GOVERNING VIRTUAL SPACE: ANALYSING INTERNET ACCESS AS A HUMAN RIGHT IN THE AGE OF INFORMATION

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Abstract

The balance between state powers and rights of citizens is a symbol of democracy, however we often see that the liberty of a person and the security of the country are at loggerheads and this fight is put before the Apex Court for Constitutional Adjudication. Inequality in India, specifically in terms of wealth, opportunities and access is increasing on a regular basis. One of the tools used by the state to combat this is Digital India, where tech and internet is used as a tool to improve and supplement government efforts in reducing this inequality. The private sector has also participated, benefited from and created benefits due to this ongoing digital revolution. However, for those that are left out of this revolution, existing inequalities are exacerbated and there is a risk of them being denied the benefits of digitization and internet access. Access to the internet affects the lived realities of individuals and communities in multiple ways, across themes such as education, economic development, political participation, health, social discourse and many more. With this context, it becomes important to question whether a specific right to internet can exist, and if it does, where it would be placed within human rights jurisprudence and the Indian constitutional structure. This paper seeks to answer this questions and suggest a pathway for taking this discussion forward. I have attempted to define the landscape around this in India, by looking at the current status of internet access, government schemes for the same, the effects of deprivation of internet access, judicial decisions which can provide a suggested pathway for looking at this question and mapping the scenario for the right to internet access from an international perspective. I have looked at court cases, research papers, studies and legislation to suggest a framework for the right to internet access as a human right within the Indian constitution, how such a right can be defined, and how this would affect the role of the state in this issue.

Keywords: Cyber Democracy, Internet Access, Right to Life, Human Rights, Digital India, Derived Rights.

INTRODUCTION

*"Give me the liberty to know, to utter, and to argue freely according to conscience, above all liberties." – **John Milton***

The essence of free speech and expression means the ability to speak express freely without any restriction. The pre-requisite of a successful democracy is the equilibrium between state powers and rights of citizens. The speech and expression were taken to a new level through the advent of internet and social media networks. With the dawn of the Internet era, communication technology is made inexpensive, practicing of free speech, expression, association and assembly is facilitated and we have an affordable stage for self-expression. Nevertheless, most governments around the world imbibe eventualities into their national law which permit them to take command of communication networks, and bar or obstruct them under the pretext of Public Emergencies or for national security. However conditions under which a government could resort to this power are

generally not indicated evidently[1]. If we look at the recent past few years, 'virtual curfews' or 'network shutdowns' have been increasingly resorted to in South Asian countries such as India, Pakistan, Bangladesh and Maldives. For example, India saw 23 such shutdowns in 2016 alone[2] . The Bangladesh government had shut down the Internet for about 90 minutes in November 2015[3] while Pakistan had suspended mobile phone services in more than 80 cities[4] for 16 hours as a security measure. The right to freedom of speech and expression in the medium of internet needs to be protected and regulated to prevent unwanted commotion in the society.

So much of what takes place in the modern world depends on transactions taking place online. Data has become more valuable than oil,and companies like Google, Amazon and Facebook rely heavily on data, its extraction and processing to deliver services to their users. Even without them, there are plenty of other services like education, connecting with people, transmission of news and communication-different necessities which are rendered obsolete without some reliance on the internet. But then, it also raises certain questions- given its importance in our lives, can access to internet be necessarily considered as a basic right which should be available to everyone?

There are several arguments to be considered on both sides of the issue. One of the major arguments put forward is that the internet cannot be considered as a human right because it is a means to an end and not an end in itself.[5] Moreover the internet does not exist in itself, it was created as a result of human endeavour and is essentially a technological advancement. Such an entity does not meet the requisite high standard of being deemed as a human right as it is a mere enabler of rights and not a right itself.[6]

The last line is particularly crucial. The fact that internet is a product of technology and that it facilitates enabling of other human rights (like freedom of expression) is well founded and to an extent justified. But what if access to internet could be seen to be not as a human right in itself but as a right which is a subset of other human rights as an inextricable part? A plain reading of article 27 of the Universal Declaration of Human Rights makes this clear. Article 27 states that –

(1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.

(2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

Part (1) says that there is a right to freely participate in cultural life and enjoy benefits of scientific advancement. In today's world where governments and private enterprises are heavily dependent on the internet, as well as consumers who go about their daily lives, the argument for access to internet as a human right becomes increasingly strong. Some argue that technological progress will always change how people enjoy their fundamental rights, and require governments and people to reaffirm the inseparability rights, and the methods of enjoyment of those rights.[7] Thus, it becomes imperative that governments enact laws which enable citizens to enjoy these rights and that laws should be in tune with what is produced in the form of technological advancement.

