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EDITORIAL NOTE

A CASE FOR RECOGNITION OF THE RIGHT TO INTERNET ACCESS IN THE AGE OF INFORMATION

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In the age of information, internet access has become a crucial factor to realise rights such as education and health, as well as to achieve 'digital literacy'. India, due to its young population sees an ever-growing rise in the need for employment. Meaningful internet access proves to be fundamental for both economic and human development. It is acknowledged, that any socio-economic right requires resources from the State and private players, and thus setting a universal threshold as to internet bandwidth and the number of telecenters, is not a practical response. However, with countries like India pushing for digital initiatives, there is a strong argument for progressive realisation of this right. Each State must re-assess the budgetary allocation of internet services as the internet in a post-COVID world does not remain merely as a medium of information, but a marketplace for exercising various constitutionally guaranteed rights.

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I. INTRODUCTION

The internet has become a fundamental part of the contemporary society. It is a platform to realise both collective and individual rights. It is a “basic requirement for social inclusion and economic participation.”¹ The reality is that many people do not have access to the information disseminated on the internet which keeps them away from the opportunities (political, economic and social) offered by the digital revolution.² In a country like India, the internet has become a crucial component for all walks of life.³ Those working in the gig economy depend on technology for their everyday life. Students across the country study and take online tests, thus necessitating the internet as a medium to enjoy the right to education. Furthermore, it provides access to transport and healthcare to people from both urban and rural areas. It is also an important medium for business, especially small businesses who are more often than not home-based.

Due to its manifold advantages and wide-ranging benefits, the importance of having a right to internet access is slowly and steadily being considered all around the globe. Apart from the need to be recognised and positively affirmed as a standalone legal right, the right to internet access must also be seen as one that facilitates and promotes other imperative constitutional and fundamental rights. Hence, this right has aided in the fulfilment of other composite rights such as the ones related to access to courts and justice⁴ amongst other derivative rights.

The right to internet access presents a two-fold requirement to be satisfied i.e. accessing content online and presence of necessary infrastructure to access the internet. In order to do the latter, there arises a positive obligation on the State. To that end accessing the internet, calls for a need to improve infrastructure, which requires comprehensive positive action. Giving importance to the positive obligation of the right does not mean giving less importance to the negative liberty, but the positive aspect requires addressing a more complicated web of timing and procedure that States would have to take up in order to provide free or highly subsidised internet access.⁵ This positive access can be divided into two strands i.e. first, ensuring that those who do not have internet access get this access; and the

¹ Alison Powell, Amelia Byrne and Dharma Dailey, ‘The Essential Internet: Digital Exclusion in Low-Income American Communities’(2010) 2(2) Policy and Internet 161, 163. <<https://onlinelibrary.wiley.com/doi/abs/10.2202/1944-2866.1058>> accessed 31 March 2020.

² Peter K Yu, ‘Bridging the Digital Divide: Equality in the Information Age’ [2002] Cardozo Arts & Entertainment Law Journal 20 <<http://dx.doi.org/10.2139/ssrn.309841>> accessed 31 March 2020.

³ OECD Digital Economy Papers, No 257, Economic and Social Benefits of Internet Openness, <<https://www.oecd-ilibrary.org/docserver/5jlwqf2r97g5en.pdf?expires=1599469983&id=id&accname=guest&checksum=64FE87479900F1F5096B0B5CF35AA2B9>> accessed 31 March 2020.

⁴ *Court on its Own Motion v UT of J&K* 2020 SCC OnLine J&K 290.

⁵ Ivar Hartman, ‘A Right to Free Internet? On Internet Access and Social Rights’ (2013) 13(2) Journal of High Technology Law 297, 371 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2355900> accessed 31 March 2020.

second, to ensure that there is “meaningful access”.⁶ For the first strand, States would have a duty to provide internet access and not doing so would lead to a violation of the right. Similarly in the second strand, States have to ensure that the internet has a wide reach and there is no manipulation with its access in any way.⁷

Merely fulfilling the first prong will not solve the problem of a digital divide. To give an example, the average internet speed in African countries is seven times slower than Western Europe.⁸ While it is obviously not practical for every State to provide similar access to its citizens, the disparity to access acts as a hindrance to a number of essential activities such as education and medical consultations. Participation of young citizens in civic life is crucial in an information society, and barriers to access such as affordability, inclusivity, connectivity, literacy and discrimination disallow children from realising their rights.⁹

The right to internet access consists of various policy considerations that can be incorporated such as infrastructure for high speed connectivity, creation of community telecenters, informational literacy training, subsidies for computers etc.¹⁰ In practical terms, internet access must be perceived as a vehicle that encourages and promotes the crystallisation of multiple rights such as right to education. This access unlocks several learning opportunities as well as provides universal resources, that aid in reshaping the approach of a country towards imperative sectors.¹¹ It requires a lot of resources no doubt, but it is also essential to procure human resources in our digitised world. A human right to the internet can be equated to legislative mandates for a socio-economic connotation, and through guaranteeing codification it enacts it as a statutory socio-economic right. In times of the current pandemic, where the entire education system is forced to go ‘online’,¹² the importance of such a correlation can be understood clearly. Online education is now, not just a feature of higher education or one that is essential in certain specialised fields.¹³ Students across all levels of education –

⁶ Basak Kali, ‘The Case for the Right to Meaningful Access to the Internet as a Human Right in International Law’ [2020] *The Cambridge Handbook of New Human Rights* 276.

