Jammu & Kashmir Internet Restrictions Cases: A Missed Opportunity to Redefine Fundamental Rights in the Digital Age

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Abstract

In Anuradha Bhasin v. Union of India, the Supreme Court was called upon to review the constitutionality of the communication shutdown imposed in Jammu & Kashmir in August 2019. The Court's decision endorsed human rights principles of necessity and proportionality and recognized a derivative fundamental right to internet access. Yet, this principled adjudication failed to provide any immediate relief to the 12.5 million people of Jammu & Kashmir reeling under the longest internet shutdown imposed in any democracy. Our analysis considers why and how this occurred and how the absence of relief necessitated further litigation. Subsequently in Foundation for Media Professionals v. U.T. of Jammu & Kashmir, the Court once again declined to provide relief while denial of 4G mobile internet continued in Jammu & Kashmir during the COVID-19 pandemic.

We first examine how the Court avoided any form of judicial review despite endorsing the rigorous and evidence-based proportionality standard in both judgements. We situate both judgements within a line of cases where the Court has given primacy to the 'national security' justification offered by the State. When national security grounds are invoked by the State, the Court adopts at least a facial, procedural review which is absent in these cases. This is important because the Court's recognition of a derivative fundamental right to internet access is yet to be actualized through the grant of relief. We then focus on negative and positive conceptions of a derivative fundamental right to internet access to criticize the Court's non-enforcement of the former and its cursory dismissal of the latter. Finally, we conclude that the Court's directions in Anuradha Bhasin and Foundation for Media Professionals have failed to act as a meaningful check on the executive branch but provide precedential value for future litigation.

Keywords: Jammu & Kashmir, Internet Shutdown, Freedom of Speech & Expression, Right to Internet Access, National Security.

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1. Background and Timeline of the Cases

India has the highest number of internet shutdowns in the world.[1] This ranking, which even surpasses totalitarian regimes, has come at incredible cost. In quantifiable terms, network disruptions have cost the Indian economy over $1.3 billion in 2019.[2] While internet shutdowns are a pan-India problem impacting diverse regions, the region of Jammu & Kashmir has been the worst affected.[3] This geo-politically sensitive region has witnessed the longest internet shutdown imposed by any democratic government[4] with ongoing restrictions on internet access crossing 360 days.[5]

A complete communication shutdown was first imposed in Jammu & Kashmir on 5 August 2019 and it continues till date with restrictions on 4G mobile internet access.[6] The communication shutdown was imposed immediately before abrogation of Article 370 of the Constitution of India which granted a special status to the erstwhile State. In the Kashmir region, landlines, mobile calling services, SMS services, mobile internet and fixed line internet were all suspended. In Jammu and Ladakh regions, similar restrictions were imposed but landline services remained operational.[7] The communication shutdown was accompanied by orders issued under Section 144 of the Code of Criminal Procedure, 1973 ("Cr.P.C.") which imposed severe restrictions on the movement of the general public.

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1 *Targeted, Cut Off and Left in the Dark: The #KeepItOn report on internet shutdowns in 2019*, Access Now, available at https://www.accessnow.org/cms/assets/uploads/2020/02/KeepItOn-2019-report-1.pdf , last seen on 30/06/2020. See also Facebook Transparency Report, Facebook, available at https://transparency.facebook.com/internet-disruptions , last seen on 30/06/2020.

2 S. Woodhams and S. Migliano, *The Global Cost of Internet Shutdowns in 2019*, Top10VPN, available at https://www.top10vpn.com/cost-of-internet-shutdowns/, last seen on 30/06/2020. See also R. Kathuria, M. Kedia, G. Varma, K. Bagchi and R. Sekhani, *The Anatomy of an Internet Blackout: Measuring the Economic Impact of Internet Shutdowns in India*, Indian Council for Research on International Economic Relations, available at https://icrier.org/pdf/Anatomy_of_an_Internet_Blackout.pdf , last seen on 30/06/2020; D.M. West, *Internet shutdowns cost countries $2.4 billion last year*, Brookings Institution, available at https://www.brookings.edu/wp-content/uploads/2016/10/intenet-shutdowns-v-3.pdf , last seen on 30/06/2020.

