Right to Internet Access - A Constitutional Argument

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Abstract

It all started with the printing press, which was a revolutionary technological innovation for its time, especially where the freedoms of speech, expression and information were concerned. So revolutionary in fact that the concept of the 'freedom of press' was introduced to ensure that the right of individuals to exercise their right to speech and expression through the medium of the press was preserved. But the press was only the first of many – soon enough, the very concepts of 'communication' and 'speech' were entirely revolutionised. The latest of these revolutions has been ushered in by the Internet. But the effect of the internet is not restricted to speech alone – it is a technology that has changed the very face of human society. It has become such a crucial part of our lives, in fact, that it has arguably now become a fundamental aspect of it.

Thus, this paper attempts to encapsulate this social evolution within Constitutional jurisprudence to argue for a right to internet access. It first conducts an analysis of the very articulation of the Right to Internet Access and its multiple facets, and then moves on to a comparative analysis of the evolution of the various types of Right to Internet Access across the world, considering the multiple articulations of the same and picking the parts that are the most suitable for Indian jurisprudence. It then places this discussion in the context of Indian Constitutional jurisprudence, focusing on the negative-right and freedom-of-speech based articulation of the Right

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to Internet Access. It finally puts forth an argument for the recognition of a Right to Internet Access in such a form within our existing Constitutional jurisprudence – a recognition that we desperately need.

Introduction

At one point of time, the printing press was one of the greatest technological advancements in the history of humanity, at least as far as the freedoms of speech, expression and information were concerned. The printing press gained so much importance, in fact, that the concept of the 'freedom of press' was introduced to ensure that the right of individuals to exercise their right to speech and expression through the medium of the press was not unduly restricted. But the press was only the first in a series of technological advancements that would thereafter revolutionise the entire concept of 'speech and expression', of 'communication', as human society understood it. The radio followed the press, and the television the radio. Soon, even these mediums of communications were protected under the right to freedom of expression.This 'right to freedom of expression' is a multifaceted and pervasive concept, which evolves along with the evolution of the concept of 'communication' within human society. And the next step in its evolution is the Internet.

The Right to Internet Access is gradually gaining increasing acceptance within the international community and within legal jurisprudence, with various countries adopting it outright. This paper considers the true, practical meaning of this right. On the basis of this analysis, it attempts to argue that Indian Constitutional jurisprudence, as it exists right now, directly provides for such a right, the same conceptual right which has been repeatedly violated over

the past year in India through various means, ranging from criminal sanctions for comments made online, continued privacy violations on the internet, to preventive detention for digital offences.[1] The time is ripe for it to be given the recognition it deserves, and for free speech online to be given the protection it deserves.

This paper is divided into five parts. The first part explains and analyses the concept of a right to internet access and its various dimensions. The second part traces the history of the acceptance of the right to internet access internationally, and explains the reasoning employed by the various countries which recognised this right. The third part is an analysis of existing cases from the Indian Supreme Court on the concept of the right to freedom of speech, which puzzle out the objects and purpose of this right, in the context of the Right to Internet Access. The fourth part of the paper is a short note on the positive dimension of this right, which has not been discussed in detail, as the focus remains on the negative dimension of the right. The fifth and final part of the paper is the conclusion of the paper, which combines the understanding of the right to internet access that has been created in the first two parts with the Indian jurisprudence as explained in the third part, and argues that the Indian jurisprudence implicitly already provides for the right to internet access, and that all the ingredients for its explicit recognition are already in existence.

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1 Geetha Hariharan, *No more 66A!*, CIS-INDIA (Mar. 24, 2015), http://cis-india.org/internet-governance/blog/no-more-66a; Prachi Arya & Kartik Chawla, *A Study of the Privacy Policies of Indian Service Providers and the 43A Rules*, CIS-INDIA (Jan. 12, 2015), http://cis-india.org/internet-governance/blog/a-study-of-the-privacy-policies-of-indian-service-providers-and-the-43a-rules; Gautam Bhatia, *Karnataka's Amendments to the Goonda Act Violate Article 19(1)(a)*, INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY BLOG (Aug. 5, 2014), https://indconlawphil.wordpress.com/2014/08/05/karnatakas-amendments-to-the-goonda-act-violate-article-191a/.

Notably, the arguments made with regard to the Indian jurisprudence are limited to the negative aspect of the right to internet access, as a medium for the exercise of the right to free speech, and they do not discuss the positive aspect of the same in much detail. At the same time, this paper includes a short note on this issue as well, with examples of the Indian government's attempts to bridge the digital divide. This paper also does not deal with the argument that the right to access the Internet is part of the Freedom of Association, as a Freedom to Connect, and nor does it deal with the role played by the Internet Service Providers ('ISPs') in this context. These points are admittedly quite important and worth detailed consideration but in order to do its topic justice, this paper focuses on establishing the right to Internet access within the dimension of the right to free speech.

Part I. What is the 'Right to Internet Access'? The positive and negative paradigms.

The concept of a Right to Internet Access has two recognised dimensions: a) the right to access the internet without any restrictions, except in the limited cases wherein such restrictions are allowed by law; and b) the availability of the infrastructure and technologies that would reasonably allow all citizens to connect to the internet.[2]

These issues are two sides of the same coin, but they differ on very crucial points. While the first is a *negative* right,[3] obligating the

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2 Special Rapporteur On The Promotion And Protection Of The Right To Freedom Of Opinion And Expression, Human Rights Council, U.N. Doc. A/HRC/17/27, ¶3 (May 16, 2011) (by Frank La Rue).