⁷ *ibid.*

⁸ ‘Meaningful Connectivity: Raising the Bar for Internet Access’ (World Wide Web Foundation, 26 September 2019) <<https://webfoundation.org/2019/09/meaningful-connectivity-raising-the-bar-for-internet-access-the-web-untangled/>> accessed 31 March 2020.

⁹ Carly Nyst, ‘Access to the Internet and Digital Literacy’ (2017) UNICEF Discussion Paper Series: Children’s Rights and Business in a Digital World, 7 <https://www.unicef.org/csr/css/UNICEF_CRB_Digital_World_Series_ACCESS.pdf> accessed 31 March 2020.

¹⁰ *Supra*, see (n 5) 387.

¹¹ Report by Deloitte, *Value of Connectivity: Economic and Social Benefits of Expanding Internet Access*, <https://www2.deloitte.com/content/dam/Deloitte/ie/Documents/TechnologyMedia/Communications/2014_uk_tmt_value_of_connectivity_deloitte_ireland.pdf> accessed 31 March 2020.

¹² ‘Remote Learning, EdTech & Covid-19’ (The World Bank, 15 July 2020) <<https://www.worldbank.org/en/topic/edutech/brief/edtech-covid-19>> accessed 31 March 2020.

¹³ Urvashi Sahni, ‘COVID-19 in India: Education Disrupted and Lessons Learned’ (Brookings, 14 May 2020) <<https://www.brookings.edu/blog/education-plus-development/2020/05/14/>>

be it pre-primary, primary and secondary, are shoved into a paradigm which is streaked by e-learning,¹⁴ making the right to internet access a *sine qua non* for the fulfilment of the fundamental right of education.

Through the course of this paper, we argue that the need for the right to internet access should be considered as a legal right and not specifically a fundamental right, whilst acknowledging the burden that such a stance could impose on a developing country like ours. In Part I of this paper, we have given a brief introduction to the importance of the internet in today's world. Part II discusses the ways in which the right to internet access can be recognised as a socio-economic right as well the origins of its discussion. Part III highlights various international instruments that have given realization to the right to internet access and methods through which countries can adopt this right through statutes. Further, Part IV discusses the nascent debate of the right in India and the constitutional backing that exists for the right to be realised in India. The last part provides some concluding thoughts and possible problems that States can face while adopting this right from a socio-economic angle.

II. THEORETICAL EXPLORATION OF THE RIGHT TO INTERNET ACCESS

Modern origins to the right to internet access derive from two schools of thought. The first being that of cyber-libertarianism which was brought about in the 1990s with concepts such as “cyberspaces” and “virtual communities”.¹⁵ However, this school did not lay down any obligations on States to provide for internet access and instead was focused on the freedom to connect as a right which is linked to free speech. The libertarian thought emphasises on the need for States to refrain from interfering with access.¹⁶ The second line of thought is based on the right to communicate. The United Nations Educational, Scientific and Cultural Organisation (‘UNESCO’) advocated for this right defining it as a “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

covid-19-in-india-education-disrupted-and-lessons-learned/> accessed 31 March 2020; Sat Singh, Imran Qureshi and Ayeshea Perea, ‘India Coronavirus: Online Classes Expose Extent of Digital Divide’ *BBC News* (22 July 2020) <<https://www.bbc.com/news/world-asia-india-53471749>> accessed 31 March 2020.

¹⁴ ‘Education during COVID-19; Moving Towards E-learning’ (European Data Portal, 22 June 2020) <<https://www.europeandataportal.eu/en/impact-studies/covid-19/education-during-covid-19-moving-towards-e-learning>> accessed 31 March 2020.

¹⁵ Nick Dyer-Witheford, *Cyber-Marx: Cycles and Circuits of Struggle in High-Technology Capitalism* (University of Illinois Press 1999) 34; Fred Turner, *From Counterculture to Cyberculture: Stewart Brand, the Whole Earth Network, and the Rise of Digital Utopianism* (University of Chicago Press 2010) 261.