3 Jammu & Kashmir has experienced over 200 internet shutdowns since 2012. In comparison, Rajasthan which has the second highest number of internet shutdowns in India has experienced 68 internet shutdowns during the same period. *Internet Shutdowns*, Internet Shutdowns, available at https://internetshutdowns.in/, last seen on 30/06/2020.

4 N. Masih, S. Irfan and J. Slater, *India's Internet shutdown in Kashmir is the longest ever in a democracy,* The Washington Post (16/12/2020), available at https://www.washingtonpost.com/world/asia_pacific/indias-internet-shutdown-in-kashmir-is-now-the-longest-ever-in-a-democracy/2019/12/15/bb0693ea-1dfc-11ea-977a-15a6710ed6da_story.html , last seen on 30/06/2020.

5 As on 30/07/2020.

6 The most recent Order No. (Home) 89 TSTS of 2020 was issued on 29/07/2020 and it directed slowdown of mobile internet services till 19/08/2020. Order No. Home-89 (TSTS) of 2020 dated 29/07/2020, Home Department, Government of Jammu & Kashmir, available at http://jkhome.nic.in/89(TSTS)of2020.pdf, last seen on 30/07/2020.

7 The region wise breakdown is available in an affidavit dated 30/09/2019 filed by the Government of Jammu & Kashmir in *Anuradha Bhasin.* See *Recap Part II: Kashmir Communication Shutdown and Movement Restrictions Cases*, Internet Freedom Foundation, available at https://internetfreedom.in/recap-part-ii-kashmir-communication-shutdown-and-movement-restrictions-cases/ , last seen on 30/06/2020.

The communication shutdown coupled with movement restrictions made it effectively impossible for the people of Jammu & Kashmir to exercise their right to freedom of speech and expression under Article 19(1)(a) and the right to carry on any trade, occupation or business under Article 19(1)(g). In particular, the communication shutdown and movement restrictions severely impaired the functioning of the press at a time of significant constitutional and political upheaval. Journalists were unable to contact their sources or editors and were also prohibited from moving around freely to report.

In light of the impact on press freedom, a writ petition was filed before the Supreme Court of India under Article 32 of the Constitution by Anuradha Bhasin, Executive Editor of Kashmir Times to challenge the communication shutdown on 10 August 2019.[8] In her petition, Ms. Bhasin sought restoration of all communication services including landline, mobile and internet services and quashing of any order under which the communication shutdown was imposed for being violative of Articles 14, 19 and 21 of the Constitution of India. Along with Ms. Bhasin's lead petition, another petition filed by Ghulam Nabi Azad and a batch of interventions were substantively argued before the Supreme Court for nine days in November 2019. At the time of filing of these petitions and even during the course of the hearings before the Supreme Court, the petitioners were not provided access to all the orders under which these restrictions were imposed. Specific applications were filed seeking production of orders but despite this, the government only placed eight sample orders on record.[9]

Almost 160 days after the communication shutdown was imposed, the Court pronounced its judgement in the case on 10 January 2020.[10] While reports from mainstream press hailed the judgement as a victory, on closer legal analysis, several deficiencies were pointed out by legal commentators. They coalesced around the view that the judgement failed to provide any of the effective reliefs sought by the petitioners. Instead, the Court had directed the government to review its own orders in accordance with the proportionality standard. In addition to this, the Court noted that there were several gaps in the Temporary Suspension of Telecom Services (Public Emergency or Public Safety) Rules 2017 ("Telecom Suspension Rules"). To fill this lacuna, the Court issued guidelines requiring proactive publication of orders and periodic review of internet restrictions every seven working days by the Review Committee constituted under the Telecom Suspension Rules.[11]

The Government of Jammu & Kashmir responded to the Supreme Court's directions by partially restoring access to the internet. On 14 January 2020, it issued an order under the Telecom Suspension Rules which provided access to select 'whitelisted websites' at 2G mobile internet speed but there was a ban on social media and Virtual Private Networks.[12] The government slowly

