THE TRYST OF INTERNET ACCESS AND FUNDAMENTAL RIGHTS

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I. DEVELOPMENT OF ARGUMENT

> "*At a time when an increasing number of governments are seeking to control and censor the internet, the international community's reaffirmation that the same rights we enjoy offline must be protected online is crucial […] The cross-regional support this resolution has received underscores the universality of the right to free expression, and the importance of an internet that is truly global, free and open […]"*[1]
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> ~Thomas Hughes, United Nations Human Rights Council (UNHRC)

Internet as a technology possesses immense significance in our everyday life. The advocation to make internet access as a human right is an old battle. In one of the French judgments, the highest court of France opined that access to internet is a human right and web is an essential tool for the liberty of communication and expression.[2]Undoubtedly, internet is one of the most powerful instruments of the 21st century for increasing transparency in conduct of the state, access to information, and for facilitating active citizen participation in building democratic societies. The State of Kerala has also declared universal internet access a human right and advocates for peoples' universal access. In the EU, the 'WiFi4EU' initiative aims to deliver free WiFi in the region by the end of 2020. Facebook's "Free Basics" program, promised free internet access to a select number of Facebook-curated websites in some countries before being derailed and criticized in India for violating net neutrality.

But remarkably the differentiation is found in the conceptualisation of fundamental right, constitutional right, human right and a legal right. The perfect example can be the 'right to property'. After the forty-fourth constitutional amendment, 'right to property' is now a constitutional right[3] and no more a fundamental right. The courts have also recognised it to be in the realm of human right.[4]Analogous to this, the main proposition of this article is, *whether and can 'access to internet' be a fundamental right, or a constitutional right, or a recognised human right or rather a legal right?*

This article will contextually and succinctly touch upon the major legal developments in India, test arguments in favour and against the proposition,and the prospects of recognition of "access to internet" as a 'fundamental right' in particular. Delimiting itself to the preceding proposition,

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[1]*UNHRC maintains consensus on internet resolution*, ARTICLE 19.ORG (Jul. 9, 2018), https://www.article19.org/resources/un-hrc-maintains-consensus-on-internet-resolution/.

[2]Ian Sparks, *Internet access is a fundamental human right, rules French court*,DAILY MAIL (Jun. 12, 2009),https://www.dailymail.co.uk/news/article-1192359/Internet-access-fundamental-human-right-rules-French-court.html.

[3]Bishamber v. State of Uttar Pradesh, AIR 1982 SC 33.

[4] Tukaram Kanna Joshi v. M.I.D.C., AIR 2013 SC 565

the article won't opine on the vires of order under Temporary Suspension of Telecom Services (Public Emergency or Public Safety) Rules, 2017 and S. 144 of Code of Criminal Procedure.

II. COUNTERVAILING STATE CONCERNS, ACCESS TO INTERNET AND THE RIGHTS

Reinstituting with the prologue, emphasis is placed upon *Anuradha Bhasin and Anr. v. Union of India and Ors.*[5]in which Supreme Court had the opportunity to decide, *whether the freedom of speech and expression and freedom to practise any profession, or to carry on any occupation, trade or business over the Internet is a part of the fundamental rights under Part III of the Constitution.* The court summarily touched upon this aspect and elucidated on the importance of cyberspace as dynamic medium to dissipate information whilst appraising the argument of Mr. Vinton G. Cerf, one of the 'fathers of the internet'.[6] He has argued that "while the internet is very important, however, it cannot be elevated to the status of a human right. Technology is an enabler of rights and not a right in and of itself."But appreciating the argument the court lamented, "With great respect to his opinion, the prevalence and extent of internet proliferation cannot be undermined in one's life."[7]It further said, "Non recognition of technology within the sphere of law is only a disservice to the inevitable *[...]* and our most basic activities are enabled by the use of internet."[8]

Howsoever, the court has distinguished between internet as a tool and the freedom of expression through the internet. The court's prime view was that internet is an enabler of rights. Now, as far as protection of enabler or medium of exercising a fundamental right under Article 19 is concerned, ***in Indian Express v. Union of India,[9]the Supreme Court had declared that the freedom of print medium is covered under the freedom of speech and expression. Hence, a deductive analogy can be that internet being a medium of enabling Article 19 rights also falls in the protective shield of Part III. But as appealing as it may sound, this argument would fail for two reasons:*** The primary being that internet is not only limited to speech, rather it has multiple labels attached. Second argument can be that internet as a tool is not similar to print medium. While internet is a technology which facilitates other mediums (like social media, blogs etc.) for freedom of speech and expression; print medium is itself a by-product of some other technology and is a direct 'medium' for exercising such rights. So essentially the categorisation under Article 19 is not for', technology' in itself. One contrarian view is also that internet has furthered the conflict of rights with other interests protected under the constitution. Nonetheless, argumentatively access to internet may find some substance given that Article 19(1)(a) rights are balanced through reasonable restrictions in Article 19(2).

