Medium-neutral right

Right to Freedom of speech and expression has been considered as a medium neutral right. There are numerous cases which support this argument like in the case of *S. Rangarajan v. P. Jagiivan Ram and Ors*,⁷³ where it was stated by the court that an individual has the liberty to freedom of speech and expression in “*writing, painting, picture or through any other medium*”.

Right to Publish: Right to publish is another soldier in the army of Article 19(1)(a), which protects the integrity of the unscripted 4th pillar of the Indian democracy i.e. the ‘Media’. Such 4th pillar, has undergone various changes in shape and form, while holding the hands of the up surging technological advancements. It is to be noted that such medium / mode stands only second to the actual news, as the purpose of this right is to impart awareness amongst masses by the use of legitimate modes. This understanding was further discussed in the case of *Zee Telefilms Ltd. & Anr. V. Union of India & Ors*⁷⁴ wherein the Court did not restrict the ambit of the freedom of speech and expression to just informational, artistic and scholarly endeavours, but noted that that the right to freedom of speech and expression also includes the right to educate, to inform and to entertain, and also the right to be educated, informed and entertained. The Hon’ble Court has also stated that right to free speech and communication include any media that is available thus including other medium as well. The court in the case of *S. Rangarajan v. P. Jagiivan Ram and Ors*⁷⁵ has stated that freedom of speech and expression include “*freedom of communication*” and “*right to propagate or publish opinion*”.

Right to Disseminate and Circulate Information: In a free democracy, the citizens of the nation have a right to speak, express and publish their views and circulate their ideas among themselves. The Indian judiciary has multiple occasions dealt with this right and emphasised the idea of freedom of press and right to publish, disseminate, circulate newspaper to propagate ideas within the ambit of Article 19(1)(a) of the Constitution of India, dealing with the freedom of speech and expression. The case of *Sakal Papers (P) Ltd. & Ors etc. V. Union of India*⁷⁶ and *Bennett Coleman and Co. & Ors. V. Union of India & Ors*⁷⁷, plays the part of such pack of such judicial pronouncements. This right whilst laying down the foundation for protection of freedom of press, which is considered as an important medium for exercising these rights. This understanding was further strengthened *vide Romesh Thappar V. State of Madras*⁷⁸ where the liberty of circulating the publication was given the same importance as publication itself and laid that without circulation, publishing would have little value. One of the most important case regarding freedom of press is *Secretary Ministry of Information and*

⁷³ *S. Rangarajan v. P. Jagiivan Ram and Ors*, (1989) 2 S.C.C. 574.

⁷⁴ *Zee Telefilms Ltd. & Anr. V. Union of India & Ors* A.I.R. 2005 S.C. 2677.

⁷⁵ *S. Rangarajan v. P. Jagiivan Ram and Ors*, (1989) 2 S.C.C. 574.

⁷⁶ *Sakal Papers (P) Ltd. & Ors etc. V. Union of India* 1962 A.I.R. S.C. 305.

⁷⁷ *Bennett Coleman and Co. & Ors. V. Union of India & Ors* (1972) 2 S.C.C. 788.

⁷⁸ *Romesh Thappar V. State of Madras* 1950 S.C.R. 594.

Broadcasting, Govt. of India & Ors. V. Cricket Association of Bengal & Ors,⁷⁹ where this right was explicitly included under Article 19 and the Hon'ble Supreme Court of India opined that press is an important aspect in expressing oneself also contributing to the ideas of public debate which is critical for a vibrant democracy.

In the case of Union of India V. Naveen Jindal & Anr.⁸⁰ the Hon'ble Supreme Court of India opined that: "...the right to impart and receive information by air waves and otherwise is a species of the right of freedom of speech and expression..."⁸¹, the crucial part here being the Court's usage of the phrase 'and otherwise'.

Thus, we may hereby draw and analysis that the freedom of speech and expression and freedom of press is a crucial and fundamental right, forming an integral part of the Article 19(1)(a) i.e. the right to freedom of speech and expression.

Going further, it is pertinent to note that such freedom of press *inter-alia* includes "...the freedom to communicate or circulate one's opinion without interference to as large a population in the country as well as abroad as possible to reach"⁸² which directly supports right to freedom of internet access.