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[1] See the Article 35 of the International Telecommunication Union (ITU) Constitution http://www.itu. int/dms_pub/itu-s/oth/02/09/S02090000115201PDFE.PDF

[2] News Article, Data : 46 Internet Shutdowns in India in 12 States This Year; https://www. nextbigwhat.com/Internet-shutdowns-india-2016-297/

[3] News Article, "Internet access restored in Bangladesh after brief shutdown at BDNews "http:// bdnews24.com/bangladesh/2015/11/18/Internet-access-restored-in-bangladesh-after-briefshutdown; Accessed on March 25th 2020

[4] News article, "'Mobile Phone Services Suspended In More Than 80 Cities'" https://www.geo.tv/

latest/66272-mobile-phone-services-suspended-in-more-than-80-cities; Accessed on March 20, 2020

[5] Vinton G. Cerf. 'Internet Access Is Not A Human Right', The New York Times, (New York, 4 January 2010) <https://www.nytimes.com/2012/01/05/opinion/internet-access-is-not-a-human-right.html?_r=1&ref=opinion> accessed 24 December, 2019

[6] Ibid

[7] Scott Edwards, ' Is Internet Access A Human Right?', Amnesty International, <https://www.amnestyusa.org/is-internet-access-a-human-right/> accessed 28 December, 2019

Moreover, the internet has also proved to be an important means for human rights activists themselves to further the rights of the marginalized and oppressed. Jamie Metzl writes that *"information technology systems can allow for information to be both collected and disseminated faster and more cheaply than before, can foster links between local human rights groups or between local and international can allow local groups to be less dependent on accessing information relevant to their work"*.[8] Metzl has also emphasized upon the important role that can be played by individual actors- Electronic communication has allowed concerned observers to bypass traditional filters of the news media or international NGOs and receive daily reports of developments surrounding an issue of concern rather than wait for sporadic coverage by popular media.[9] This again highlights the key reasons as to why human rights activists, legal scholars and even some governments are increasingly coming on board with the idea of internet access as a human right.

But the question one is more concerned with is whether such an access would impinge upon existing rights? Maria Lourdes P. A. Sereno writes that as the internet and other communication technologies permeate more aspects of our lives, the internet access and usage will be a frequent arena of future legal battles for human rights advocates, regulators and legislators.[10] He elucidates that the codes and data which allow for the connections to take place are not representative of mere electrical signals but are representative of something greater- "these numbers and codes are representations of our choices, feelings, opinions, and the knowledge wegenerate and are the products of our creative minds."[11] And Lourdes is right in saying that. Thisalso means

that when our choices become simplified into pinpoints and collectable data, they become prone to exploitation, and this exploitation can take place in several ways. Technology, while being useful, is increasingly showing a dark side, and big internet companies like Facebook, Google and Microsoft are creating power structures that are changing the very frontiers on which the struggle for human rights is taking place. This shall be elaborated upon in the succeeding sections.

2. THE CHALLENGES TO INTERNET FREEDOM: SOME RECENT EVENTS

Privacy is one of the biggest emerging concerns among consumers across the world. This has been highlighted in several key events which occurred throughout different countries and this section will discuss some of the key events which are important for the debates around freedom, technology, data and the internet.

In an article appearing in the Guardian in 2015, Harry Davies reported that in the run-up to the 2016 American presidential election, the presidential candidate Ted Cruz had been employing the services of a company called Cambridge Analytica for boosting his chances against Donald Trump and other Republican candidates.[12] The company, while being funded by one of Cruze's leading donors Robert Mercer, made use of so called "psychographic profiles"- using psychological data based on research spanning tens of millions of Facebook users, harvested largely without their permission to analyse and understand his voter base and induce and influence them to vote in a particular way in a bid to make his campaign successful.[13]

What started as a minor news leak raising concerns about user data privacy became a full

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[8] Jamie F. Metzl, 'Information Technology And Human Rights', (1996)18 HRQ (4) 705, 712

[9] Jamie F. Metzl, 'Information Technology And Human Rights', (1996)18 HRQ (4) 705, 713

[10] Maria Lourdes P A Sereno, 'Internet and Human Rights: Issues and Challenges' (2013) 2013 Asian J Legal Stud 93, 101

[11] Maria Lourdes P A Sereno, 'Internet and Human Rights: Issues and Challenges' (2013) 2013 Asian J Legal Stud 93, 101

[12] Harry Davies, 'Ted Cruz using firm that harvested data on millions of unwitting Facebook users' The

Guardian (London, 11 December 2015) <https://www.theguardian.com/us-news/2015/dec/11/senator-ted-cruz-president-campaign-facebook-user-data> accessed 30 December 2019

[13] Harry Davies, 'Ted Cruz using firm that harvested data on millions of unwitting Facebook users' The Guardian (London, 11 December 2015) <https://www.theguardian.com/us-news/2015/dec/11/senator-ted-cruz-president-campaign-facebook-user-data> accessed 30 December 2019

blown scandal in March 2018 as a result of the work of other leading journalists on the case, most notably Carole Cadwalladr, who published articles with the help of an ex-employee in Cambridge Analytica, Christopher Wylie.[14]Data had been harvested on an unprecedented scale from Facebook users- personal information included and not just preferences and choices. The scandal ended up causing a huge outcry in the public and revealed interference in the Brexit campaign as well as elections in several countries. Mark Zuckerberg, the CEO of Facebook eventually agreed to testify in front of the U.S. Congress as a result of the scandal. But this is just one of the many events which have taken place in the past few years which raised concerns among the public about data privacy and the trust they hold in internet companies.