3 Jonathon W. Penney, *Internet Access Rights: A Brief History and Intellectual Origins*, 38 (1) WILLIAM MITCHELL LAW REVIEW 9, 15 (2011).

State to not interfere with the right of a citizen to access the internet in any way he or she pleases except in the most extreme of cases, the latter is a *positive* right,[4] obligating the State to take all measures necessary and practical in order to enable each and every one of its citizens to access the internet, within reasonable bounds. Furthermore, while the former is a form of a civil and political right, the latter is a socioeconomic right.

A. **The Negative Right**

As mentioned earlier, the negative dimension of the right to internet access is simply an obligation on the State to allow its citizens to access any and all content on the internet, without unreasonable, undue or illegal restrictions. It is essentially a right *against* unreasonable blocking of internet-based resources.This dimension of the right is based on the existing jurisprudence on the interlinked rights of Freedom of Speech, Opinion and Expression, of Information, of Press, the Right to Association, and so on. It is the logical evolution of the aforementioned liberties, brought about as a result of technological development, convergence, and a growing awareness of the potential of the internet medium.

To establish the same, we must necessarily look to the object and purpose of the freedom of speech and expression. Here, the Canadian case of *Irwin Toy Ltd. v. Quebec (Attorney General),*[5]one of the first and most important cases in Canada regarding freedom of speech, is quite illustrative. The parts of the judgement relevant here are the three values that were found to be underlying freedom of speech – respectively, the value of seeking and attaining truth; the value

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4 *Id.*

5 (1989) 1 S.C.R. 927.

of participation in social and political decision-making; and individual self-fulfilment and human flourishing.

Indian jurisprudence has tended to agree with the view taken in *Irwin Toy Ltd. v. Quebec (Attorney General)* – in fact, similar underlying principles of the freedom of speech have been noted in the case of *Indian Express Newspapers (Bombay) (P) Ltd. &Ors. v. Union of India & Ors.*,[6] both of them drawing upon the thesis of the instrumentalist justifications of free speech given by John Stuart Mill in his essay, '*On Liberty*',[7] and all of these purposes directly tie in with the internet.

1. Individual Content Creators

Not only does the internet as a medium directly support the achievement of all the values of the right to free speech, it is increasingly becoming a *necessary* means for it, just as the press did in the 20th century. It has rapidly become one of the fundamental tools for the exercise of a citizen's right to freedom of speech, a tool of political discussion and debate[8] and for gaining information and knowledge that would otherwise be unavailable. The internet has made each individual an active publisher of information, an '*individual content creator*'.[9] It, along with other technological advancements, has taken the power that rested earlier in the hands of television and radio broadcast networks and newspapers, and given it directly to the netizens. This new form of freedom holds immense practical promise, as a dimension of individual freedom, and a platform for better democratic participation, a medium to foster a more critical

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6 A.I.R. 1986 SC 515.

7 UDAI RAJ RAI, FUNDAMENTAL RIGHTS AND THEIR ENFORCEMENT, 32 (2011).

8 Ahmet Yildirim v. Turkey, App. No. 3111/10, ECtHR (December 18, 2012).

9 YOCHAI BENKLER, THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM 1-5 (2006).

and self-reflective culture, and in an increasingly information-dependent global economy, as a mechanism to achieve improvements in human development everywhere. In short, it holds immense promise to achieve the core objectives of the freedom of expression.[10]

This is because the same content that earlier required huge amounts of capital and an established infrastructure is now available to all citizens at a fraction of the cost and a minimal infrastructure requirement. For instance, artists, authors, and journalists alike can now simply create their content and upload it on the internet, getting the same reach as any established record studio, publishing house, newspaper, or news channel. The internet even allows people to exercise their right to information, against governments and political parties and corporations alike.[11] The internet gives the people a voice to an extent unlike that provided by any technology or medium that preceded it.

2. Convergence

This 'democratisation' of internet is even more radical because of a phenomenon that is now termed 'convergence',[12] which refers to a confluence between the various media of communication, such as text (newspapers), simple audio (radio and telephony), and audio-video (television) within one medium – the internet. Thus, not only does the internet allow its users to create content at a level that was unimaginable even two decades ago, it is gradually bringing all

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10 *Id*, at 2.

11 For instance, *see YourAdhikar*, available at: https://youradhikar.com/, an online tool to help citizens file RTIs.

12 Milton L. Mueller, *Digital Convergence and its Consequences*, THE PUBLIC 6(3) 12 (1999).

the existing media of communication together into one, singular medium. Thus, the importance of the right to internet access can really not be overstated. Not only is it a crucial right in and of itself, it is a right that is extremely crucial for the exercise of the enjoyment of the right to freedom of speech and expression. It is an enabling right, and its importance will only increase with the passage of time.

B. **The Positive Right**

Keeping in mind the above points, providing internet access to all the citizens of a country is still not 'cheap', and the cost of such a program increases exponentially when the country in question is as large and populous as India. But at the same time, there are some very important arguments to be made for the positive version of the right to internet access.

The most convincing of these arguments is based on the Right against Discrimination. Currently, internet access is for the most part a luxury enjoyed by the affluent. Affordable mobile internet seems to be changing that, but the fact remains that right now, internet access is a prerogative of the rich.[13]

This has resulted in a phenomenon dubbed the 'digital divide', which is defined as "*the gap between people with effective access to digital and information technologies, in particular the Internet, and those with very limited or no access at all*".[14]The digital divide also exists along wealth, gender, geographical and social lines within States, especially in India due to the low Internet penetration.[15] With wealth being one of the

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13 La Rue, *supra* note 2, at 17.