Relevance of Freedom of Internet Access

As discussed above that judiciary expanded the constitutional jurisprudence of freedom of expression thus inculcating and recognising the role of different medium of expression. However, the idea of right to internet access and the scope of it is a separate and complex content altogether and it does need a separate examination especially with the threads due to criminalisation of legitimate expression or arbitrary blocking by the private or government sources. With the recent increase in the internet shutdown which has been taking place in the country has called for better and more impeccable need for the right to internet access. Though the Indian judiciary has been quite pro-active in recognising the right to internet access yet it is important to study and the analyse the scope which pertains this right. Recently, the Supreme Court of India has given recognition to internet access in two judgements which has been discussed below:

Faheema Shirin V. State of Kerala⁸³

The High Court of Kerala: Internet as an Integral Part of the Education Facts in Brief:

⁷⁹ *Secretary Ministry of Information and Broadcasting, Govt. of India & Ors. V. Cricket Association of Bengal & Ors* (1995) 2 S.C.C. 161.

⁸⁰ *Union of India V. Naveen Jindal & Anr* A.I.R. 2004 S.C. 1559.

⁸¹ *Ibid.*

⁸² *Secretary Ministry of Information and Broadcasting, Govt. of India & Ors. V. Cricket Association of Bengal & Ors* (1995) 2 S.C.C. 161.

⁸³ *Faheema Shirin V. State of Kerala*, WP(C)No.19716, High Court of Kerala, 2019.

- a) The petitioner, Faheema Shirin, a female student at Sree Narayaguru College (“SNC”) challenged the new regulations at the SNC girl’s hostel, which restricted the use of mobile phones within the hostel premises for a particular duration of day.
- b) The petitioner approached the Deputy Warden, the Matron and the Principal, in relation to this arbitrary rule and further informed the SNC authorities that the restriction is causing inconvenience amongst students and hence could not be abided by them.
- c) The SNC authorities in lieu of such compliant by the petitioner, directed her to either comply with the impugned rule or vacate the hostel premises immediately.
- d) In the given matter, the executive director of SFLC was added as a third party. SFLC is an organisation which helps women provide protection to rights on the digital world. It was contended by SFLC in its affidavit that it is important to realise the right to internet is crucial and restrictions on this right would hamper with freedom of expression.

Case in Contravention to Applicable Law⁸⁴:

- a) The petitioner contended that the restrictions with regards to the use of mobile phones were only enforced in the women’s hostel. The new regulations were in clear violation of the UGC provisions with regards to gender discrimination (clause 5). Thus, the arguments proposed by the petitioner was that these restrictions created hinderance with the quality of education of female students, also these restrictions were arbitrary and unreasonable in nature. Adding to this, these restrictions also violated international conventions against gender discrimination i.e. Convention on Elimination of all forms of Discrimination Against Women (“CEDAW”),⁸⁵ the Beijing Declaration ⁸⁶and the Universal Declaration of Human Rights.
- b) The regulations imposed were in clear contradiction of the state’s recognition to internet access being regarded as basic human right. They also stood in stark contrast with the state’s policy to make internet available to all citizen which is “mobile first approach for e-governance services” under the Digital Kerala Vision. The regulations were also in contraction with the State and Education Department’s vision of promoting digital learning through mobile and tablets.
- c) The petitioner also contended that the new regulations were in violation of Article 19(1) of the Constitution of India as right to internet access forms a part of freedom of speech and expression. Also, the restrictions imposed

⁸⁴Case Analysis- Faheema Shirin V. State kerala<<https://globalfreedomofexpression.columbia.edu/cases/shirin-r-k-v-state-of-kerala/>>(last accessed on 2nd June 2021).

⁸⁵ UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women* (Published on 18 December 1979), UNTS 1249/ 13<<https://www.refworld.org/docid/3ae6b3970.html>> (last accessed on 13th June 2021).

⁸⁶ United Nations, *Beijing Declaration and Platform of Action (adopted at the Fourth World Conference on Women 27 October 1995)* <<https://www.refworld.org/docid/3dde04324.html>> (accessed 23 June 2021).

were arbitrary and unreasonable in nature which does not come within the ambit of 19(2) of the Constitution of India i.e. “Reasonable Restrictions”.