In the instant case, the *court had expressly said that it is not expressing any opinion for declaring the right to access the internet as a fundamental right* and is just confining to

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[5] Anuradha Bhasin and Anr. v. Union of India and Ors., 2020 SCC OnLine SC 25 (India).

[6]Vinton G. Cerf, *Internet Access Is Not a Human Right*, THE NEW YORK TIMES(Jan. 4, 2012),https://www.nytimes.com/2012/01/05/opinion/internet-access-is-not-a-human-right.html.

[7] Anuradha Bhasin and Anr. v. Union of India and Ors., 2020 SCC OnLine SC 25 (India).

[8]*Id.*

[9] Indian Express v. Union of India, (1985) 1 SCC 641 (India).

recognise Article 19(1)(a) and Article 19(1)(g) rights using the medium of internet is constitutionally protected.[10]But the court has furthered the 'proportionality' principle for imposition of restrictions on the internet which gives internet a 'fundamental' importance.

Before the *Anuradha Bhasin judgment* came, the *Kerala High Court* through reasoning and application of UNHCR documents endorsed the idea that 'right to access internet' forms a part of basic human right.[11]

The Supreme Court in *Foundation for Media Professionals and Ors. v. Union Territory of Jammu and Kashmir and Anr.*[12]Expressed to strike a balance between fundamental rights and national security especially in concern to the internet access rights. However, the court didn't touch upon the context of recognising internet as fundamental right.

Recently writ petitions were filed in *Calcutta High Court*[13]against the *suspension of Internet services effectuated in Hooghly district* of West Bengal. In reply, the State submitted that there would be no further extension of the internet shutdown in Hooghly which was imposed following communal violence in the area.

III. CONCLUSION

The legal dictum in the Indian context gives us a conclusion that 'right to internet access' has been given limited recognition as an enabler of other rights within Article 19 and 21 and not an autonomous right. The courts have also refrained from propounding on this thematic aspect of internet and fundamental rights as the issue hasn't been explicitly raised.[14]The history of judicial activism highlights that inclusion of unenumerated rights under Part III of the Constitution has been a part of court's activist affair, and it is guided by the principles devised in *Maneka Gandhi v. Union of India*[15]. The test given by the court was whether the right claimed is an integral part or of the same nature as the named right. Further, these rights need to be in reality and substance nothing but an instance of the exercise of the named fundamental right. One can make a novel argument to include right to access internet as part of Article 21. However, given the conflicting overlap of state security, public order vis a vis the inviolable nature of Article 21 as compared to other fundamental rights, makes this argument weak. Moreover, if included under Article 21, this will create a positive state obligation for compulsory internet. Internet seems like a volatile subject to be included in Article 21.With internet becoming a condition precedent for the application of numerous directive principles related to social and economic welfare, and an enabler of fundamental rights, it can be postulated that 'internet access' can be recognised as a human right. But its recognition as fundamental right seems to be an unsuccessful argument, for the internet being a hotspot for human proliferation *albeit* nefarious activities. At the hind sight internet access has been said

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[10]*Id.*

[11]FaheemaShirin.R.K v. State Of Kerala, (2019) 4 KLJ 634 (India).

[12] Foundation for Media Professionals and Ors. v. Union Territory of Jammu and Kashmir and Anr, 2020 SCC OnLine SC 453 (India).

[13]SFLC,In v. The State of West Bengal and Anr., W.P. No. 5245(W) of 2020.

[14] Anuradha Bhasin and Anr. v. Union of India and Ors., 2020 SCC OnLine SC 25 (India).

[15] Maneka Gandhi v. Union of India, (1978) 1 SCC 248 (India).

to be a human right but it convincingly requires differential reasoning to be accorded the status of autonomous fundamental right which is *prima facie* outweighed by the troubling concerns of state sovereignty, security and public order.