The emergence of information-based technology companies and the unprecedented use of data in modern economies have led some to conclude as data having become more valuable than 'oil' in the modern day and age.[15]But collection of data in data bases raises quite a few eyebrows. Such was also the case with Aadhaar. Initially introduced as a service which was not mandatory, the government of India started introducing several campaigns encouraging Aadhaar card holders to link their unique identification numbers with essential services like bank accounts, mobile sim cards, Rural employment guarantee scheme and Public Distribution System. This prompted several petitions in the Supreme court of India regarding the nature of the service and the court ruled that

the Aadhaar system was of a voluntary nature and can't be made mandatory.[16] Nevertheless, the importance of Aadhaar grew. In July 2017, in a landmark judgement, the supreme court upheld right to privacy as a fundamental right guaranteed under articles 14, 19 and 21 of the constitution.[17] Following this, new questions started arising regarding the validity, usefulness and potentially data breaches regarding Aadhaar. In a later judgement, filed by petitioners challenging the validity of the Aadhaar act, the supreme court upheld the validity of the Aadhaar system by a 4:1 majority, while striking down several sections and instructing the government to come up with a robust system to deal with data protection.[18] Many have pointed out the judgement as a 'disappointment', pointing towards the fact that it "divides the people of this country into those receiving state assistanceand others" with some getting socio-economic rights if they do as they are asked to do.[19]Attention has also been drawn to the fact that the personal data of people who enrol themselves is not safe along with the failure rate of biometrics in various states.[20] What is also noteworthy is the lone dissent given by Justice DY Chandrachud which became the minority judgement. He wrote - "The entire Aadhar programme, since 2009, suffers from constitutional infirmities and violations of fundamental rights. The enactment of the Aadhaar Act does not save the project. The Aadhaar Act, the Rules and Regulations framed under it, and the framework prior to the enactment of the Act are unconstitutional."[21]

[14]Carole Cadwalladr and Emma Graham- Harrison, 'Revealed: 50 million Facebook profiles harvested for Cambridge Analytica in major data breach' The Guardian (London, 17 March 2018) <https://www.theguardian.com/news/2018/mar/17/cambridge-analytica-facebook-influence-us-election> accessed 30 December 2019

[15] The Economist, 'The world's most valuable resource is no longer oil, but data'(May 6 2017)<https://www.economist.com/leaders/2017/05/06/the-worlds-most-valuable-resource-is-no-longer-oil-but-data> accessed 30 December 2019

[16]Justice K.S. Puttaswamy (Retd.) v. Union of India, 2018 SCC Online SC 1624

[17]Justice K.S. Puttaswamy (Retd.) and Anr. v. Union of India, (2017) 10 SCC 1

[18] 'What's Valid and What's Not : Everything you need to know about Aadhaar Verdict' Economic Times (New Delhi, 26 September 2018) <https://economictimes.indiatimes.com/news/politic

s-and-nation/whats-valid-and-whats-not-everything-you-need-to-know-about-todays-aadhaar-verdict/articleshow/65961427.cms?from=mdr> accessed 7 January 2020

[19] Usha Ramanathan 'More Equal Than Others', Indian Express, (New Delhi, 29 September 2018) <https://indianexpress.com/article/opinion/columns/aadhaar-uidai-privacy-inequality-poverty-fundamental-rights-more-equal-than-others-5378631/> accessed 7 January, 2020

[20] Usha Ramanathan 'All Is Not Well With Aadhaar', Indian Express, (New Delhi, 7 January 2018) <https://indianexpress.com/article/opinion/columns/all-is-not-well-with-aadhaar-leak-aadhaar-details-5013305/> accessed 7 January, 2020

[21]Justice K.S. Puttaswamy (Retd.) v. Union of India, 2018 SCC Online SC 1624

This clearly shows that while the majority may be okay with it, there is scope for raising more questions regarding the validity.

Aadhaar is also one of the examples about data privacy. But that is not the only rights which are important when we are talking about big data, information and the internet. The right to freedom of expression is also an important right. But loads of information can lead to an outbreak of misinformation and data manipulation is sometimes detrimental to public morality and interest. This has become apparent in the use of data and social media in elections and political campaigning in India. We shall now take a brief look at the way the Bhartiya Janata Party has utilised the internet and social media to fundamentally change how election campaigning takes place and elections are won. The BJP is in majority in the Lok Sabha and is the ruling party. The kind of success they have enjoyed in state elections as well as the 2014 and 2019 general elections and the role of social media is unprecedented in the history of elections in this country.