- d) The petitioner argued that as only women were being subject to this arbitrary restriction so this resulted in the violation of their freedom of expression as held in the case of *Ministry of Information and Broadcasting V. Cricket Association of Bengal & Anr.*⁸⁷ It was also contended that “...the UGC Regulation 2016 (Credit Framework for Online Courses through SWAYAM) advised Universities to identify online courses for which students could receive credits, but the impugned policy deprived students of their opportunity to have access to the SWAYAM Platform...”⁸⁸.
- e) This restriction was against the Freedom of Speech and Expression as this was against any authority and basis and also confiscation of mobile phones was an infringement to right to property under Article 300A of the Constitution of India.⁸⁹

Decision Overview

- a) The Hon’ble High Court of Kerala in this case opined that restriction with the use of mobile phones are clear infringement with “right to education” and “right to privacy of a student”, as internet today has become an integral part of education and any restriction on that would hamper with the education of the student.
- b) The Hon’ble Court, directed SNC to amend the policy in relation to providing digital access and also not to discriminate on the basis of gender also asked the college to re-admit the student and the basing the suspension as unwarranted and also declaring that right to internet access should be integral part of Fundamental Right and adding this right to “Article 21 of the Constitution of India” forming part in right to privacy and education.
- c) The Hon’ble High Court observed the following:
 - i) That, the students at college level are mature enough to understand the misuse of internet and capable enough to take responsibility for the same. Further, internet is a tool to access e-resources and also the online courses provided by UGC which would enhance their knowledge. Thus, the students should be allowed to use mobile phone for internet access for educational purpose “to acquire knowledge from all available sources” in order to “achieve excellence and enhance the quality and standard of education.”⁹⁰
 - ii) The resolution 23/2 adopted by the Human Right Council ⁹¹talks about the importance of freedom of Expression on digital portal for women empowerment so that there is equal participation thus emphasising the

⁸⁷*Ministry of Information and Broadcasting V. Cricket Association of Bengal & Anr* (1985) 1 S.C.C. 641.

⁸⁸ *Faheema Shirin V. State of Kerala*, WP(C)No.19716, High Court of Kerala, 2019.

⁸⁹ Article 300A, Constitution Of India

⁹⁰ *Faheema Shirin V. State of Kerala*, WP(C)No.19716, High Court of Kerala, 2019.

⁹¹ UN Human Rights Council, *The role of freedom of opinion and expression in women's empowerment: resolution* (adopted by the Human Rights Council, 24 June 2013) A/HRC/RES/23/2, <<https://www.refworld.org/docid/53bd1c254.html>> (accessed 24 June 2021)

importance of online communication. The court relied on international conventions like the resolution 26/13 which states that “*the promotion, protection and enjoyment of human life on the internet*” thus emphasising the role of state in prompting in provide access to internet as it is means for enhancing knowledge and also promoting education and also that international conventions and treaties should be parallel to the fundamental rights which are enshrined in the Constitution of India in a situation if a where there is no domestic law with this regards⁹².

- iii) The Court recalled *S. Rengarajan and others V. P. Jagjivan Ram*⁹³, which found that:

*“censors should be responsive to social changes and they must go with the current climate, freedom of expression which is legitimate and constitutionally protected, cannot be held to ransom by an intolerant group of people and can be reasonably restricted only for the purposes mentioned in Article 19(2) and the restriction must be justified on the anvil of necessity”.*⁹⁴

Thus, these reasoning were looked into for providing a better and more accepting policies with regards to internet and also asked the authorities to pay more heed to modern technologies for providing education.

Key Findings:

To conclude, the court laid down that the new regulations with regards to the usage of mobile phone and also confiscation of the same during study hours was “*absolutely unwarranted*”. The court also looked into the UN and HRC resolutions which emphasised that right to internet access is a “*fundamental freedom and a tool to ensure right to education*”, and “*a rule of instruction which impairs the said right of the students cannot be permitted to stand in the eye of the law.*”⁹⁵

Therefore, the new hostel regulations violated fundamental rights to education as well as the infringed with privacy rights of students as this may result in the “*adversely affecting the future and career of students who want to acquire knowledge and compete with their peers.*”

Anuradha Bhasin V. Union of India⁹⁶

The Hon’ble Supreme Court of India recognised Internet as a Fundamental Right under Article 19(1)(a).