¹⁶ Jonathan W Penney, ‘Open Connectivity, Open Data: Two Dimensions of the Freedom to Seek, Receive and Impart Information’ (2012) Victoria U Wellington Working Paper Series 1, 9.

process”.¹⁷ However, in the end the idea of an imposing an international obligation did not concretise. At the time when these conversations took place, for all States to provide for the infrastructure for communication was not possible as they did not the resources and the political will for it.¹⁸

The need for social services to be seen as more than a gratuitous offering by the state is an idea more acceptable in recent times.¹⁹ As said by Henry Shue, every basic right comprises of three duties in order to fully honour the right and has to be undertaken by everyone.²⁰ These duties are to avoid deprivation, to protect and to aid.²¹ However, once a government makes a policy to create the requisite infrastructure and uses resources for it, there will inevitably be restrictions placed on the right.²²

While the internet is instrumental in realising other rights, the contents of this right is *sui generis*.²³ This is because it cannot be reduced in any form within another right, as it fulfills purposes that cannot be done through any other way. It is not another form of other rights ie: free speech, right to education, right to free assembly or information even though it allows for digital enabling of these rights.²⁴ The access to the internet can be termed as a “positional good”.²⁵ These are ‘goods with the property that one’s relative position in the distribution of the good affects one’s absolute position with respect to its values’.²⁶ To deny the right to internet access has been argued to deny an existential minimum of a decent life in an informational society.²⁷

If a matter related to such a right goes to the court where the State has failed to draw up a policy, the court can issue a deadline and broad guidelines.²⁸ However, this would exert high pressure on the authorities to put forth a plan

¹⁷ United Nations Educational, Scientific and Cultural Organisation, General Conference Resolution. Res 4/19, 21st Session (1980).

¹⁸ Karol Jakubowicz, ‘The Right to Public Expression: A Modest Proposals for an Important Human Right’ (2010) Open Society Institute Media Program, 2 <<https://www.scribd.com/document/137932990/The-Right-to-Public-Expression-A-modest-proposal-for-an-important-human-right>> accessed 31 March 2020.

¹⁹ Charles A Reich, ‘Individual Rights and Social Welfare: The Emerging Legal Issues’ (1964) 74 Yale LJ 1245 <<https://digitalcommons.law.yale.edu/ylj/vol74/iss7/2>> accessed 31 March 2020.

²⁰ Henry Shue, ‘Basic Rights’ (1980) Human Rights Quarterly <<https://www.jstor.org/stable/761904>> accessed 31 March 2020.

²¹ *ibid.*

²² *Court on its Own Motion v UT of J&K* 2020 SCC OnLine J&K 290, 367.

²³ Merten Reglitz, ‘The Human Right to Free Internet Access’ (2019) 37(2) Journal of Applied Philosophy 8 <<https://doi.org/10.1111/japp.12395>> accessed 31 March 2020.

²⁴ *ibid* 4.

²⁵ *ibid* 8.

²⁶ Harry Brighouse, Adam Swift, ‘Equality, Priority, and Positional Goods’ (2006) 116(3) Ethics 472 <<http://www.mit.edu/~shaslang/mprg/BrighouseSwiftEPPG.pdf>> accessed 31 March 2020. (n 23) 2.

²⁷ Arnold Picot & Christian Wernick, ‘The Role of Government in Broadband Access’ (2007) 31(10–11) Telecomm Pol’y 660, 662 <<https://doi.org/10.1016/j.telpol.2007.08.002>> accessed 31 March 2020.

for internet infrastructure which would not take place without judicial interference.²⁹ A judicial order does not have to give detailed plans giving the government enough discretion to take steps to fulfill its positive obligation.³⁰ Internet bandwidth has been improving throughout the years and people are able to access better applications and use the internet for diverse needs.³¹ From a reasonability threshold, costs of universal access are not always exorbitant to access certain basic information.

The minimum core of a right is a concept introduced by the Committee on Economic, Social and Cultural Rights ('CESCR') in order to ensure "minimum essential levels" of each right that State Parties need to satisfy.³² The concept attempts to place a "quantitative and qualitative" baseline for rights envisioned in the International Covenant on Economic, Social and Cultural Rights ('ICESCR').³³ Looking at it from a perspective of a minimum core is the idea that there is a base minimum for informational literacy.³⁴ A mere broadband connection is not enough for people to use the internet freely. Instead, sufficient knowledge of information is the way ahead to ensure access.³⁵ Even for literacy, it includes training that is important to educate children to participate in the public sphere.³⁶ Having a minimum core is a difficult exercise as there can be no universal training for such skills, again depending upon the capacity of the state. However, to ensure an essential level is important to realise the right in at least the most basic terms.

According to the General Comment No. 3 of the CESCR, any retrogressive measures towards progressively realising a right would need to be closely scrutinised and justified with reference to the complete set of rights provided by the State Party, whilst exercising maximum use of its public resources.³⁷ The principle

²⁹ *ibid* 669

³⁰ *ibid* 663.

³¹ Graham Murdock & Peter Golding, 'Information Poverty and Political Inequality: Citizenship in the Age of Privatized Communications' (1989) 39(3) *J Communication* 180 <<https://doi.org/10.1111/j.1460-2466.1989.tb01051.x>> accessed 31 March 2020.

³² Officer of the High Commissioner for Human Rights, 'CESCR General Comment No 3: The Nature of State Parties' Obligation (art 2, para 1 of the Covenant)', 14 December 1990, E/1991/23, para 8.

³³ *ibid*.