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8 Two journalistic bodies, the Foundation for Media Professionals and the Indian Journalists Union also intervened in Anuradha Bhasin's petition, W.P. (Civil) No. 1031 of 2019 to support press freedom in Jammu & Kashmir. Another separate writ petition, W.P. (Civil) No. 1164 of 2019 was filed by Former Chief Minister of Jammu & Kashmir, Ghulam Nabi Azad which highlighted the impact of the communication shutdown and movement restrictions on the local economy. This petition was tagged with Anuradha Bhasin's lead petition.

9 An application for production of orders was filed by the Foundation for Media Professionals on 14/10/2019. See Supra 7

10 Anuradha Bhasin & Anr. v. Union of India & Ors., 2020 SCC Online SC 25.

11 Ibid, at ¶ 163.

12 Order No. Home-03 (TSTS) of 2020 dated 14/01/2020, Home Department, Government of Jammu & Kashmir, available at http://jkhome.nic.in/03(TSTS)%202020.pdf , last seen on 30/06/2020.

expanded the list of whitelisted websites and eventually removed the ban on social media and Virtual Private Networks but till date, it has continued slowing down mobile internet speed in Jammu & Kashmir to 2G.[13] Here, it is pertinent to mention most Indian internet users access the internet through smartphones, and this also holds true in Jammu & Kashmir where there are approximately seventy three mobile internet subscribers for each fixed line internet subscriber.[14]

The outbreak of COVID-19 in India and the ensuing nationwide lockdown led to the issue of restrictions on internet access in Jammu & Kashmir being litigated before the Supreme Court again. On 31 March 2020, the Foundation for Media Professionals, which was an intervenor in Ms. Bhasin's petition, filed another petition before the Supreme Court of India under Article 32 of the Constitution.[15] The petition challenged the government's decision to deny 4G mobile internet access to the people of Jammu & Kashmir during a pandemic and nationwide lockdown when effective internet services were necessary to facilitate telemedicine, online learning, remote work and virtual court hearings.

The Court pronounced its judgement in Foundation for Media Professional's petition on 11 May 2020 and it once again abstained from granting any substantive relief.[16] Instead, the Court constituted a Special Committee consisting of senior bureaucrats belonging to the central and union territory government to examine the material placed on record by all parties and to immediately determine the necessity of continuation of restrictions on internet access in Jammu & Kashmir.[17]

Since there was no information about the constitution and functioning of the Special Committee in the public domain, the Foundation for Media Professionals filed a contempt petition against members of the Special Committee before the Supreme Court on 09 June 2020.[18] During the first hearing in the contempt petition on 16 July 2020, the Attorney General revealed that the Special Committee had held two meetings and decided to defer the issue of restoration of 4G internet access for two months. However, the Attorney General insisted that the minutes of the meetings could only be shared with the judges in sealed cover.[19]

In sum, since 5 August 2019, despite two judgements of the Supreme Court, restrictions on internet access continue in Jammu & Kashmir. Hence, a question arises: Was the Court's

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13 Order No. Home-66 (TSTS) of 2020 dated 17/06/2020, Home Department, Government of Jammu & Kashmir, available at http://jkhome.nic.in/66(TSTS)2020.pdf , last seen on 30/06/2020.

14 There are 0.08 million wireline broadband subscribers and 5.82 million wireless broadband subscribers in Jammu & Kashmir. Ministry of Communications, Government of India, *Telecom Statistics India- 2019*, available at https://dot.gov.in/sites/default/files/Telecom%20Statistics%20India-2019.pdf?download=1 , last seen on 30/06/2020.

15 Prior to filing of the writ petition, Diary No. 10817 of 2020, the Foundation for Media Professionals also sent representations to the Government of Jammu & Kashmir urging restoration of complete internet access on January 30, 2020 and March 27, 2020.