In a piece published in 2014, Arvind Gupta, the technology head of BJP, revealed the role data analytics played in the campaign which allowed Narendra Modi and is government to come to power."We had data on each of the 543 constituencies. We knew how many mobile and Internet users were present in each constituency. The same holds true for social media users. Alongside, we used analytics to understand which polling booths had voted for the BJP in the previous elections," saidGupta.[22] Gupta further elaborated that for each polling booth data analytics was used to segregate voters into blocks to determine who were pro, undecided or against the BJP.[23]"Deep analytics was employed to understand group communication behaviour

and then used appropriate technology to communicate with them," he said.[24]

The results speak for themselves- In 2014, the BJP won 242 seats. In 2019, they won 303. Their wins in state elections show similar electoral domination barring a few states. The words used by Gupta may sound like the words of a pragmatic strategist looking out for the best interests of his party but seem to have a manipulative tone to them. The fact that technology can be harnessed in ways which can allow political parties to "influence" voters shows how destructive and dangerous the use of technology has become in conducting free and fair elections as voters can no longer be said to be free, aspeople who make an informed choice today may not be completely well versed with all the facts which are considered pre-requisites in order to make such choices. We have witnessed in the last few years a surge in the spread of misinformation on the internet in the form of fake news. Earlier this year, the messaging service company WhatsApp spent over Rs. 120 crores on an ad campaign which aimed to spread awareness about fake-news as a result of the rising cases of lynching, something which the company had done for the first time in any country.[25]

The nature of the incidents describes a brutal reality about the internet and the future it promises. Perhaps the most persisting question is this – Is internet freedom real? or a myth? The next section will try to find answers for the same.

3. THE MYTH OF INTERNET FREEDOM

The debates about internet access and human rights are inseparable from the larger one

[22]PR Week, 'How India's BJP Used Data Analytics To Swing Voters'(September 17 2014)<https://www.prweek.com/article/1312443/indias-bjp-used-data-analytics-swing-voters> accessed 9January 2020
[23]PR Week, 'How India's BJP Used Data Analytics To Swing Voters'(September 17 2014)<https://www.prweek.com/article/1312443/indias-bjp-used-data-analytics-swing-voters> accessed 9 January 2020
[24]PR Week, 'How India's BJP Used Data Analytics To Swing Voters'(September 17

2014)<https://www.prweek.com/article/1312443/indias-bjp-used-data-analytics-swing-voters> accessed 9 January 2020
[25] Shambhavi Anand. 'A Rs 120-Crore Whatsapp Message To Fight Fake News', The Economic Times, (New Delhi, 10 January 2019) <https://m.economictimes.com/tech/internet/a-rs-120-cr-whatsapp-message-to-fight-fake-news/articleshow/67464732.cms> accessed 5 January, 2020

surrounding internet freedom. Access to the internet in a free and equitable manner is essential cornerstone of any functioning modern-day democracy and the human right freedom of expression. This could be alluded to the idea of right to information, a right which emerged under the Indian constitution as a result of the influential movement carried out by Aruna Roy and the Mazdoor Kisaan Shakti Sangathan (MKSS). The act is meant to- "provide for setting out the practical regime of right to information for citizens to secure access to information under the control of public authorities, in order to promote transparency and accountability in the working of every public authority, the constitution of a Central Information Commission and State Information Commissions and for matters connected therewith or incidental thereto."[26]Thus we see that the right to information is not necessarily a right in itself but is implicit in the right to freedom of expression. Same goes for the internet.

But there are limits to how the internet works and how it can be used for the good. One of the many ways in which the internet has been hailed as revolutionary is by its power to democratize. There are many who believe that authoritarian regimes could be easily toppled if people are empowered by access to internet technology and social media websites like twitter or Facebook. This idea is part of a larger ideology of 'internet centrism' which Evgeny Morazov calls 'cyber utopianism'.[27] Morazov argues that governments and their faith in the magic of internet i.e. cyber utopianism is dangerous because it is expensive to maintain, forgoes asking important questions about the ethics of internet and may not work in fighting authoritarianism. There is also no guarantee about its misuse as authoritarian regimes could very well use the internet as a tool to oppress people.[28]

Free flow of too much information also creates problems and this is also prevalent in human rights reporting. Human rights NGOs are under enormous pressure when collecting data to aim for 100% accuracy and are particularly vulnerable in authoritarian regimes.[29] Morazov argues that certain information regarding human rights abuses should not be made accessible on the internet. For instance, if information is revealed about rape victims (say geographic location), it can make lives worse for and unbearable for them.[30] Thus, the data protection mechanisms built into human rights reporting need to be protected regardless of the impetus to promote internet freedom.[31]

Thus, pushing for internet freedom becomes an extremely tricky task. While commitment to internet freedom may be the right and inevitable moral choice, according to Evgeny Morazov, what needs to be understood is that a freer internet, by its very nature might create new problems and entrench old ones.[32]

4. SOLUTIONISM AND THE ILLUSION OF TECHNO-UTOPIAS

The hurdles in the democratization of internet and human rights are also created by an over reliance on the internet technology in terms of offering solutions to problems being faced by modern society. The government of India has launched a programme known as 'Digital India' which is aimed at "transforming India into a digitally empowered society and knowledge economy."[33]

The programme is supposedly meant to strengthen electronic manufacturing in the country. According to the government sources, "e-governance" in this country needs a thrust in order to promote inclusive growth that covers electronic services, products, devices and job