Facts in Brief and Contravention to Applicable Law:

- a) On August 5, 2019, the Government of India issued a Constitutional Order number 272, 2019, thus stripping Jammu and Kashmir of its special status that has been included in the constitution since 1954. The constitutional

⁹² *Vishaka & Ors v. State of Rajasthan & Ors* AIR 1997 SC 3011. Also see Article 51 and 253, Constitution of India 1950.

⁹³ *S. Rengarajan and others V. P. Jagjivan Ram* (1989) 2 SCC 574.

⁹⁴ *Ibid*

⁹⁵ *Ibid*.

⁹⁶ *Anuradha Bhasin V. Union of India*, W.P. (C) No. 1031, Supreme Court of India, 2019.

order made the state subservient to the all provisions of constitution of india and modified Article 367 for its application to Jammu and Kashmir.

- b) In furtherance to the aforementioned order, the government started restricting online communication thus creating a hinderance to freedom of expression. The government-imposed restriction on the same date of the order with regards to suspension of internet networks, mobile phone and landlines also, District Magistrate imposed additional restriction with regards to Section 144 of the Code of Criminal Procedure, 1973. Thus, restricting the citizens with the fundamental right to freedom of expression and movement.
- c) Due to such restrictions (“Restrictions”) because of which the ability of movement of journalists and their ability to publish were challenged in court of law as it violated Article 19 of Constitution of India, which guarantees the Right to Freedom of Expression and Freedom of Movement.
- d) On the of Basis this Restriction, the first petitioner Ms. Anuradha Bhasin, the editor of the Kashmir Times Srinagar Edition contended that the internet is essential for the modern press and there by shutting it down due these restrictions would lead to a “grinding halt” to the print media altogether.
- e) The second petitioner Mr. Ghulam Nabi Azad, a Member of Parliament, contended that basis of such restrictions should be more “objective” in nature rather than basing the it on mere” conjectures”. Furthermore, the official orders passed by the state should be published as transparency should be maintained by the state. As per Article 365 of the Constitution of India, state of emergency could only be declared by the authorities during the times of “internal disturbance” and “external aggression”. In the present situation, state justifying restriction on this argument is baseless. The petitioner seeks quashing of all the order and restoring all mode of communication in the region.

Decision Overview

- a) The issue which is to be looked here is whether the internet shutdown or the restrictions imposed by the state violated the freedom of speech and expression. In this case the Hon’ble Supreme Court of India referred to its earlier judgements where the right to freedom of expression has extended its jurisprudence to new medium of expression with the changing times. Like in the case of *Indian Express vs Union of India*,⁹⁷ (mentioned above) the court recognise the freedom of print medium. In *Odyssey Communications Pvt. Ltd. V. Lokvidayan Sanghatana*,⁹⁸ “*it was held that the right of citizens to screen films was a part of the fundamental right of freedom of expression*”. The court recognises the evolution of technology and incorporated different medium though right to internet access should be a fundamental right. Though the aspect, whether right to freedom of internet be considered as a fundamental right was not examined in the captioned case. The court ruled that freedom of speech and expression through internet medium is an

⁹⁷ *Indian Express Newspapers (Bombay) (P) Ltd. & Ors. V. Union of India & Ors* (1985) 1 S.C.C. 641.

⁹⁸ *Odyssey Communications Pvt. Ltd. v. Lokvidayan Sanghatana* (1988) 3 SCC 410.

integral part of Article 19(1)(a) of the Constitution of India and any restriction with regards to suspension of this right should be in consonance with Article 19(2) of the Constitution.