14 *Id.*

15 Chandra Gnanasambandam et al., *Online and Upcoming: The Internet's Impact on India*, MCKINSEY & COMPANY,6,available at: http://www.mckinsey.com/~/media/mckinsey%20offices/india/pdfs/online_

most significant factors in determining who can access Information Communication Technologies ('ICTs'), Internet access is likely to be concentrated among socioeconomic elites. In addition, people living in rural areas often face several obstacles to Internet access, such as lack of technological and infrastructural availability, slower Internet connection, and/or higher costs.[16]

Furthermore, even where Internet connectivity is available to all persons, disadvantaged groups, such as persons with disabilities and persons belonging to minority groups, often face barriers to accessing the Internet in a meaningful way that would be relevant and useful to them in their daily lives.[17]

Part II. 'Right to Internet Access' internationally

The 'Right to Internet Access' has been gaining increasing recognition on the international platform, as evidenced by the recognition of the *positive* and/or *negative* dimension of this right by various States, Courts, and UN bodies. At the same time, there are some forums which partially recognise the crucial role played by the internet in the exercise of the fundamental rights, even if they do not explicitly recognise a '*right to internet access*'. In order to understand the forms of and arguments for recognition of a right to internet access in a broad and practical manner, the recognition accorded to it by the various bodies has been analysed here.[18]

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and_upcoming_the_internets_impact_on_india.ashx (last accessed Aug. 30, 2015).

16 *Id.*

17 *Id.*

18 Paul De Hert & Dariusz Kloza, *Internet (Access) as a New Fundamental Right, Inflating the Current Rights Framework?*, 3 EUROPEAN J OF L & TECH 3, 3 (2012).

A. **International Recognition**

One of the most important documents regarding the right to internet access in all its dimensions and facets is the 2011 report of United Nations Special Rapporteur for Freedom of Speech and Expression Frank La Rue.[19] The Special Rapporteur's report was the first international document to make note of the right to internet access and examine the concept in detail.

The Special Rapporteur's report finds the basis for the right to internet access within i) the right to freedom of speech and expression, as enshrined within Article 19 of the Universal Declaration of Human Rights ('UDHR') and the International Covenant on Civil and Political Rights ('ICCPR'); and ii) in the right to 'seek, receive and impart information'. The arguments used by the Special Rapporteur follow the trend of a movement to recognise the '*right to communicate*', an essentially *positive* right which has quite a history within the international sphere, though they aren't limited to the same.[20]

1. Right to Communicate

The original idea of a "*right to communicate*" was articulated in the international sphere in 1969 by the late U.N. official Jean d'Arcy, who believed the UDHR would one day recognize it. But the movement for its recognition did not gain momentum among international institutions like the UNESCO until much later. [21] UNESCO brought the idea of a "*right to communicate*" to the international stage in 1980, when its General Conference in Belgrade

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19 La Rue, *supra* note 2.
20 Penney, *supra* note 3, at 18.
21 *Id*, at 14.

passed a resolution recognizing 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 process*", with further recognition coming in subsequent resolutions in 1981 and 1983. [22] This culminated with a '*status report*' on the right prepared by UNESCO consultants in 1985.

However, international interest in the '*right to communicate*' began to falter during early 1990s, with UNESCO itself showing decreasing inclination to promote it in its subsequent meetings. Subsequent efforts of other international organizations and officials to take up the cause met with little success[23] and the movement to codify "right to communicate"internationally ultimately failed. The reasons for this are multifaceted, but an important role was played by the fact that the right, as it was then expressed and advocated, implied a kind of international positive obligation to provide a means for people to communicate, which neither the First nor the Third World States wanted to support or subsidize, due to a lack of will and resources.

2. Right to Freedom of Speech and Expression, and Right to Seek, Receive, and Impart Information

The Special Rapporteur's arguments regarding the right to internet access are fundamentally based on the "*right to seek, receive and impart information and ideas*", a right which is directly drawn from Article 19(2) of the ICCPR, on the right to freedom of speech and

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22 *Id.*

23 *Id*, at 15.

expression. The history and origins of the former are informed to a great extent by the latter, as a part of the 'Free Flow' paradigm.[24]

The first noted use of the language that indicates an implication of the Free Flow paradigm was Resolution 59(I), the 1946 U.N. Declaration on Freedom of Information. It cited the right to "*gather, transmit, and disseminate news anywhere and everywhere without fetters*", an early form of right to "*seek, receive, and impart information*" mentioned above, which called for an international conference on freedom of information. This language was later reiterated in the preamble to the first resolution issued by the same conference, convened in 1948, which recognized that "*freedom of information carries the right to gather, transmit, and disseminate*".[25] Furthermore, within the resolution itself, the right was expressed in a language which is even closer to that later found in both the UDHR and ICCPR, inextricably linking the right to freedom of expression and opinions with the right to freedom of information.

Thus, it is a culmination and confluence of the right to seek, receive and impart information, the right to freedom of expression, and the right to communicate that informs the understanding of the right to internet access as it is articulated by the Special Rapporteur.

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[24] *Id* (The language used here codified the broader international legal paradigm of the 'Free Flow of Information', on freedom of information and expression.Its origins in international law and politics go back to about the Second World War, when the movement to adopt international covenants and bills of rights gained momentum. The rights to "seek, receive and impart information," codified in the UDHR and ICCPR and re-invoked in the Report emerged from within this paradigm.)