³⁴ Tricia Wang, 'Internet Access as a Social Right: Implications for Social Citizenship' (*Tricia Wang*, 23 January 2011) <<https://www.triciawang.com/projects/2011/1/23/internet-as-a-social-right-implications-for-social-citizensh.html>> accessed 31 March 2020; 'The Future of Social Citizenship: Politics, Institutions and Outcomes' (2008) ISA Research Committee on Poverty, Social Welfare and Social Policy RC 19, 24, accessed 31 March 2020.

³⁵ *ibid*.

³⁶ Donald J Leu et al, 'Toward a Theory of New Literacies Emerging from the Internet and other Information and Communication Technologies' in *Theoretical Models and Processes of Reading* (5th edn, International Reading Association 2004) 1590.

³⁷ Officer of the High Commissioner for Human Rights, 'CESCR General Comment No 3: The Nature of State Parties' Obligation (art 2, para 1 of the Covenant)', 14 December 1990, E/1991/23, para 9.

of non-retrogression can be applied in realising the right to internet access by building infrastructure, construct information literacy and community telecenters. Telecenters are set up for internet use and training in areas which are isolated and do not have the infrastructure to support internet access.³⁸ Studies have shown that governments of developing countries such as Brazil and India have been highly dependent on such facilities, where there is a stark digital divide.³⁹ These centers are even seen in more wealthy countries, as an option for people of weaker sections who cannot afford such infrastructure at their homes.⁴⁰ This is more so prevalent in locations that are isolated, the obligation of the State to provide for tele centers becomes much more important.

In interest of this right, equality before law is not relevant but that of 'material equality' due to people receiving unequal treatment due to certain situation is more relevant in the current discourse. Especially in case of internet networks, certain groups lose out on technology accessible to others.⁴¹ Equality can be linked to the positive protection of the right as internet access is not equal among all. The problems faced by different groups ought to be incorporated in policies of digital inclusion. There can be existing policies which exclude certain people. Judicial intervention can mandate the State to provide equal access to the internet, enforcing the positive obligation through equality.⁴²

III. RECOGNISING THE RIGHT UNDER INTERNATIONAL LAW

The UN Millennium Declaration has a goal which aims to make Information and Communication technologies reachable to all.⁴³ Number of States have also stated their commitment to build a people-centered, inclusive and development-oriented Information Society, where everyone can create, access, utilize and share information and knowledge'.⁴⁴ They have recognised the need for human rights promotion facilitated by the internet.⁴⁵ The European Community

³⁸ Francisco J Proenza, Roberto Bastidas-Buch & Guillermo Montero, 'Telecenters for Socioeconomic and Rural Development in Latin America and the Caribbean' (2001) *Political Science* 5, 6, 11, <https://www.itu.int/ITU-D/ict/mexico04/doc/doc/10_telecenters_e.pdf> accessed 31 March 2020.

³⁹ *ibid* 5, 6, 11.

⁴⁰ *ibid* 26, 30.

⁴¹ Chris Freeman, 'Social Inequality, Technology and Economic Growth' in Wyatt et al, *Technology And In/Equality: Questioning The Information Society* (Routledge 2000) 158.

⁴² Iosif Klironomos, Margherita Antona, Ioannis Basdekisand Constantine Stephanidis, 'White Paper: Promoting Design for All and e-Accessibility in Europe' (2006) 5(1) *Universal Access in the Information Society*, 105, 117 <[10.1007/s10209-006-0021-4](https://doi.org/10.1007/s10209-006-0021-4)> accessed 31 March 2020.

⁴³ GA Res 55/2, UN Doc A/RES/55/2 (September 18, 2000).

⁴⁴ International Telecommunications Union, 'Building the Information Society: A Global Challenge in the New Millenium'(Geneva Declaration of Principles, World Summit on the Information Society, December 2003) <<http://Www.Itu.Int/Net/Wsis/Docs/Geneva/Official/Dop.Html>> accessed 30 March 2020.

⁴⁵ Rec CM/Rec(2007)16 of the Committee of Ministers to Member States on Measures to Promote the Public Service Value of the Internet [2007] Council of Europe.

has called upon its members to formulate national policies that recognise the need for universal internet access.⁴⁶

The General Assembly Resolution on the protection of human rights emphasised that the internet is an “enabler of development and innovation”, “global inclusive education”.⁴⁷ It has noted that the existing digital divide due to gender, disabilities and other exclusions requires the application of a well thought out human rights approach.⁴⁸ Even though the Special Rapporteur’s report on the right to internet was along the lines of a civil and political right, he dedicated an entire section on the infrastructure required to facilitate such a right. He notes that “without Internet access, which facilitates economic development and the enjoyment of a range of human rights, marginalized groups and developing States remain trapped in a disadvantaged situation, thereby perpetuating inequality both within and between States”⁴⁹. One of the ways that inequality can be countered is through giving fringe groups a platform to voice their complaints. The internet serves as a platform to obtain essential information in today’s age, access educational resources and put forth their opinions for the betterment of social and economic situations.⁵⁰ It attempts to give a level playing field for all individuals and groups to participate. Moreover, statistics have shown how increased internet access can be a boost to both the Gross Domestic Product, as well as increase the number of jobs in developing countries.⁵¹ The rapporteur’s report has led to the notion that to facilitate internet access as a human right, States need to establish ‘universal access’ in the same way as water and electricity are accessible to the masses.⁵² Acknowledging the global ‘digital divide’⁵³ and the inequalities that are a cause of it, he calls upon States for progressive realisation of the right and highlights its requirement in order to impart quality education.⁵⁴ Digital divide

⁴⁶ Internet Governance Principles (Conference entitled Internet Freedom: from Principles to Global Treaty Law, Strasbourg, 18–19 April 2011) para 5, accessed 7 September 2020.