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[26]The Right to Information Act, No. 22 of 2005

[27] Evgeny Morazov, The Net Delusion: How Not To Liberate The World (Penguin Books 2011), 26

[28] Evgeny Morazov, The Net Delusion: How Not To Liberate The World (Penguin Books 2011), 27

[29] Evgeny Morazov, The Net Delusion: How Not To Liberate The World(Penguin Books 2011), 271

[30] Evgeny Morazov, The Net Delusion:How Not To Liberate The World(Penguin Books 2011), 271

[31] Evgeny Morazov, The Net Delusion : How Not To Liberate The World (Penguin Books 2011), 272

[32] Evgeny Morazov, The Net Delusion: How Not To Liberate The World (Penguin Books 2011), 248

[33]Digital India, 'About Digital India'<https://digitalindia.gov.in/content/about-programme> accessed 15 January 2020

opportunities.[34] The intent of the government seems to be well founded. Afterall, who does not want growth and job opportunities? But does this mean that there should be an over reliance on technology for providing us solutions for our foremost problems?

Evgeny Morazovthinks it does not and he provides an interesting critique about the problems of a mindset and belief called solutionism. Morazov refers to solutionism as an ideology which sanctions a belief system based on technology that seeks to find simplistic computable, well -defined solutions to complex problems. When combined with technology, these can become potentially dangerous. "Recasting all complex social situations either as neatly defined problems, with definite , computable solutions or as transparent and self-evident processes that can be easily optimized-if only the right algorithms are in place!- this quest is likely to have unexpected consequences that could eventually cause more damage than the problems they seek to address" says Morazov.[35]

Does that mean that we completely shun technology? Doing so would be harmful. And Morazov recognises this. What is argued here is that there needs to be a better approach in terms how one deals with technology and implicitly recognising that technology is not going to be an answer to all our problems. According to Morazov, *"The very idea of internet has become an obstacle to having a more informed and thorough debate about digital technologies".*[36] He thus points out very succinctly that the problem can only be solved if we let go of our pre-conceived notions of the internet and come up with solutions which can allow technology to enable human flourishing.[37]

What is the importance of solutionism and how is it particularly relevant to human rights and the ongoing discussion about access to internet? Well the fact that techno-utopianism is a threat to the development of effective and ethical technologies are a cause of great worry. This is prevalent in modern society in many facets. To cite just one example, let us come back to the example of digital India mentioned above. In its bid to improve e-governance, if the government relentlessly pushes for techno-based solutions, they can run into potential problems. This is present in the ongoing debate and criticism about policies like the Aadhaar system and the Personal data protection bill. There was also a controversy with regards to Unified Payment Interface (UPI). Truecaller, a phone app service which aims at identifying unknown callers on mobile phones came under flack when some customers started receiving messages about UPI IDs being created and shared with ICICI bank. According to sources, Information regarding their existing bank accounts was revealed in the process, and their phone numbers and other information may have been shared with ICICI Bank.[38] What is clear is that information was shared but to what extent, it could not be said clearly. This being done without the consent of users is a violation of their right to privacy. Incidents like these along with the right to privacy judgement have led people to argue for a robust data protection law. While that is still being tabled by the parliament, one thing is clear from this discussion- pushing endlesslyfor a techno-centric world driven by a sense of 'solutionism', internet-centrism and cyber utopianism is problematic.

The international human rights regime is finding a tricky place in the cyber world. Cees J. Hamelink has discussed in detail the application of the international human rights regime in cyberspace. Cyberspace, according to Hamelink, involves the operation of computer networks and encompasses all social activities in which digital information and communication

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[34]Digital India, 'About Digital India' <https://digitalindia.gov.in/content/about-programme> accessed 15 January 2020

[35] Evgeny Morazov, To Save Everything Click Here:Technology, Solutionism And The Urge To Fix Problems That Don't Exist (Allen Lane 2013), 5

[36] Evgeny Morazov, To Save Everything Click Here:Technology, Solutionism And The Urge To Fix Problems That Don't Exist (Allen Lane 2013), 61

[37] Evgeny Morazov, To Save Everything Click Here:Technology, Solutionism And The Urge To Fix Problems That Don't Exist (Allen Lane 2013), 62

[38]Prasanth Sugathan. 'Truecaller's UPI Bug Shows Why Indians Need A Strong Data Protection Law', The Wire, (New York, 1 August 2019) <https://thewire.in/business/truecaller-upi-bug-privacy-violation-india> accessed 14 January, 2020

technologies (ICT) are deployed.[39] One of the major arguments made by him is that human rights in cyberspace should not only be articulated as individual rights, butshould be recognized both as individual and as collective rights.[40] This is because placing rights in either category undermines the rights of the individual as a part of the community as well as the community as a whole. In Hamelink's own words –"Knowledge as common heritage should be protected against its private appropriation by knowledge industries."[41]The growing economic disparities and concentration of wealth in the hands of a selected few is a reality which is well known in today's times. With an emphasis on solutionism, governments and private companies play a greater and greater role in our lives. Hamelink argues that information rights should be free from public as well as private parties.[42]That is, freedom of expression and access to the internet should be done in a way which maximizes individual freedom of expression. However, this can only be done once the notion of freedom changes.