16 Foundation for Media Professionals & Ors. v. U.T. of Jammu & Kashmir & Anr., 2020 SCC Online SC 453.

17 Ibid, at ¶¶ 23-24.

18 Foundation for Media Professionals v. Ajay Kumar Bhalla & Ors., Contempt Petition Civil No. 411 of 2020.

19 *Supreme Court directs Govt to file its reply in FMP's contempt petition*, Internet Freedom Foundation, available at https://internetfreedom.in/fmp-contempt-petition-reply/, last seen on 27/07/2020.

abstinence from granting effective relief premised on adequate legal reasoning and consistent with well-founded principles of judicial review?

2. National Security and Abdication of Judicial Review

This section embarks on a legal analysis of the two judgements of the Supreme Court of India on the issue of internet restrictions in Jammu & Kashmir starting with the judgement in *Anuradha Bhasin v. Union of India* ("*Anuradha Bhasin*"). *Anuradha Bhasin* was the first case where the Supreme Court of India had to substantively consider the issue of internet shutdowns, and the three-judge bench had to first determine the appropriate standard of review in such cases. While the petitioners urged the Court to adopt the evidence-based proportionality standard previously endorsed by a nine-judge bench in *K.S. Puttaswamy v. Union of India*,[20] the government cautioned the Court against interfering in matters involving national security. In fact, national security was invoked at the very first threshold of legality to refuse disclosure of orders pursuant to which the communication shutdown and movement restrictions were imposed. The government eventually relented and produced a few sample orders but cited logistical difficulties in production of all the orders.

In its judgement in *Anuradha Bhasin*, the Court formally endorsed the proportionality standard as the appropriate standard to review restrictions on internet access but it simultaneously warned against "excessive utility of the proportionality doctrine in the matters of national security, sovereignty and integrity."[21] The Court neither explained why such an exception is warranted nor did it provide an alternate standard of review which would be appropriate for cases involving national security implications. Hence, the Court side-stepped any guarantee that the proportionality standard will be consistently applied in the future, and this loophole limits the judgement's ability to deter arbitrary executive action in case of internet shutdowns or even other matters in which the plea of national security could be raised.

The national security exception carved out by the Court in *Anuradha Bhasin* is also inconsistent with the structure of the Indian Constitution which treats rights as the norm and restrictions as the exception and this foundational logic is inverted when an entire population is made to suffer for the misdeeds of a few. If national security concerns are too severe and imminent to be addressed without resorting to such extreme measures, then the Constitution permits suspension of judicial review vis a vis enforcement of certain fundamental rights but this requires a formal declaration of emergency.[22] By carving out an exception to robust judicial review in cases where a national security interest is invoked, the judgement in *Anuradha Bhasin* has shielded the government from the reputational costs and parliamentary scrutiny which would otherwise be

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20 K.S. Puttaswamy & Ors. v. Union of India & Ors., 2017 10 SCC 1. The proportionality standard requires any government measure which restricts fundamental rights to satisfy the following criteria: (i) the measure must have a basis in law (Legality Stage); (ii) the measure must pursue a legitimate goal (Legitimacy Stage); (iii) the measure must be a suitable method for achieving the goal (Suitability Stage); (iv) the measure must be the least restrictive alternative to achieve the goal (Necessity Stage); and (v) the measure must not have a disproportionate impact on the right holder (Balancing Stage).

21 Supra 10, at ¶ 140.

22 See Article 359, The Constitution of India, 1950.

associated with a formal declaration of emergency, while simultaneously allowing it to impose blanket restrictions on an entire population which can only be considered to be justifiable in a state of emergency.

The Court's understanding of what constitutes an 'emergency' is most flawed when it compares restrictions on telecommunication services during a 'public emergency' under the Telecom Suspension Rules with derogation of rights permitted under Article 4 of the International Covenant on Civil and Political Rights[23] but fails to recognize that the latter requires an official proclamation of emergency by the State. Such a comparison proceeds from a facial examination which fails to consider even the first principles of constitutional reasoning.