⁴⁷ GA Res 32/13, UN Doc A/HRC/RES/32/13 (July 18, 2016).

⁴⁸ *ibid* 3.

⁴⁹ Frank La Rue, ‘Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression’ (United Nations General Assembly, Human Rights Council, 2011), UN Doc A/HRC/17/27, para 62 <https://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/a.hrc.17.27_en.pdf> accessed 31 March 2020.

⁵⁰ *ibid*.

⁵¹ ‘Connecting for Inclusion: Broadband Access for All’ (The World Bank) <[https://www.worldbank.org/en/topic/digitaldevelopment/brief/connecting-for-inclusion-broadband-access-for-all#:~:text=Only%20about%2035%20percent%20of,80%20percent%20in%20advanced%20economies\).&text=Even%20%E2%80%9Cdigital%20divides%E2%80%9D%20in%20access,rural%20communities%20and%20the%20poor](https://www.worldbank.org/en/topic/digitaldevelopment/brief/connecting-for-inclusion-broadband-access-for-all#:~:text=Only%20about%2035%20percent%20of,80%20percent%20in%20advanced%20economies).&text=Even%20%E2%80%9Cdigital%20divides%E2%80%9D%20in%20access,rural%20communities%20and%20the%20poor)> accessed 31 March 2020.

⁵² ‘Internet Access is a Human Right, United Nations Report Declares’ *Huffington Post* (6 August 2011) <https://www.huffpost.com/entry/internet-access-human-right-united-nations-report_n_872836> accessed 30 March 2020.

⁵³ It refers to the gap between people with effective access to digital and information technologies, in particular the Internet, and those with limited or no access at all.

⁵⁴ Iosif Klironomos, Margherita Antona, Ioannis Basdekis and Constantine Stephanidis, ‘White Paper: Promoting Design for All and e-Accessibility in Europe’ (2006) 5(1) *Universal Access in the Information Society*, pt 5 <10.1007/s10209-006-0021-4> accessed 31 March 2020.

has both geographic i.e. rural and underdeveloped areas and social i.e. language etc. dimensions, which can be caused by many factors.⁵⁵ It has impacts which are beyond the political arena due to its creation of inequalities in health care and in a broader sense limits the options to avail different products and services.⁵⁶

The CESCR has actively discussed the right from two perspectives i.e. the right to education and a broader cultural right.⁵⁷ For realising the obligations connected with the right to education⁵⁸, the CESCR advised for setting up of informational centers, especially for the most vulnerable. Looking at the right to internet access as a socio-economic right is more about enacting a statute than it is connected to international law. Certain countries have initiated “universal service programs” to provide highly subsidised telecommunication services to ensure affordability.⁵⁹ Even though it has been criticised widely, there is an understanding that it has socio-economic connotations, and thus cannot be done away with.⁶⁰ The concept not only includes providing internet access but also computes assistance to low-income groups.⁶¹ However, this model is not feasible in developing countries as it only works if there is existing infrastructure, and requires funds. Therefore, developing countries can employ initiatives which require lesser funds and are not particularly universal. Instead of having internet available at home, these countries can ensure access to each person without being limited to a particular area. To initiate a policy for universal access there needs to be political will, encouragement of competition by a regulatory framework and realistic fund management.⁶²

Linking the right to internet access to the right to development is helpful in the current era due to the latter right being imperative to realise third generation

⁵⁵ Jacopo Coccoli, ‘The Challenges of New Technologies in the Implementation of Human Rights: An Analysis of Some Critical Issues in the Digital Era’ (2017) 1(2) Peace Human Rights Governance <10.14658/pupj-phrg-2017-2-4> accessed 31 March 2020.

⁵⁶ Stephen B Wicker and Stephanie M Santoso, ‘Access to the Internet is a Human Right’ (2013) 56(6) Communications of the ACM <https://dl.acm.org/doi/pdf/10.1145/2461256.2461271> accessed 30 March 2020.

⁵⁷ Łukasz Szoszkiewicz, ‘Internet Access as a New Human Right? State of the Art on the Threshold of 2020’ (2018) 8 Adam Mickiewicz University Law Review 49 <10.14746/ppuam.2018.8.03> accessed 31 March 2020.