This can happen with the promotion of the so called 'positive' notion of freedom. This involves, in Hamelink's opinion, focusing upon the provision of access to thepublic expression of opinions rather than on restrictions to freedom of expression.[43] Construing freedom in this sense in important because in a highly unequal society, freedom does not exist for everyone.[44] Thus, in order to expand the scope of human rights, including improving access to internet and construing that as an innate part of pre-existing inalienable rights would require moving away from 'solutionism' and internet- centrism.

5. UNDERSTANDING BEHAVIORAL MODIFICATION AND THE CHALLENGES IT POSES

Manipulation and behavioural modification sound like heavy words coming from a science fiction dystopian novel. It can also be associated with magicians and performers who aim to hypnotize and control their subjects but not necessarily the heads of technology giants. But reality is often more disturbing than fiction. And when it comes to modern information society and neo-liberal economics, the tech companies are no exception.

The parallel discussed above need not be taken literally. But there is a disturbing problem which exists in our society which many had been observing but were unable to articulate. However, new beginnings have been made by some scholars in identifying this new phenomenon which has been termed as surveillance capitalism by the scholar Shoshana Zuboff, Surveillance Capitalism is a new phenomenon, argues Zuboff that is unprecedented in history, brought about in the 21st century as by the advent of information technology and technology giants like Facebook, Google, Microsoft and increasingly, Amazon.[45] It is a new form of capitalism which, in Zuboff's understanding, claims human experience as raw materials for creating behavioural predictions in terms of 'prediction products', which are then traded in a new market called *behavioural futures market*. By virtue of such measures, Surveillance capitalists render individual choice redundant by essentially creating tweaks in our behaviour which then

[39] Cees J, 'Human Rights in Cyberspace' in A.L Cobb and others (eds), Cyberidentities: Canadian and European Presence in Cyberspace (University of Ottawa Press 1999), 31

[40] Cees J, 'Human Rights in Cyberspace' in A.L Cobb and others (eds), Cyberidentities: Canadian and European Presence in Cyberspace (University of Ottawa Press 1999), 37

[41] Cees J, 'Human Rights in Cyberspace' in A.L Cobb and others (eds), Cyberidentities: Canadian and European Presence in Cyberspace (University of Ottawa Press 1999), 37

[42] Cees J, 'Human Rights in Cyberspace' in A.L Cobb and others (eds), Cyberidentities: Canadian and

European Presence in Cyberspace (University of Ottawa Press 1999), 41

[43] Cees J, 'Human Rights in Cyberspace' in A.L Cobb and others (eds), Cyberidentities: Canadian and European Presence in Cyberspace (University of Ottawa Press 1999), 35

[44] Cees J, 'Human Rights in Cyberspace' in A.L Cobb and others (eds), Cyberidentities: Canadian and European Presence in Cyberspace (University of Ottawa Press 1999), 35

[45] Shoshana Zuboff, The Age Of Surveillance Capitalism: The Fight For A Human Future At The New Frontiers Of Power (Profile books 2019),12

results in behavioural modification.[46] The phenomenon is deeply worrisome and poses the latest threat to human rights in its long-drawn history in this author's opinion. As Zuboff elucidates succinctly – " the struggle for power and control in society is no longer associated with the hidden facts of class and its relationship to production but rather by the hidden facts of automated engineered behaviour modification."[47]She has relied on interviews, calls, patents, company programmes and policies of executives from companies like Facebook, Google and Microsoft in order to understand Surveillance capitalism.[48]

One of the key problems highlighted by Zuboff is Surveillance Capitalism's relation with decision rights. Decision rights confer the power to choose whether to keep something as secret or share it. Surveillance capitalism lays claims to these rights, by redistributing privacy instead of eroding it.[49]

This phenomenon became visible in the public domain after the Cambridge Analytica data scandal. People were specifically targeted during the Brexit campaign by showing them specific content which would eventually result in influencing their behaviour, thus violating principles of free choice. Such an influence, when taken on a large scale, say a general election, could potentially have terrible consequences in terms of undermining human sovereignty. Access to Internet thus becomes a questionable objective considering such widely skewed power dynamics. Yet, it is an important right for which people must argue and fight for.

6. THE SOLUTION: AN ETHICS BASED APPROACH TO TECHNOLOGY

The debate around human rights and their intimate relationship with modern technology

and the internet is becoming complicated with each passing year. Added to that are the grand dynamics of increasing income inequality, fall in standards of living in terms of environmental degradation as well as a spurt in cases of mental health because of social media.

And yet, there is still a case for making internet access as a human right for it is becoming essential in the age of information. But as has been highlighted in this paper, there are several impediments in front of it which makes it extremely hard to fight for this cherished ideal in the 21st century. There are several things which can be done in terms of policy making and change of ideas which can lay down the groundwork for paving the way for a better conversation around internet access and how it can be framed as a human right.