[25] *Id.*

B. **State Recognition**

The following is a chronological list of countries where the right to internet access has been explicitly recognised, including the form and means of the recognition.

Estonia

The first country to acknowledge the right to internet access as a fundamental right was the small nation of Estonia. A Soviet-controlled state till 1990, Estonia started off with barely any telecommunications infrastructure and a strict control on information. Deeply affected by this, the independent Estonia chose to ensure the exact opposite. About a decade later, in February 2000, the Estonian *Riigikogu* (Parliament) enacted the new Telecommunications Act, adding Internet access to its universal service list, an acknowledgement of the *positive* dimension of the right to internet access.[26] Now, Estonia is one of the most extensively wired nations in the world, with a robust network infrastructure,[27]and easily accessible wireless coverage.[28] Education, voting, culture, taxation, and governance are some of the sectors that have now entirely moved online. The current networked nation makes a sharp contrast to its Soviet roots.

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[26] Telecommunications Act (Act No. 56/2000), § 5 (Est.).

[27] Felix Knoke, *Estonia: Tiger's Leap into the Wireless Network*, SPIEGEL ONLINE, available at: http://www.spiegel.de/netzwelt/web/0,1518,488083,00.html (as translated by Google Translate).

[28] In part, thanks to the *Tiigrihüpe* (Tiger Leap) Project; *see* Soumitra Dutta (INSEAD), *Estonia: A Sustainable Success in Networked Readiness?*, THE GLOBAL INFORMATION TECHNOLOGY REPORT, Chapter 2.1 (2006), available at http://www.weforum.org/pdf/gitr/2.1.pdf (last accessed on 19 Aug., 2014).

Greece

Following Estonia, Greece amended its Constitution in 2001,[29] introducing Article 5A, (2): "*All persons have the right to participate in the Information Society. Facilitation of access to electronically transmitted information, as well as of the production, exchange and diffusion thereof, constitutes an obligation of the State*".This is a recognition of both, the positive and negative dimensions of the right to internet access.

European Union

The European Union ('EU') in 2009 enacted Directive 2009/136/EC of the European Parliament and Council, which entered into force in 2011.The Directive amended, among others, the 2002 Directive(2002/22/EC) on Universal Service and Users' Rights Relating to Electronic Communications Networks and Services.[30] The 2009 amendment replaced Article 4 of the earlier Directive, establishing a *positive* obligation on European States to ensure that all reasonable requests for network connection from a fixed location are met with a functional level of internet access.[31] Member States of the EU were obligated to transpose the Directive into their national law by 2011. At the same time, the European Commission ('EC') launched a public consultation in 2010 to analyse whether the universal service obligations should be extended to broadband access. Following this, the EC launched the Digital Agenda for Europe action plan, one of the objectives of which is to ensure that by 2020

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29 Syntagma, [CONSTITUTION], APR. 6, 2001 (Greece).

30 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.

31 Directive 2002/22/EC of 7 March 2002 on the authorisation of electronic communications and services [2002] OJ L 108/21.

all Europeans '*can*', and not *must*, have access to much faster internet.[32]

France

The French example is of particular importance to the issue at hand, as the recognition of the right to internet access in France came not from the Government, but from the *Conseil Constitutionnel*('Constitutional Council'). The pronouncement came in a June 2009 decision of the Council regarding the *Haute Autorité pour la Diffusion des OEuvres et la Protection des Droits sur Internet,* more commonly known as the HADOPI law or the '*three strikes*' law, which aimed at ensuring copyright protection online. The Council declared in its judgement that '*given the generalized development of public online communication services and the importance of the latter for the participation in democracy and the expression of ideas and opinions*',[33] the '*free communication of ideas and opinions'* enshrined in the Declaration of the Rights of Man and the Citizen, 1789, a doctrine essentially identical to the right to freedom of speech and expression, implied freedom to access such services. Notably, this upholds the *negative* dimension of the right to internet access, within the dimension of the existing civil liberties.[34] The Council's judgment rendered the HADOPI law toothless, essentially stating that no law could restrict the right to internet access without reason. The limits of the 'reasonable restriction' are illustrated by a following judgement which came only a few months later, in which an amended version of the HADOPI law was

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[32] The 2010 communication (COM (2010) 472) is available here: http://ec.europa.eu/information_society/activities/broadband/docs/bb_communication.pdf (last accessed 19 Aug., 2015).

[33] Conseil Constitutionnel [CC] [Constitutional Court] decision No. 2009-580 DC, 10 June 2009, Rec. 107, ¶ 12 (Fr.)

[34] *Id*, ¶ 24-27.

approved by the Council, [35] as the amendment restricted the revocation of an offender's Internet access for a maximum period of one year but, imperatively, only after judicial review.

Finland

Finland followed suit in 2011, declaring broadband access a basic right through an amendment to Section 60C of its Communications Market Act, [36] including a functional Internet connection in its '*universal service*'.[37]Thus, from July 2010 onwards, Finnish telecom operators categorised as '*universal service providers*' must be able to provide every permanent residence and business office with access to a reasonably priced and high-quality connection with a minimum downstream rate of 1 Mbit/s. This is another acknowledgement of the *positive* dimension of the right to internet access, but it is slightly different from the legislations noted earlier as it increases the burden on a universal service provider with regard to the quality of the connection.

Costa Rica

Just like France, the recognition of the right to internet access came to Costa Rica through the *Sala Constitucional* (Constitutional Court) in a July 2010 judgment.[38]The Court's judgment came in a case filed against the government's delay in opening the telecoms market to competition.[39] The Court stated in the judgement that the delay in

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35 Conseil Constitutionne [CC] [Constitutional Court] decision No. 2009-590 DC, 22 October 2009, Rec. `179 (Fr.).