⁵⁸ ‘Concluding observations of the Committee on the 3rd periodic report of Ecuador as approved by the Committee at its 49th session’ [2012] UN Committee on Economic, Social and Cultural Rights, E/C.12/ECU/CO/3, §34 <https://www.refworld.org/publisher,CESCR,CONCOBSERVATIONS,ECU,52d551274,0.htm> accessed 31 March 2020.

⁵⁹ Stuart Buck, ‘TELRIC vs Universal Service: A Takings Violation?’ (2003) 56(1) Federal Communications Law Journal <http://dx.doi.org/10.2139/ssrn.454200> accessed 31 March 2020.

⁶⁰ Segura-Serrano, ‘Internet Regulation and the Role of International Law’ in *Max Planck Yearbook of United Nations Law* (vol 10, MartinusNijhoff Publishers 2006) 265 <https://www.mpil.de/files/pdf3/06_antoniiov1.pdf> accessed 31 March 2020.

⁶¹ *ibid.*

⁶² International Telecommunication Union, Universal Access Regulatory Best Practice Guidelines (Global Symposium for Regulators, International Telecommunication Union, 8–9 December 2003) <https://www.itu.int/ITU-D/treg/bestpractice/2003/BestPractices_E_31.pdf> accessed 30 March 2020.

rights.⁶³ As discussed above, increased penetration of technology has provided countries with opportunities of economic development. For instance, improved access to the internet allows for people with low income to access a wide variety of financial services, which is otherwise not possible.⁶⁴ The internet can popularise e-commerce and online trading. Studies have shown that for every 10% increase in the use of the internet, it brings in a rise of about 1.28% to 2.5% in the Gross Domestic Product of developing nations.⁶⁵ Access to the internet can bridge the gap between fringe areas and more developed regions. This has the advantage of decreasing the socio-economic divide that exists due to the asymmetry in information dissemination, leading to varied development in countries and regions.

IV. LEGAL BASIS FOR THE RIGHT TO INTERNET IN INDIA

The number of internet users in India is ever increasing. By 2016, online education garnered around 73 million USD in investment.⁶⁶ The Internet is an effective learning platform⁶⁷ and the Indian government as part of the 'Digital India' initiative aims to establish an internet network in all parts of the country and provide children with learning modules which are pre-installed. 'Digital empowerment' has been a phrase used in all national campaigns as it is an empowering tool bringing in 'equality, accountability and transparency' in the country.⁶⁸

A large part of this year's budget has been allotted to boost Digital India programs,⁶⁹ which prove that the Indian Government does prioritise the need for internet services. Thus, some part of this budget can indeed be used to ensure

⁶³ Molly McHugh, 'UN Declares Internet Access a Human Right' (Digital Trends, 9 June 2011) <<https://www.digitaltrends.com/computing/un-declares-internet-access-a-human-right/>> accessed 31 March 2020.

⁶⁴ Brendan Greeley and Eric Ombok, 'In Kenya, Securing Cash on a Cell Phone' (*Bloomberg Businessweek*, 9 September 2011) <<http://www.businessweek.com/magazine/in-kenya-securing-cash-on-a-cell-phone-09082011.html>> accessed 31 March 2020.

⁶⁵ Michael Minges, 'Exploring the Relationship between Broadband and Economic Growth' (2015) World Development Report 2016, Background Paper <<http://pubdocs.worldbank.org/en/391452529895999/WDR16-BP-Exploring-the-Relationship-between-Broadband-and-Economic-Growth-Minges.pdf>> accessed 31 March 2020.

⁶⁶ 'Online Education in India: 2021', (*A Study by KPMG in India and Google*, May 2017), <<https://assets.kpmg.com/content/dam/kpmg/in/pdf/2017/05/Online-Education-in-India-2021.pdf>> accessed 31 March 2020.

⁶⁷ 'E-learning: India's Education System Needs to Get Online' *Hindustan Times* (6 March 2017) <<https://www.hindustantimes.com/editorials/e-learning-india-s-education-system-needs-to-get-online/story-GsitwEdCHPZMmBOSjUt49K.html>> accessed 31 March 2020.

⁶⁸ Osama Manzar, 'A 15-year Journey to Bridge the Digital Divide' *Livemint* (16 December 2017) <<https://www.livemint.com/Opinion/OvWHiB3AZmLx0k2ohkJACL/A-15year-journey-to-bridge-the-digital-divide.html>> accessed 31 March 2020.