- b) The court further emphasised in the aforementioned case that the Constitution of India lays down certain restrictions mentioned in the Article 19(2) which states that there are certain restrictions as to Freedom of Speech and Expression but these restrictions should also be reasonable proportionate and not arbitrary in nature as. It was stressed that these restrictions should be a standard test and should not go beyond the necessary measure. Having said that the court emphasised the need for a balancing approach so that national security and liberty of rights are not overlapping each other. With this in mind, the Court defined proportionality as the question of whether “While exercising restrictions on fundamental right, it is the duty of the legislator or the administrator that they apply the least or appropriate restrictive measure so that the purpose or objective of the legislation is achieved”.⁹⁹
- c) The court relied on the judgement of Germany, Canada and India in terms of defining the test of proportionality. There is comparative analysis of the test which is drawn from the German Federal Constitutional court and Oakes test ¹⁰⁰by the Canadian Counterpart court:
- d) The court laid down following 4 prong test of proportionality¹⁰¹:
 - i) The goal of the restriction must be legitimate (legitimate goal test).
 - ii) The restriction must be necessary and authorities have no alternative measures (necessity test).
 - iii) Measures undertaken should be rationally connected to the purpose of the restriction imposed (Rational connection stage).
 - iv) The proper relation between the purpose and restriction and it should be in lesser degree (balancing stage).
- e) The Court added that in order to stand an emergent situation, the degree of restriction and scope of such restriction must be necessary. It must also comply with the territorial jurisdiction and also must be temporary in nature. According to the concept of proportionality, the following must be taken into consideration: i) territorial extent of the restriction; ii) nature and duration of the restrictive measure; iii) state of the emergent situation and iv) urgency of the matter. ¹⁰²
- f) The court rejected the state’s justification for banning internet as there are no technologies for selectively blocking internet services as this would provide unauthorised power with the state to impose ban thus emphasising on the principles of proportionate restriction over the speech and expression on internet. However, the Court conceded that there was “ample merit in the contention of the Government that the internet could be used to propagate terrorism thereby challenging the sovereignty and integrity of India” ¹⁰³and thus it had to determine the extent to which the restriction burdened free speech.

⁹⁹*Chintaman Rao and Ors. vs. State of Madhya Pradesh* AIR 1951 SC 118.

¹⁰⁰*R. v. Oakes* (1986) 1 SCR 103 (Can) SC.

¹⁰¹*Modern Dental College & Research Centre v. State of Madhya Pradesh* (2016) 7 SCC 353.

¹⁰²*Anuradha Bhasin V. Union of India*, W.P. (C) No. 1031, Supreme Court of India, 2019, Para 71.

¹⁰³*Ibid*, Para 76.

- g) The court analysed both substantial and procedural arguments to check the legality of internet shutdown. The Suspension Rules under Section 7 of the Indian Telegraph Act which allows the government to suspend telecommunication services including internet services under certain safeguards. In furtherance to the argument, according to the section 5(2) of the Telegraph Act¹⁰⁴, suspension orders can only be permitted in a situation of “public emergency” or “in the interest of public safety”. As the phrase public emergency has not been well defined under the telegraph act thus phrase has been referred for its usage and in connotation with the phrase “in the interest of public safety.”¹⁰⁵
- h) The definition of emergency varies as the court relied on various international sources like Article 4 of ICCPR ¹⁰⁶states that “*in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed...*”. ¹⁰⁷Also referring to Article 15 of ECHR ¹⁰⁸which states that “*in time of war or other public emergency threatening the life of the nation*”. ¹⁰⁹Thus, we can infer that “public emergency” is supposed to be taken in a very serious nature and also it should be analysed on a case to case basis.

Key Findings

Thus, on the basis of above findings the court concluded that:

- a) Freedom of Expression and Freedom to carry on any trade, business and profession through internet medium is constitutionally protected.
- b) The government has to prove the necessity for the suspension of internet services and also provide a temporal limit for the same which in this case it fails to do so. Thus, the court ordered to lift the unnecessary suspension which did not had a temporal limit.
- c) Section 144 of CrPc could not be imposed just to suppress freedom of expression and any such restriction comes within judiciary scrutiny. Thus, the court ordered to review its restriction.

After analysing the aforementioned judgements, we can conclude that the scope of freedom of internet access is limited in India. Even though the Bhasin judgement did lay down precedent for future purposes yet the court did not declare the internet blockade as unconstitutional entirely. The Hon’ble Supreme Court of India asked the state to review the necessity to block the internet services by weekly publishing report, which gave the state leeway simply publish report weekly under TRAI internet rules 2017. Internet access as a fundamental right is very limited.

¹⁰⁴Section 5(2), Indian Telegraph Act 1885.

¹⁰⁵ *Anuradha Bhasin V. Union of India*, W.P. (C) No. 1031, Supreme Court of India, 2019, Para 91

¹⁰⁶ International Covenant on Civil and Political Rights 1976 (adopted 16th December 1966, entered into force 1976) 999 UNTS 171 (ICCPR), Art 4.