36 Communications Market Act (Act. No. 393/2003) , § 60 (c) (1) (Fin.).

37 De Hert & Kloza, *supra* note 18.

38 *Id.*

39 Sala Constitucional De La Corte Suprema De Justicia, Exp: 09-013141-0007-CO. Res. N° 2010012790, available at:

opening up the verified telecommunications market violated, among others, the exercise and enjoyment of other fundamental rights, such as freedom of choice of consumers, the constitutional right of access to new information technologies, the right to equality and the eradication of the digital divide,and the right to free enterprise and trade.[40] This is, again, a recognition of the *positive* right, but at the same time it has ingredients of the *negative* dimension in it. This case is all the more notable because it obliged the government to revise the national plans of telecoms development, as there was no obligation on the government to provide for universal access of the service until this point.

Spain

The last on this list is Spain, which recognised the *positive* dimension of the right to internet access in 2011 through Article 52 of its Sustainable Economy Act 2011.[41]It added broadband access to its 'universal service', stipulating that a broadband connection at a speed of 1Mbit per second is to be provided, through any technology.

The above analysis has been summarised in this table:

Country	**Recognised the**		**Recognition by**	**Year of Recognition**
	Positive Aspect	**Negative Aspect**		
Estonia	Yes	-	Government, Constitution	2001
Greece	Yes	Yes	Government, Constitution	2001

https://docs.google.com/document/d/1_n7anxwm9Cd4fJT-rP6zt1vvjHMnA0DFibTV-AMmCg0/edit (last accessed 19 Aug., 2015).

40 *Id.*

41 De Hert & Kloza, *supra* note 18.

European Union	Yes	-	European Parliament Directive	2009
France	-	Yes	*Conseil Constitutionnel*	2009
Finland	Yes	-	Government, Legislation	2010
Costa Rica	Yes	-	*Sala Constitucional*	2010
Spain	Yes	-	Government, Legislation	2011

It is thus quite clear that most of the countries have only recognised the positive dimension of the right to internet access, and not the negative dimension, thereby leaving the question of the effect of this right on the freedom of speech online unclear. The most relevant example is the French one, as its recognition comes from its Constitutional Court, and is based on the right to freedom of speech and expression and other civil liberties.

C. **Partial Recognition**

There have been a multitude of cases in multiple forums which have recognised the important role played by the internet as a medium of speech. These cases directly support an argument for a right to internet access within the paradigm of existing civil liberties, specifically the right to free speech.

The European Court of Human Rights ('ECtHR') has recognised the importance of the Internet in the contemporary communications landscape in a forthright manner in the case of *Ahmet Yildirim v. Turkey,*[42] stating that the internet "*has become one of the principal means for individuals to exercise their right to freedom of expression*

[42] *Supra* note 8.

today: it offers essential tools for participation in activities and debates relating to questions of politics or public interest."

This was followed up by the ECtHR in the case of *Eğitim ve Bilim Emekçileri Sendikası v. Turkey,*[43] which was the first case before it dealing with unreasonable blocking of websites. The ECtHR followed the reasoning given in *Ahmet Yildirim*, finding that the right to freedom of speech of the owners of the wrongly blocked websites had been violated.

The importance of the Internet with regard to the right to freedom of speech was also recognised by the Canadian Supreme Court in the case of *Saskatchewan (Human Rights Commission) v. Whatcott.*[44] The United States of America has repeatedly recognised the importance of the internet towards the right to freedom of expression, most notably in the cases of *Reno v. ACLU*[45] and *Ashcroft v. ACLU.*[46]

Part III. The Indian Supreme Court and the Right To Freedom of Speech

The jurisprudence surrounding the negative dimension of the concept of a right to internet access is therefore deeply intertwined with the right to freedom of speech and expression, and the right to seek, receive, and impart information, and, as we will discuss here, the freedom of press. These rights are known within the Indian Constitutional jurisprudence in various forms, such as the 'Right to

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43 Eğitim ve Bilim Emekçileri Sendikası v. Turkey, App no 20641/05, ECtHR. (25 September 2012).
44 (2013) 1 S.C.R. 467.
45 521 U.S. 844 (1997).
46 535 U.S. 564 (2002).

Know',[47] the 'Right to Publish',[48] the 'Right to Disseminate and Circulate Information',[49] and the 'Right to Communicate'(separate from the eponymous concept mentioned earlier).[50].

A. **Rights within Rights**

The concept of 'derivative rights' has been discussed in detail in the case of *People's Union for Civil Liberties ('PUCL') v. Union of India('UoI').*[51] The Court in this case rejected the idea of 'derivative rights', stating that the fundamental rights and freedoms enshrined in the Constitution have no contents, and that from time to time, it has fallen to the Court to fill the '*skeleton with soul and blood and [make] it vibrant*', in the words of Shah, J. To support this contention, the Court used the precedents laid down by *Kesavananda Bharati v. State of Kerala*, wherein Mathew, J. stated that the fundamental rights themselves have no fixed content, and that most of them are empty vessels into which '*each generation must pour its content in the light of its experience*'[52] and *Pathumma v. State of Kerala,* wherein the Court stated that it should be the attempt of the Court to expand the reach and ambit of fundamental rights.[53]The Court also relied on the American case of *Missouri v. Holland.*[54] Therefore, our Supreme Court is quite clearly capable of reading into the law a new right such as the right to internet access on the basis of existing rights. In fact, it has done so