The decision in *Anuradha Bhasin* is best understood in the context of the Supreme Court's longstanding reluctance to engage in judicial review on substantive grounds in national security cases.[24] Through a long line of precedent relating to preventive detention and anti-terrorism laws, the Supreme Court has limited its role to ensuring procedural compliance in cases involving national security concerns and allowed individuals to challenge executive action only on narrow grounds such as non-application of mind, excessive delegation and mala fide.[25] However, *Anuradha Bhasin* marks a more dangerous version of this trend because it fails to provide both substantive and procedural justice.

In *Anuradha Bhasin*, the Court did not even undertake any kind of procedural review of the orders issued under the Telecom Suspension Rules and Section 144, Cr.P.C. since the government did not place all orders on record. However, the government did present eight sample orders before the Court which were assailed by the petitioners on several procedural grounds. For instance, the petitioners objected to the sample orders under the Telecom Suspension Rules 2017 being issued by the Inspector General of Police because he was not and could not be authorized to issue directions for suspension of telecom services under the proviso to Rule 2(1).[26] However, the Court did not answer even these procedural questions which could have been decided on narrow statutory grounds without any controversial constitutional adjudication.

In national security cases, the primary focus of the judiciary has been improving mechanisms of administrative review, but such an approach is at odds with the mandate of Article 32 of the Constitution which guarantees a fundamental right to seek remedy before the Supreme Court review for violation of fundamental rights under Part III. Following in this vein, the Court in *Anuradha Bhasin* began its discussion on internet shutdowns by noting that

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23 Supra 10, at ¶ 101.

24 See Haradhan Shah v. State of West Bengal, 1975 3 SCC 198; AK Roy v. Union of India, 1982 1 SCC 271; Kartar Singh v. State of Punjab, 1994 3 SCC 569; Peoples' Union of Civil Liberties v. Union of India, 2004 9 SCC 580.

25 Courts have not questioned the subjective satisfaction of executive officials in these cases and limited the scope of review to whether the decision-maker was authorized under the law to make the decision and had applied his/her mind before issuing an order. Courts have set aside orders for non-application of mind if the decision-maker failed to consider all relevant materials or if it relied on irrelevant factors. See D.P. Jinks, *The Anatomy of an Institutionalized Emergency: Preventive Detention and Personal Liberty in India*, 22 Michigan Journal of International Law, 311, 331-332 (2001); S. Chopra, *National Security Laws in India: The Unraveling of Constitutional Constraints*, 17 Oregon Review of International Law, 1, 50-57 (2015).

26 Consolidated written submissions of the petitioners and intervenors in *Anuradha Bhasin*. See Supra 7.

"procedural justice cannot not be sacrificed at the altar of substantive justice"[27] and then chose to focus on filling gaps in the Telecom Suspension Rules instead of determining the constitutionality of the communication shutdown imposed in Jammu & Kashmir.

These deficiencies became apparent in *Foundation for Media Professionals v. Union of India* ('*Foundation for Media Professionals*'), when the Court was soon forced to grapple with the inadequacies of procedural safeguards laid down by it in *Anuradha Bhasin*. Despite mandating publication of all orders and periodic review of the restrictions in *Anuradha Bhasin*, the Court was once again called upon to judicially review the restrictions on internet access because the government had continued slowing down mobile internet speed indiscriminately across all districts of Jammu & Kashmir amidst the COVID-19 pandemic and nationwide lockdown. The factual basis of this challenge was the change in circumstances caused by the COVID-19 pandemic and vagueness in the orders issued under the Telecom Suspension Rules which did not reflect any district specific reasons. Here it is important to note that the petitioners in *Anuradha Bhasin* and *Foundational for Media Professionals* took a strategic decision to incrementally challenge the exercise of powers granted by the Telecom Suspension Rules rather than the existence of such a power itself.

Unlike *Anuradha Bhasin*, the Court in *Foundation for Media Professionals* could not avoid judicial review by citing unavailability of the impugned orders. In *Anuradha Bhasin*, the Court had directed proactive publication of all orders issued under the Telecom Suspension Rules, and therefore, the petitioners were able to produce and challenge specific orders in *Foundation for Media Professionals*. In *Anuradha Bhasin*, the Court clearly held that the government cannot refuse disclosure of orders by citing logistical inconvenience; but it deviated from this principled stance by not penalizing the government in any manner for subverting judicial review by withholding the orders.