It is argued that having a more ethics-based approach to science, technology and its development should be the first step. Several people have worked on this idea in the past. In particular, Karim et al. say that a human rights based approach grounded in ethics means "an approach that demands scientists to push their knowledge further in understanding "how their work bridges with human rights and demands" that they endeavour to confirm and secure human rights by the knowledge they generate."[50] In their article they have tried to understand the nexus between human rights and science and how they two are co-related in several different aspects.[51]

Among others, the chief problems which seem to have been identified and talked about in this paper are related to the ideology of solutionism, internet-centrism, and the existence of a new system of power articulated as surveillance capitalism. Each of them is as important as the other and are interconnected in intricate ways. A collective battle must be waged in tackling each of them systematically in order to ensure

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[46]Shoshana Zuboff, The Age Of Surveillance Capitalism: The Fight For A Human Future At The New Frontiers Of Power (Profile books 2019), 8
[47]Shoshana Zuboff, The Age Of Surveillance Capitalism: The Fight For A Human Future At The New Frontiers Of Power (Profile books 2019), 309
[48] Shoshana Zuboff, The Age Of Surveillance Capitalism: The Fight For A Human Future At The New Frontiers Of Power (Profile books 2019), 24

[49]Shoshana Zuboff, The Age Of Surveillance Capitalism: The Fight For A Human Future At The New Frontiers Of Power (Profile books 2019), 90
[50] Ridoan Karim and Md S Newaz and Rafsan M Chowdhury, 'Human Rights-Based Approach to Science, Technology and Development: A Legal Analysis' (2018) 163, 164
[51] Ridoan Karim and Md S Newaz and Rafsan M Chowdhury, 'Human Rights-Based Approach to Science, Technology and Development: A Legal Analysis' (2018) 163, 164

effective implementation of the international human rights regime. Detaching from the idea of solutionism could be one of the first steps, both philosophically and policy wise. Governments and World Organizations need to work together to not only spread information among the masses but need to foster a newer relationship with technology. The fact that ownership of most internet companies as well as related technologies rests with private enterprises is not likely to change soon. Thus, new laws and policies need to be formulated in order to create an effective mechanism for checks and balances.

Karim et al. believe that science and technology are inextricably linked with human rights.[52]Both rely on each other in various capacities to foster a culture of creativity as well as welfare. The question that needs to be answered now is how to expand the scope of scientific development in a way which allows societies to maximize human development. They argue that in terms of law and rights, more emphasis must be put upon the 'right to science' or 'right to scientific advancement'. Legal analysis should enlighten these terms to ensure the establishment of core human right instruments.[53]Understanding the relationship of right to development and its relationship with technology development is also important. Hamelink puts it very succinctly when he writes – "UNGA Res.34/46 of 1979, states that "the right to development is a human right and that equality of opportunity for development is as much a prerogative of nations as of individuals within nations." As a result, in the discussion on the locus of human rights the

individual and the community cannot be separated."[54]In his understanding, Individuals also play an important role as Human rights cannot be realized without involving citizens in the decision-making processes about the spheres

in which freedom and equality are to be achieved.[55] In addition to that, public accountability of private players seems to be a running concern. This is unlikely to change as government's world over tend to rely more and more on private participation in technology markets, which allows them a virtual free run with extreme concentration of powers. This has resulted in new forms of instrumentarian power, like surveillance capitalism. Thus, in order to keep private players in the market in check i.e. to bring their work in greater sync with the existing human rights regime, a massive mobilization and politicization of consumer organizations around the world is required.[56]

It would be pertinent to state at this point that the case for a right to internet access as a basic right is one which must be made simultaneously with the other measures stated above. The right must be construed not only in the context of right to privacy but must be structured as being intimately linked with the right to freedom of expression and individual liberty. Such arguments have been made in the past as well, stating that the legal horizon extends beyond the right to privacy to freedom of expression and that technological development means that that our assessment of the same needs to be done using a new lens.[57]

CONCLUSION

On January 10, 2020, the Supreme Court of India passed an order asking the centre to review all orders regarding curbs in Jammu and Kashmir, which had been experiencing an ongoing internet shutdown[58]. While the court did opine that the freedoms of speech, expression and conducting business on the

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[52] Ridoan Karim and Md S Newaz and Rafsan M Chowdhury, 'Human Rights-Based Approach to Science, Technology and Development: A Legal Analysis' (2018) 163, 175

[53] Ridoan Karim and Md S Newaz and Rafsan M Chowdhury, 'Human Rights-Based Approach to Science, Technology and Development: A Legal Analysis' (2018) 163, 178

[54] Cees J, 'Human Rights in Cyberspace' in A.L Cobb and others (eds), Cyberidentities: Canadian and European Presence in Cyberspace (University of Ottawa Press 1999), 34

[55] Cees J, 'Human Rights in Cyberspace' in A.L Cobb and others (eds), Cyberidentities: Canadian and