¹⁰⁷ *Ibid.*

¹⁰⁸ Council of Europe, European Convention on Human Rights and Fundamental Freedoms as amended by Protocols Nos. 11 and 14 (adopted 4th November 1950, entered into force 3rd September 1953) ETS 5 (ECHR), Art 15.

¹⁰⁹ *Ibid.*

Conclusion and Suggestions

Conclusion

In a civilized society expression through speech is basic right guaranteed by the constitution. In this modern arena, the interpretation of the word “expression” has been given a broader connotation thereby propagating one’s opinions by scripting or through audiovisual mediums, through commercials and through any other broadcasting means. In a democratic setup these rights have been extended to include right to information, freedom of press etc., thereby insuring transparency and fairness.

As discussed earlier in the research, that the freedom of speech and expression has always expanded its scope and included innumerable rights thus giving recognition to new rights which evolved with passage of time. One such right is ‘Right to Freedom of Internet Access’. Importance of internet freedom with a span of time has gained momentum within the international community and is gradually getting recognized a vital part of sustainable development goals.

In India, Internet can be regarded as a new fuel for economy and society and to protect and develop the same the Government in the process of undertaking numerous regulatory / legislative reforms which are including but not limited to:

- a) Digital India Programme: The Government is undertaking the promotional activity in relation to internet governance for the purpose of improving efficiency of Governmental services,
- b) National Optic Fibre Network ¹¹⁰Plan: The plan was approved in the year 2011 for the purpose of providing broadband connectivity to all panchayat, basis the National E-Governance plan of 2006¹¹¹,
- c) Setting up of E-Kiosk: Government has and is set-up (setting up) common service centres or ‘e-kiosk’ in collaboration with private sector.

The role of judiciary in this regime is also extreme substantial as it has recognized the importance of internet access with the aforementioned which broadens the contours of Article 19 of Constitution of India. However, it is to be noted that this right is preceded with the word freedom and not “liberty” meaning that it is not conclusive and is subjected to restrictions which may be imposed as per the said article thereby limiting the scope for freedom of internet access.

Recommendations

In the aforesaid deliberations, efforts have been put to understand the various provisions of Freedom of internet access in national and international scenario.

¹¹⁰ Bharat Net, *National Optic Fibre Network* (initiated on 25th October 2011) < <https://vikaspedia.in/e-governance/digital-india/national-optical-fibre-network-nofn> > (last accessed on 18th June 2021).

¹¹¹ Ministry of Electronic and Information Technology, *National E-Governance Plan* (initiated in 2006) < <https://meity.gov.in/divisions/national-e-governance-plan> > (last accessed on 18th June 2021).

On the basis of finding and resources available, following are the suggestions with regards to 'Right to Internet access':

- a) International Synchronization: The international human rights instruments offer good information in cases relating to internet freedoms, it is prudent for the principles enshrined in the international law to be recognized more widely and applied by national courts, taking into account local laws, traditions, circumstances and needs.
- b) Express Definition: To stand the test of reasonableness the law must define it expressly. The procedural reasonableness requires that any opportunity provided to the party concerned must be real and effective. In the Bhasin judgement (ref. Paragraph #2.1.2 of Chapter 3), the Hon'ble Supreme Court of India laid down directives for internet shutdown in accordance with the principles of reasonableness and proportionality. As there is no concrete definition with regards to the proportionality test, thus there needs to more clarity in terms of that.
- c) Constitutional Protection: As right to internet has been included under Article 19(1)(a) of Constitution of India which limits the scope for internet access. Recently, the hon'ble High Court of Allahabad passed an order related to the suspension of internet services in Uttar Pradesh in a *suo moto* public interest litigation. The court opined that right to internet is an extension to right to live in present era. This judgement did bring into light that whether right to internet could flow from Article 21 as an independent right like Right to Education (Article 21A). As right to education was given an independent status by broadening the scope of Directive Principles of State Policy. Similarly, right to internet could also be given an independent status along the lines of this argument which would create a negative obligation on state.
- d) Guidance from Foreign Jurisdiction: Following the footsteps of Estonia and Finland where right to internet access was given a positive dimension and internet was recognised as a universal service. Similarly, India could also give this right a positive dimension which would create a positive obligation on state to provide minimum standards and good quality internet access.

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