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47 State of Uttar Pradesh v. Raj Narain, 1975 A.I.R. 865, (1975) 3 S.C.R. 333.
48 Sakal Papers (P) Ltd. & Ors. v. Union of India, A.I.R. 1962 S.C. 305.
49 Secy. Ministry of Information and Broadcasting, Govt. of India & Ors. v. Cricket Association of Bengal & Ors. 1995 (2) S.C.C. 161.
50 *Id.*
51 A.I.R. 2003 S.C. 2363.
52 (1973) 4 S.C.C. 225.
53 (1978) 2 S.C.C. 1.
54 252 U.S. 416.

on similar occasions, for instance with the right to privacy, which was included under Article 21 of the Constitution.[55]

Such a separate and specific recognition of the right to internet access is crucial, as it is quite complex a concept, which cannot be subsumed in its entirety within the existing jurisprudence of the right to free speech, and it deserves to be examined separately. Furthermore, it is a right which is consistently under threat due to the criminalisation of legitimate expression and arbitrary blocking of content, from both governmental and private sources. These threats include the blocking, tampering, and regulation of Internet content[56] and the concentration of controlling power over the Internet, in the hands of private entities or the government, through a lacking Network Neutrality regime.[57]

1. **The Object and Purpose of the Right to Freedom of Speech**

The justifications usually given for the right to free speech can be divided into two categories: instrumentalist and non-instrumentalist.[58] In the former category, are arguments that try to prove the necessity of this right by pinpointing the values it serves and the good it does, while in the latter are arguments that find free speech itself worth being guaranteed, irrespective of its benefits or harms. The Indian jurisprudence is heavily inclined towards instrumentalist justifications.[59] It also arguably gives more importance

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55 M. P. Sharma & Ors. v. Satish Chandra, 1954 A.I.R. S.C. 300.

56 La Rue, *supra* note 2, 9-15 & 19-20.

57 TIM WU, THE MASTER SWITCH: THE RISE AND FALL OF INFORMATION EMPIRES, 260 (2010).

58 RAI, *supra* note 7, at 32.

59 *Id,* at 35.

to political speech than other forms of speech,[60] which is, in my opinion, a fallacy.

It becomes necessary, then, to consider the purpose of the various rights that the Court has articulated under the Right to Freedom of Speech. Crucial here is the case of *Indian Express Newspapers (Bombay) (P) Ltd. &Ors. v. Union of India & Ors.*[61] in which the Court observed that the freedom of expression has four broad social purposes to serve: 1) helping an individual to attain self-fulfilment (which is a non-instrumentalist purpose); 2) assisting the discovery of truth (this and the following two are instrumentalist purposes); 3)strengthening the capacity of an individual in participating in decision-making; and, 4) providing a mechanism by which it would be possible to establish a reasonable balance between stability and social change. The Court stated that this was in order to ensure that all members of the society should be able to form their own beliefs and communicate them freely to others, which leans towards the instrumentalist side of the debate. As noted earlier, these observations are quite similar to those of the Canadian Supreme Court in the case of *Irwin Toy v. Quebec,* except for the maintenance of a balance between stability and change mentioned here.[62]

The Court here used this logic to establish the '*right to know*' within the freedom of speech and expression, the obiter making the value given to political speech extremely clear. It also stated that anyone supporting the freedom of expression would necessarily support the right to know, drawing a strong link between the two. Using this logic, the Court expanded the freedom of speech to also

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60 *Id*, at 33.
61 (1985) 1 S.C.C. 641.
62 (1989) 1 S.C.R. 927.

include the freedom of propagation of ideas in the case of *Romesh Thappar v. State of Madras*[63]. It spoke of this concept in the context of the right of circulation of newspapers, but the medium of the propagation is secondary to the actual propagation itself, as we shall see later in the paper.

This logic can thus be extended to include within it a right to internet access as a medium of exercise of the right to free speech, since the Internet demonstrably supports all four of these stated purposes. The non-instrumentalist purpose argues that the very right to free speech itself is what is important, and the internet is now one of the leading mediums for the exercise of this right by individuals and institutions alike. Not only is the Internet a medium through which individuals can communicate with others, it is also a medium which provides access to a plethora of information. This brings us directly to the third and fourth purposes – the cornucopia of information, academic and otherwise, that is available on the Internet directly and inarguably assists in discovery of truth. This was actually the original purpose of the Internet in its halcyon years when it was designed as a network to share information between universities to facilitate research.[64] And through the same information sharing, which extends from the academic environs to the published results of Right to Information reports, news reports from all over the world, and the reports of the works of policy workers, and the discussion and debate platforms provided to *individuals*, the Internet directly assists individuals in strengthening their ability to participate in decision-making. Finally, the Internet is such a vast platform that there is some space for everyone, and a lot of overlap in between for

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63 1950 S.C.R. 594.

64 Julien Mailland, *The Semantic Web and Information Flow: A Legal Framework*, 11 N. CAROLINA J. OF L. & TECH. 269, 272 (2010).

social change and transition. It provides for a platform for sharing and learning about diverse views, and for disagreement, thereby providing as much of a balance between stability and social change as possible while still moving forward.

2. **A Medium-neutral Right**

It is argued here that the freedom of speech and expression, as it has been established within Indian jurisprudence, is medium-neutral. This argument is supported by the observations of the Court in quite a few cases, three of which are noted below.