Coming back to *Foundation for Media Professionals*, the Court could have utilized this opportunity for course correction and conducted substantive review but instead, it outsourced the decision-making to another Special Committee consisting solely of executive officials which was established to review the restrictions on internet access in Jammu & Kashmir.[28] The Court did not offer any reasons for declining judicial review despite having access to the impugned orders and merely stated that unlike the previous Review Committee which only had officials from the union territory government, the new Special Committee would be better suited to address the issue since it also had officials from the central government.[29] Such a bald conclusion ignores the political realities and also ignores that subsequent to the conversion of Jammu & Kashmir into a Union Territory, the central government already has control over 'police' and 'public order' in the region through the Lieutenant Governor.[30]

The Court's proposed solution of outsourcing decision making to an executive controlled Special Committee in *Foundation for Media Professionals* also missed a crucial point about the importance of judicial review to ensure proper consideration is provided to humanitarian concerns.

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27 Supra 10, at ¶ 86.

28 The members of the Special Committee include: (i) Secretary, Ministry of Home Affairs; (ii) Secretary, Department of Telecommunications; and (iii) Chief Secretary, Government of U.T. of Jammu & Kashmir.

29 Supra 16, at ¶ 23.

30 S.32(1), The Jammu & Kashmir Reorganization Act, 2019.

This has been most clearly recognized by the Supreme Court of Israel in its widely known *Beit Sourik* decision which held that while military commanders are best placed to decide military considerations such as where a separation fence should be erected, constitutional judges are the experts at determining whether the humanitarian impact of any government action on the local population is disproportionate.[31] Relief is the essence of judicial review. This goes beyond constitutional rhetoric and as instructed in the opening lectures on public law in law schools across India, Article 32 of the Constitution of India is titled as 'Remedies for enforcement of rights conferred by this Part (III).' This is also why Article 32 has been characterized by Dr. B.R. Ambedkar as the heart and soul of the Constitution because the existence of fundamental rights under Part III of the Constitution is meaningless without an effective remedy to ensure their enforcement.[32]

Unfortunately, in cases with national security implications, the Supreme Court views itself as a 'mediator' between the petitioners and the government rather than a 'guardian' of fundamental rights.[33] As Professors Mrinal Satish and Aparna Chandra have persuasively argued, this approach is at odds with the Court's general interventionist approach and it is "not a thought out or conscious decision-making strategy but an opportunistic role reversal, smacking of judicial escapism."[34] The decisions in *Anuradha Bhasin* and *Foundation for Media Professionals* exemplify this kind of role reversal and represent a version of the judiciary which Lord Atkins famously characterized as "more executive minded than the executive."[35]

3. Right to Internet Access

In *Anuradha Bhasin*, the right to internet access was held to be a derivative fundamental right which enables the exercise of primary fundamental rights, but the Court's characterization of this right has received surprisingly little scholarly attention. In human rights theory, derivative rights include auxiliary rights which facilitate exercise of a primary right..[36] Adopting a similar approach, the Court in *Anuradha Bhasin* relied on its past precedent in *Secretary, Ministry of Information & Broadcasting Government of India v. Cricket Association of Bengal*[37] and *Shreya Singhal v. Union of India*[38] to hold that the right to freedom of speech and expression includes the right to wide dissemination of information through different mediums. The Court then recognized the importance of the internet as a tool for dissemination of information and for trade and commerce in modern times, and finally concluded that "the right to freedom of speech and

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31 Beit Sourik Village Council v. Government of Israel, HCJ 2056 of 2004, at ¶ 48.

32 Constituent Assembly Debates, Vol. VII, pg. 953.

33 M. Satish and A. Chandra, *Of Maternal State and Minimalist Judiciary: The Indian Supreme Court's Approach to Terror-Related Adjudication*, 21 National Law School of India Review, 51, 60 (2009).