European Presence in Cyberspace (University of Ottawa Press 1999), 37

[56] Cees J, 'Human Rights in Cyberspace' in A.L Cobb and others (eds), Cyberidentities: Canadian and European Presence in Cyberspace (University of Ottawa Press 1999), 43

[57] Tommaso Edoardo Frosini, 'Access to Internet as a Fundamental Right' (2013) 5 Italian J Pub L 226, 228

[58] Aneesha Mathur, 'Govt actions in J&K not justified, review curbs within 7 days: Supreme Court' available at <https://www.indiatoday.in/india/story/jammu-and-kashmir-lockdown-supreme-court-order-1635559-2020-01-10> accessed 18 January 2020

Internet are fundamental rights integral to Article 19 of the constitution and subject to reasonable restrictions, it did not give any opinion as to whether access to internet was a fundamental right of itself. "None of the counsels have argued for declaring the right to access the Internet as a fundamental right and therefore we are not expressing any view on the same," Justice Ramana, who authored the verdict, wrote.[59] They did however quote one of the pioneers of the internet, Vinton G. Cerf, who argued that while the internet is important, its access cannot be made a human right.

While the verdict was praised for directing the centre to carry out reviews, it also raises certain questions. There is still a lot of scope for placing the right within the ambit of fundamental rights. While reasonable restrictions are and should be applicable as and when required, Tully writes that even international human rights law itself imposes restrictions on the kinds of information content which can be accessed.[60] But the essential gap in Indian jurisprudence, as pointed out by Kartik Chawla is that internet access as a right as to be discussed in detail in its positive dimension which has so far not been carried out.[61] The positive dimension consists of 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.[62] Beyond putting private players in check, tackling internet solutionism and surveillance capitalism, the biggest challenge in making internet access a human right is this aspect. This is potentially tricky because the state is also being brought under checks and balances, something which has become imperative and necessary in countries like India, which records some of the highest internet shutdowns in the world. But this paper has trued tries to argue that our essential fears about giving unfettered internet access and the costs involved need to be handled bravely, looking at the positive dimensions of the right,

creating the infrastructure and facilities for individuals so that individual liberty can thrive. And this is happening right now across several countries. The scale needs to broaden and there is a need to expand the ambit of stakeholders so that civil society can play an active role. The world has undergone rapid transformation and thus, our laws and notions of human rights need to change as well. And it is possible because. The reason is best summed up in Frosini's own words – "In the past, it was the government to control citizens by the control over information; today, it has become harder and harder to control what a citizen reads-sees-hears, seeks-receives-imparts. The technology provides thus to individuals the ability to become a power that is in the condition to control the other powers."[63]

As we have seen earlier, the courts in India have consistently interpreted Article 21 to be a broad right, which comprises of numerous unenumerated rights which are located within 21 if they can be seen as an essential part of life. With internet access affecting each and every aspect of an individual's life, as well as becoming a condition precedent for the application of numerous directive principles related to social and economic welfare, it can be postulated that the right to internet access can be recognized as a human right within the Indian Constitutional system. We have already seen in the previous section of this paper that numerous judgements have underscored the intersection of fundamental rights and directive principles.

In this proposed framework, the right to internet would be both a positive and a negative right. The state would have (i) a positive obligation to ensure respect for and protection of these rights, including particularly the human right to access and use the Internet and (ii) a negative obligation prohibiting the State from engaging in conduct that impedes, obstructs or violates such human right. In this context positive obligations on the state would include ensuring access, digital

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[59] Krishnadas Rajagopal, 'SC has no views on if 'access to Internet' is a fundamental right (New Delhi, 10 January 2020) <https://www.thehindu.com/news/national/sc-has-no-views-on-if-access-to-internet-is-a-fundamental-right/article30536065.ece> accessed 17 January 2020

[60] Stephen Tully, 'A Human Right to Access the Internet - Problems and Prospects' (2014) 14 Hum Rts L Rev 175, 191

[61] Kartik Chawla, 'Right to Internet Access - A Constitutional Argument' (2017) 7 Indian J Const L 57, 60

[62] Kartik Chawla, 'Right to Internet Access - A Constitutional Argument' (2017) 7 Indian J Const L 57, 61

[63] Tommaso Edoardo Frosini, 'Access to Internet as a Fundamental Right' (2013) 5 Italian J Pub L 226, 234

literacy, infrastructure creation etc. At the same time it is important that the negative obligations are also simultaneously being observed and the State must ensure that restrictions on online content must only be imposed as exceptional measures and must pass certain tests. It is proposed that the four fold test to determine proportionality, as given in the Puttaswamy[64] case can be replicated here.

(a) A measure restricting a right must have a legitimate goal (legitimate goal stage).

(b) It must be a suitable means of furthering this goal (suitability or rationale connection stage).

(c) There must not be any less restrictive but equally effective alternative (necessity stage).

(d) The measure must not have a disproportionate impact on the right holder (balancing stage).

In conclusion, it is important that the right to internet must be recognized as an enabler not just for communication, or economic activity, but as a pathway to guaranteeing a better quality of life for all Indians.

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[64] Puttaswamy Case (n 16)