⁶⁹ Press Trust of India, 'With 23% Boost, Digital India Program Gets Rs 3,958 Crore' *Economic Times Government* (3 February 2020) <<https://government.economictimes.indiatimes.com/news/digital-india/with-23-boost-digital-india-program-gets-rs-3958-crore/73889733>> accessed 31 March 2020.

meaningful internet access as the first step to reach digital literacy. The Kerala High Court was the first to recognise the right to internet access and noted that disrupting the internet impacts women and other vulnerable groups more than others.⁷⁰ The right to internet access was held to be an enabling aspect of privacy and right to education under Article 21 of the Constitution.⁷¹ Access to the internet and digital literacy allow a variety of services and work around socio-cultural systems.⁷² While the judgement acknowledges the need for internet access for other fundamental rights, it needs to be recognised as an independent right to create required infrastructure and prohibiting any overarching restrictions.⁷³ Kerala has also been the first State to recognise the right to internet access by keeping aside a special fund to provide connections to around 20 lakh families, either free of cost or on highly subsidised rates.⁷⁴ In the recent case of *Anuradha Bhasin v. Union of India*, the Supreme Court categorically refused to declare the right to internet access as a fundamental right and instead, left the question open for interpretation by future benches.⁷⁵ However, the Court held the internet to be an important source for trade and commerce.⁷⁶ Although the case was about the incessant internet shutdowns in erstwhile Jammu and Kashmir, these shutdowns have a huge impact on the overall development of a place. Differing access to the internet produces socio-economic exclusions. A report by the Digital Empowerment Foundation highlights the link between internet access and digital literacy with that of public services.⁷⁷ In terms of state welfare schemes which help vulnerable groups secure their livelihood, access to the internet allows them to get information, which benefits the programmes for both the citizens and the State.⁷⁸ Recently, the Jammu and Kashmir High Court noted that the restrictions on the internet are hampering the fundamental right of access to justice through the Courts and creating a paradigm where rights are continuously denied and subsequently violated.⁷⁹ The internet, thus, was making this right of access, available to all citizens. The intrinsic nature and character of the right to internet access as an 'enabler' advances several constitutional guarantees and offers the fulfillment of intrinsic civil liberties. The advantages and accruing benefits clearly depict the

⁷⁰ *Fabeema Shirin RK v State of Kerala* 2019 SCC OnLine Ker 2976 : AIR 2020 Ker 35.

⁷¹ Sumeesh Srivastava, 'Inequality of Another Kind' *The Hindu* (24 September 2019) <<https://www.thehindu.com/opinion/op-ed/inequality-of-another-kind/article29492512.ece>> accessed 31 March 2020.

⁷² *ibid.*

⁷³ *ibid.*

⁷⁴ 'Right to Access Internet is a Fundamental Right: Kerala HC' (*The Week*, 19 September 2019, <<https://www.theweek.in/news/india/2019/09/19/right-to-access-internet-is-part-of-right-to-privacy-right-to-education-kerala-hc.html>> accessed 28 March 2020).

⁷⁵ *Anuradha Bhasin v Union of India* 2019 SCC OnLine SC 1725, ¶ 22.

⁷⁶ *ibid.*

⁷⁷ Sumeesh Srivastava, 'The SC Must Go Further and Recognise Access to Internet as a Comprehensive Right' (*The Wire*, 11 January 2020) <<https://thewire.in/rights/kashmir-internet-supreme-court>> accessed 28 March 2020.

⁷⁸ *ibid.*

⁷⁹ *Court on its Own Motion v UT of J&K* 2020 SCC Online J&K 290.

imperative need to recognise the right to internet access as a legal right and subsequently a human right.

A nuanced understanding of such a position would be better appreciated if an analogy is drawn with the status and recognition of the right to property. The Right to Property ceased to exist as a fundamental right vide the Constitutional Amendment in the year 1978.⁸⁰ However, despite this change, it still is duly recognised as a legal right and more importantly as a human right.⁸¹ This recognition stems from the multifaceted approach that has been adopted by the courts while interpreting the State's action against this right. The right to own property as well as enjoy its possession cannot be violated except with the due sanction and authority of law.⁸² A welfare State cannot trample the right of property in the name of adverse possession and it forms a part of the inviolable basic structure of dignified human existence.⁸³ Thus, despite non-recognition as a fundamental right, it still retains protection as a legal right and has been preserved by the Courts.⁸⁴ A similar recognition must be extended to the right of internet access, where its unlawful usurpation and denial must be dealt with an iron hand. Hence, even if there exists no positive obligation on the State to provide for the right to internet access, there is a need for negative sanction on the State if such a right is arbitrarily deprived.

Socio-economic rights in India find their place in the chapter on Directive Principles of State Policy ('DPSPs'). Article 38 encourages the state to take social measures and Article 39(b) obligates States to distribute *material resources* in such a manner so as to decrease existing inequalities.⁸⁵ "Material resources" refers to all kinds of resources.⁸⁶ Furthermore, Article 39(c) aims to implement the objectives of the Preamble, particularly social justice and dignity of a person with equal status, and Article 47 mandates the State to maintain a minimum standard of living.⁸⁷ Even though DPSPs are not directly enforceable, they have been cited in various judgements and are integral for the governance of the country. Even if the right to internet access is seen to be a material resource, it is useful to get its support under the aforementioned DPSPs as it helps realise these obligations.

In reality, however, there have been strong opponents for realising the right in India in its positive form. These arguments flow from Vinton Cerf's idea that

⁸⁰ The Constitution of India, 44th Amendment, 1978.

⁸¹ *Indore Vikas Pradhikaran v Pure Industrial Coke & Chemicals Ltd* (2007) 8 SCC 705.