The first is the case of *S. Rangarajan v. P. Jagjivan Ram and Ors.,*[65] wherein the Court stated that the freedom of speech and expression means that every citizen has the right to express his or her opinion by words of mouth, writing, printing, picture or *'in any other manner'*. The Court here specifically noted that the communication of ideas *"could be made, through any medium, newspaper, magazine or movie"*.[66] The Court therefore concluded that the freedom of speech and expression would include the 'freedom of communication' and the 'right to propagate or publish opinions'.

The second is the case of *LIC v. Manubhai D. Shah,*[67] wherein theCourt noted that the freedom of speech and expression is a natural right and a basic human right, relying herein on the same Article 19 of UDHR that Frank La Rue has relied on, and noted that it is a right that every human being has since birth. The Court stated that, therefore, every citizen has a right to air his or her views

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65 (1989) 2 S.C.C. 574.
66 *Id.*
67 (1992) 3 S.C.C. 637.

through *the printing and/or electronic media or through any communication method.*

The third case that supports this argument and indicates an evolution in the right to freedom of expression on the basis on the medium being employed to exercise it is that of *Odyssey Communications Pvt. Ltd. v. Lokvidayan Sanghatana &Ors.*,[68] wherein the Court held that citizens had a right to exhibit films on Doordarshan, subject to Doordarshan's terms and conditions. The Court went on to state that this right is a part of the fundamental right of freedom of expression guaranteed under Article 19 (1) (a), and that such a right can be curtailed only under circumstances set out under Article 19 (2). The Court likened it to the right of citizens to publicise their views through *'any other media'*, such as newspapers, magazines, advertisement hoarding etc., subject to the terms and conditions of the owners of the media.

Thus, the right to freedom of speech is a medium-neutral right, which therefore can be extended to protect the same right on the internet.

3. **The Freedom of Press, or the Right to Publish**

Another crucial concept that must be examined here is the Freedom of Press, or the Right to Publish, and the object and purpose of the same. Relevant here is the case of *Sakal Papers (P) Ltd. & Ors etc. v. Union of India,*[69] in which the Court noted that the freedom of speech and expression includes the right of citizens to publish**,** disseminate and circulate their ideas, opinions and views in order to propagate them.

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[68] 1988 A.I.R. S.C. 1642.
[69] 1962 A.I.R. S.C. 305.

Crucially, the Court's defense of the freedom of press and of circulating newspapers depended on the fact that the freedom of press and of circulation of a newspaper was an essential and basic attribute of the conception of the freedom of speech, with regards to the right of citizens to circulate their views to all whom they can reach or care to reach. Similarly important is the case of *Bennett Coleman and Co. & Ors. v. Union of India & Ors.*,[70] in which the Court noted that the freedom of press means the right of citizens to speak, publish and express their view, as well as the right of people to read.

Thus, the central concept in the freedom of press is not the press itself, but the right of *citizens* to publish and propagate their views. The protection accorded to freedom of press here is entirely dependent on the fact that press acts as a medium for the exercise of the right to freedom of speech.

The arguments being made here can be summarised very well through the observations of the Supreme Court in case of *Secy., Ministry of Information and Broadcasting, Govt. of India &Ors. v. Cricket Association of Bengal &Ors.*[71]Here, the Supreme Court summarised the law on the freedom of speech and expression under Article 19 (1)(a), as restricted by Article 19 (2), and found it to include the right to acquire and disseminate information. The Court focused on the necessity of this right for the purposes of achieving self-expression, its ability to enable people to contribute to debates of social and moral issues, and the fact that it is also the best way to find the truest model of anything, since it is only through this freedom that the widest possible range of ideas can circulate and be compared.

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70 (1972) 2 S.C.C. 788.
71 (1995) 2 S.C.C. 161.

The Court thus concluded that this freedom is the only vehicle of political discourse so essential to democracy, but also considered equally important, the role it plays in facilitating artistic and scholarly endeavours of all sorts. 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.[72]

The Court further stated in this case that the right to communicate, under the right to freedom of speech, therefore included right to communicate *through any media that is available,* whether print or electronic or audio-visual such as advertisement, movie, article, speech etc. Following the same line of reasoning, the Court concluded in the case of *Union of India v. Naveen Jindal & Anr.*[73] 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…*", the crucial part here being the Court's usage of the phrase 'and otherwise'.

Furthermore, the Court explicitly stated that it is because the press supports and facilitates this freedom that it is protected under freedom of speech and expression. Thus, it concluded that the fundamental right to freedom of speech and expression and the freedom of press 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*", and that this fundamental right can be limited only by reasonable restrictions under a law made for a purpose mentioned in Article 19 (2) of the Constitution, stating that

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72 Zee Telefilms Ltd. & Anr. v. Union of India & Ors., A.I.R. 2005 S.C. 2677.
73 A.I.R. 2004 S.C. 1559.

the burden to justify such restrictions is on the authority making them.The nature of the right in the existing Indian Jurisprudence, in its purposes and its medium, directly supports a right to internet access.

4. **Media Freedom and Monopolies – Justice KK Matthew's Dissent**

In the context of Media Freedom, another concern that attaches itself to the practicalities of the right to free speech is the privatisation and monopolisation of the very medium of speech itself by corporates. This is conceptualised clearly by Justice KK Matthew's dissent in the case of *Bennett Coleman v. Union of India*,[74] wherein he spoke of the weakening effect of the '*concentration of power*' on the fundamental presupposition that the right to press facilitates the objectives of the right to free speech.

What worried Justice Matthew was that if mass media was to be concentrated in a few hands, the chances of ideas antagonistic to the ideas of the proprietors of this mass media getting access to the same become very remote. This, according to him, biased the 'marketplace of ideas', meaning that it did not treat all ideas equally. He believed that it was no use to have a right to express your idea, unless you have got a medium for expressing it.