34 Ibid, at 76-77.

35 Liversidge v. Anderson, 1942 A.C. 206

36 See K. Mathiesen, *The Human Right to Internet Access: A Philosophical Defense*, 18 International Review of Information Ethics, 11, 13 (2012).

37 Secretary, Ministry of Information & Broadcasting Government of India v. Cricket Association of Bengal, (1995) 2 SCC 161.

38 Shreya Singhal v. Union of India, (2015) 5 SCC 1.

expression under Article 19(1)(a), and the right to carry on any trade or business under 19(1)(g), using the medium of internet is constitutionally protected."[39]

In order to fully understand the nature and scope of the derivative right to internet access recognized in *Anuradha Bhasin*, we must first examine the Court's general conception of fundamental rights under Part III of the Constitution. In the judgement, the Court asserts that barring the fundamental right to education under Article 21A, all other fundamental rights guaranteed by Part III of the Constitution are negative rights.[40] This is a rather questionable claim since the Indian Supreme Court has recognized various socio-economic rights which impose positive obligations on the State to provide food education and healthcare as a part of the fundamental right to life with human dignity under Article 21.[41] Therefore, there is no *a priori* justification to limit the scope of the right to internet access to a purely negative right which only provides protection against interference by the government but does not impose any positive obligation on the government to facilitate internet access by creating necessary infrastructure.

Further, the Court's cursory dismissal of a positive right to internet access also ignores existing government policy which recognizes internet access as an essential service and seeks to ensure universal broadband coverage. For instance, in 2004, the Indian Telegraph Act, 1885 was amended to recognize a universal service obligation to "provide access to basic telegraph services to people in the rural and remote areas at affordable and reasonable prices" and a Universal Service Obligation Fund was created to achieve this goal.[42] Interestingly, another amendment was made in 2006 to increase the scope of this obligation by removing the word 'basic' which appeared as a qualifier before 'telegraph services.'[43] More recently, the National Broadband Mission launched in 2019 also aims to provide universal, affordable, high speed and reliable broadband coverage across India in the next five years.[44]

Finally, a positive right to internet access has found recognition in international human rights law. In a landmark 2011 Report, the UN Special Rapporteur on Freedom of Expression has suggested that all state parties to the International Covenant on Civil and Political Rights should formulate concrete and effective policies to "make the Internet widely available, accessible and affordable to all segments of population."[45] The Special Rapporteur's recommendation flows from a clear understanding of how the internet enables exercise of a wide variety of human rights and

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39 Supra 10, at ¶ 31.

40 Supra 10, at ¶ 23.

41 Peoples' Union of Civil Liberties v. Union of India, Writ Petition (Civil) No. 196 of 2001 (Right to Food); Unnikrishnan v. State of Andhra Pradesh, 1993 SCR 1 594 (Right to Education); Paschim Banga Khet Mazdoor Samity v. State of West Bengal, 1996 4 SCC 37 (Right to Health). See A. Surendranath, *Life and Personal Liberty*, 756, 768 in *Oxford Handbook of the Indian Constitution* (S. Choudhry, M. Khosla and P.B. Mehta, 1st ed., 2016).

42 Indian Telegraph (Amendment) Act, 2003.

43 Indian Telegraph (Amendment) Act, 2006.

44 Ministry of Communications, Government of India, *National Broadband Mission*, available at https://dot.gov.in/sites/default/files/National%20Broadband%20Mission%20-%20Booklet_0.pdf?download=1, last seen on 30/06/2020.

45 *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue*, May 16, 2011, Human Rights Council, *Official Record*, U.N. Document A/HRC/17/27, 19, available at https://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf , last seen on 30/06/2020.

emphasizes that the right to internet access has two dimensions: "access to online content" and "the availability of the necessary infrastructure and information communication technologies, such as cables, modems, computers and software."[46]

In view of the above, the Court's concern that "positive prescription of freedom of expression will result in different consequences which our own Constitution has not entered into"[47] is out of touch with its own prior precedent, governmental policy and international human rights norms which provide support for the recognition of a positive right to internet access. At this stage, it is important to clarify that recognition of a positive right to internet access would not impose an obligation on the government to provide a smartphone and internet connection to every citizen immediately since this may not be within the limited financial capacity of the State and would completely undermine the ability of democratically elected representatives to decide budgetary allocations in accordance with policy priorities. It is well established that States are required to ensure realization of socio-economic rights in a gradual and progressive manner because they need flexibility to develop and adopt a suitable implementation plan after considering budgetary constraints.[48] Therefore, the Court's seemingly pragmatic concern about the "socio-economic costs of such proactive duty"[49] are also unfounded.