⁸² Krishnadas Rajagopal, 'Private Property is a Human Right: Supreme Court' *The Hindu* (New Delhi, 12 January 2020) <<https://www.thehindu.com/news/national/private-property-is-a-human-right-says-sc/article30551819.ece>> accessed 31 March 2020.

⁸³ Art 17, Declaration of Human and Civic Rights of 26 August 1789.

⁸⁴ *Narayan Prasad v State of Chhattisgarh* 2017 SCC OnLine Chh 1226.

⁸⁵ Arts 38 and 39(b), Constitution of India.

⁸⁶ *Sanjeev Coke Mfg Co v Bharat Coking Coal Ltd* (1983) 1 SCC 147, AIR 1983 SC 239.

⁸⁷ Arts 39(c) and 47, Constitution of India.

“technology is an enabler of rights, not a right itself”.⁸⁸ However, the catch is that Cerf defines it as a civil right which cannot be taken away from those who already have it, and is not based on the prospect of a human right which is inherent to human beings.⁸⁹ The notion that the Indian Constitution only protects negative freedoms is false, as rights such as education and health have been read into the broader right to life time and again. While it is agreeable that there are certain budgetary constraints which can be cited as defence for the government’s inability to provide for positive rights, this holds true in the case of negative freedoms as well.

V. CONCLUSION

Freedom of expression is a constitutional right, which has been now extended to the internet. However, to enable this communication requires affirmative protection of social rights by the State, thus giving a positive aspect to the right to internet access. The right is a *sui generis* right and not just a facilitator of other rights, as it requires a unique infrastructure and provides access to services which do not always have to be included in other rights. Realising a right to internet access is not equivalent to acknowledging the right to free broadband for everyone. Judicial intervention will play the balancing act just as in case of a negative right. Internet access is so prevalent that it has become necessary for leading a dignified life, where the government’s decisions can be superseded by the courts in order to put in a concrete right. Any decrease in existing levels of internet access will require the government to provide adequate justification. Moreover, if the State provides access to a certain section of the population, leaving out vulnerable groups, courts will look at why there is a difference in treatment and might direct positive protection in terms of material equality.

States are not presently mandated under international law to provide for the infrastructure related to internet access. The maximum that they are required to do is to not restrict access. The internet has various dimensions and is used by people for a variety of reasons such as education, healthcare, community services, commerce and entertainment.⁹⁰ Internet access assists in keeping a minimally decent life which include necessities and equal status. In the end, the internet is needed to lead a dignified life. Access and capabilities are so intertwined that by denying the right to internet access, you are diminishing access to the capabilities available otherwise.

⁸⁸ Vinton G Cerf, ‘Internet Access is not a human right’, January 4, 2012, available at <https://www.nytimes.com/2012/01/05/opinion/internet-access-is-not-a-human-right.html?_r=1> (accessed March 28, 2020).

⁸⁹ ‘Why the “right to internet” is a bad idea’, *Livemint* (April 4, 2017), available at <<https://www.livemint.com/Opinion/yoyNyx6EsVQZpNHtv2qKlM/Why-the-right-to-Internet-is-a-bad-idea.html>> (accessed March 28, 2020).

⁹⁰ *Supra* (n5).

It is clear that internet access facilitates a number of rights, but the debate arises while recognising it as a standalone right, as the scope remains unclear. Internet services, like any other services, require money. However, the right to internet access provides a “gateway” for other rights in a more organised manner, reducing public expenditure. Ensuring affordable access does not fulfill the positive obligation to deliver ideas and information on an efficient basis. Therefore, merely moving government services online without the requisite digital literacy does not have make economic sense either. In India, the common service centres which are located in more remote areas provide for information related to government services.⁹¹ Even though the government is saving resources by shifting its services online, it still has to undertake a huge expenditure, as the majority of the population is unable to use these services. To solve this, the government has come up with newer initiatives such as the Bharat Net programme, an attempt to install optical fibre networks in all gram panchayats, in order to provide internet access all over the country.⁹² However, this and many other initiatives have not been seriously implemented.⁹³ This is where the recognition of a right is necessary in order to enforce these projects. By recognising this right, it does not just allow communication and economic activity, but also possesses the power to ensure a better standard of living.

Thus, it is impossible to secure protection against any contemporary threats through other rights the way the right to internet ensures. There is an immediate necessity for not only municipal legislations and constitutional adjudications but also a top-down approach of a *sui generis* right to internet access from existing international human rights obligations, for effectively enforcing a rights based framework in the current era.

⁹¹ Government of India Ministry of Electronics and Information Technology, Common Service Centres <<https://www.csc.gov.in/>> accessed September 7, 2020.

⁹² Moushumi Das Gupta, ‘Govt’s optical fibre cable project BharatNet entangled in turf war’, April 2, 2017, available at <<https://www.hindustantimes.com/india-news/govt-s-optical-fibre-cable-project-bharatnet-entangled-in-turf-war/story-4zB7QTbIxG0zvaXAvs2iXO.html>> accessed September 7, 2020.

⁹³ *ibid.*