On the basis of the above, Justice Matthew concluded that the 'marketplace of ideas', if any such concept had ever existed, has long since ceased to exist due to the concentration of mass media in select hands, creating *private* restrictions to free speech in place of the governmental restrictions. This is exactly where the right to internet

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74 (1973) 2 S.C.R. 757.

access actually becomes even more important. Because the internet is the one and only medium at this point of time that is, or rather can be, free from privatisation, monopolisation, and non-governmental control.[75]This is due to the principle of '*Network Neutrality*', which requires all ISPs to treat all data on their networks *equally*, and conjoins them from discriminating between various types or streams of data on their networks. Therefore, not only is a right to internet access necessary to ensure the widest and most effective medium of free speech currently possible, it is also the first step towards enforcing Network Neutrality as a law in India, thereby ensuring that at least this one free medium, remains free.

Part IV. Positive dimension of the Right to Internet Access

Arguably, the theoretical structure for even the positive dimension of the right to internet access already exists, within the bounds of the right against discrimination, and the international obligations undertaken by our country.[76] But such an obligation is difficult for the Indian government to execute immediately, keeping in mind the current size and population of our nation. Furthermore, we are already failing to achieve a good standard of education under the Right to Education – the added burden of a positive right to internet access will be catastrophic for the Indian government.

But it should still be noted that the Indian government has launched quite a few schemes and programs to bring ICTs, including the Internet, to those deprived of them. For instance, soon after his election as the Prime Minister, Narendra Modi proposed an ambitious 'Digital India' program aimed at promoting e-governance,

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75 WU, *supra* note 61, 260.

76 Stephen Tully, *A Human Right to Access the Internet? Problems and Prospects*, 14 (2) OXFORD HUMAN RIGHTS L. REV. 175 176 (2014).

two of the stated focus areas of which are "*[bringing]Digital infrastructure as a Utility to Every Citizen*" and the "*Digital Empowerment of Citizens*", including digital literacy.[77]

Some of the details of these programs are:

i. National Optic Fibre Network: This plan was approved in 2011, and aims to provide broadband connectivity to all panchayats by extending the existing optical fibre network to the same. It was rebooted by the Modi government, and now aims to be finished by 2017.

ii. A part of the same program is to ensure provision of mobile communication services to areas affected by left wing extremism.

iii. As part of the National E-Governance Plan of 2006, the government has established 'Common Service Centres', or 'e-Kiosks', in collaboration with the private sector. As of January 2011, over 87,000 centres have reportedly been established.[78]

Conclusion

The roots of the negative dimension of the right to internet access, as has been discussed in the beginning, can be traced to the concepts of the right to freedom of speech, the right to information, and the right to communication within international jurisprudence.

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77 Press Conference on 100 Days Performance of IT and Telecom, *India at the Door of Digital Revolution – Ravi Shankar*, PRESS INFORMATION BUREAU (13 Sep., 2014), available at: http://pib.nic.in/newsite/erelease.aspx?relid=109646, (last accessed Aug. 30, 2015).

78 La Rue, *supra* note 2, at 18.

The internet is the next step in the evolution of the very idea of communication, of speech, as we see it. In fact, it has already revolutionised all the previous modes of communication to the extent that they are all converging into a singular medium, that of the Internet. And it is quite clear from the above analysis that the internet is now fundamental to the stated object and purpose of the right to freedom of speech within the Indian jurisprudence. Furthermore, it has clearly been established that in the Indian jurisprudence, the right to freedom of speech is a medium-neutral right, and that in fact, any medium that is important to the exercise of the right to freedom of speech of an individual gradually becomes included *within* the right to freedom of speech, and becomes protected under it. We saw a similar evolution with regards to the freedom of press in India, and we saw the evolution of the law to include the television medium as well.

The time will soon be at hand when internet access becomes crucial for nearly any form of mass exercise of the right to freedom of speech – in fact, it is arguably already here. In such an age, the recognition of the importance of the internet medium as central to the right to freedom of speech is the necessary next step for the law. Just as the technology has evolved, so has the human condition, and so must the law.

Frank La Rue defines the negative dimension of the right to internet access as "*the right to access the internet without any restrictions, except in the limited cases wherein such restrictions are allowed by law*". This paper establishes that this definition of the right is entirely in consonance with the Indian jurisprudence surrounding the right to freedom of speech, including the reasonable restrictions clause. But this conceptual right has been repeatedly threatened over the past year in India, through legislations such as the amendment of the

Karnataka Goonda Act, [79] Section 66A of the Information Technology Act, absurd arrests under the same, and a multitude of agreements which violate the principle of Network Neutrality. Even despite Section 66A being struck down for its unconstitutionality, the government is reportedly attempting to bring it back in a different guise. [80] At the same time, this concept is a complex one, which includes dimensions like the concept of Network Neutrality, jurisdictional issues, and has far more potential for impact than any other existing medium. It, therefore, deserves to be analysed and protected separately. It is thus high time that the Indian Courts formally recognised the right to internet access, since without such recognition, the 'right to freedom of expression' in the context of internet is nothing but a set of hollow, meaningless words.

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79 Bhatia, *supra* note 1.

80 PTI, *Govt working on restoring 66A of IT Act with changes*, BUSINESS STANDARD (31 July, 2015), available at: http://www.business-standard.com/article/pti-stories/govt-working-on-restoring-66a-of-it-act-with-changes-115073101000_1.html.