Moreover, we must remember that in *Anuradha Bhasin* and *Foundation for Media Professionals*, the Court did not have to direct the government to create any new digital infrastructure. Rather, it was only expected to judicially review the constitutionality of restrictions imposed on the use of existing digital infrastructure during a public health crisis. By refraining from striking down interference by the government with access to existing internet services, the Court failed to even uphold the narrow negative right to internet access that the judgements did explicitly recognize. The principle of progressive realization may be appropriate in the context of positive rights because their enforcement requires the government to allocate its limited resources in specific ways but it should have no application in the context of a negative right against governmental interference which must be remedied in an urgent and binding manner.[50]

The silver lining of the judgements in *Anuradha Bhasin* and *Foundation for Media Professionals* is that the Court avoided falling into the trap of characterizing the internet as a luxury which is not essential enough for the survival of an individual to qualify as a human right. Skeptics have warned that recognition of internet access as a human right would lead to human rights inflation and weaken the force of human rights claims.[51] However, such a viewpoint fails to fully appreciate the centrality of internet access in modern life. Unlike newspapers, radio or television, the internet is not merely a medium for accessing information and entertainment, and it also fosters economic participation, social inclusion and civic engagement. For instance, during the COVID-19 pandemic, the internet has become a lifeline which has enabled people to access telemedicine, online education, e-commerce and virtual court hearings without violating social distancing norms.

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46 Ibid, at 4.
47 Supra 10, at ¶ 24.
48 Article 2, International Covenant on Economic, Social and Cultural Rights, 1966.
49 Supra 10, at ¶ 24.
50 I.A. Hartmann, *A Right to Free Internet: On Internet Access and Social Rights*, 13 Journal of High Technology Law, 299, 388 (2013).
51 B. Skepys, *Is There a Human Right to the Internet?*, 5 Journal of Politics and Law, 15, 25 (2012).

Therefore, the Court in Anuradha Bhasin must be commended at least for recognizing that "the prevalence and extent of internet proliferation cannot be undermined in one's life."

4. Conclusion

In this comment, we analyzed *Anuradha Bhasin* and *Foundation for Media Professionals* to argue that the Court's refusal to review internet restrictions on both substantive and procedural grounds represents further erosion of judicial review in national security contexts. We explained that such denial of judicial review cannot be justified in the absence of an official proclamation of emergency under the Constitution and critiqued the Court's flawed understanding of what constitutes a state of emergency that would justify derogation of rights of citizens. We then examined the nature of the right to internet access recognized in these cases and argued that the Court's cursory rejection of a positive right to internet access is inconsistent with past judicial precedent, government policy and international human rights norms. More importantly, we emphasized that the present cases related to enforcement of a negative right against government interference with digital infrastructure which should have been addressed in an urgent and binding manner.

As we have explained, the judgements in *Anuradha Bhasin* and *Foundation from Media Professionals* suffer from serious flaws, but it may be premature to write off their promise and potential entirely. By formally rejecting some of the government's most extreme arguments about secrecy of orders and exclusion of judicial review, the Court has demonstrated a commitment to rule of law, albeit at its minimal, that mildly improved the status quo. Similarly, the Court's finding that internet restrictions must be territorially and temporally limited in scope serve utility for judicial review against indiscriminate and prolonged shutdowns imposed in the future. However, the continuing legacy of this decision will be marked by the Court's failure to put principles into practice which has resulted in the continuing denial of effective internet access to the people of Jammu & Kashmir for almost a year.