

Faheema Shirin v. State of Kerala: In Light of Right to Internet

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I . Introduction**II. Right to Internet as a Fundamental Right****III. Detached Efforts Resulting in Exclusion by the State****IV. Conclusion****I. Introduction**

THE RECENT judgment delivered by the High Court of Kerala has spurred up a debate on the extent of the right to internet as a fundamental right. This decision becomes extremely relevant in the Indian context today because reports such as the National Sample Survey as a part of its Survey on education clearly indicate that internet is a privilege in our country.¹ The report clearly mentions that only 1% of the rural household in the bottom classes as compared to around 16% of rural households of the top quintile classes possessed computer where the definition of computer includes desktop, laptop, notebook, smartphones, netbooks etc. Access to internet does not mean that the household actually has internet at home. In fact the report suggests that only half of the households that have any access to internet own a computing device which includes a smartphone. There is a very clear urban and rural divide as well where only 27% of the population have access in the urban areas while only 5% have access in the rural areas. Another important information in this report which further elaborates this divide is the fact that the ability of an urban male to use computer for the desired result which is three times compared to his rural counterpart. Similar observations were also made in other reports which indicate how India is limited in its usage of the internet because of various factors.² The High Court of Kerala declared

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¹ National Sample Survey, “Education in India (2014)”, Access to Computer and Internet (129-131), available at: http://mospi.nic.in/sites/default/files/publication_reports/nss_rep_575.pdf (last visited on June 20, 2020).

² Azari, R and Pick, B. J. “Understanding Global Digital Inequality: The Impact of Government, Investment in Business and Technology, and Socioeconomic Factors on Technology Utilization” Paper presented at the Hawaii International Conference on System Sciences 42, 1–10 Hawaii (Jan 5, 2009- Jan. 8, 2009) Date of the conference to be mentioned in footnote.

that the right to access the internet is not only a fundamental right but is also an intricate part of realizing the right to education under article 21 of the Constitution. A brief legal explanation is apposite at this point. Right to education was originally not a fundamental right under the Indian Constitution instead it was loosely placed under article 41 (state to make effective provision for securing right to education), article 45 (provision for free and compulsory education for children under the age of fourteen) and article 46 (special provision of education of socially and economically weaker sections) of the Constitution. These provisions are aspirational or non-enforceable as the states merely have to try and achieve. It was in the case of *Unni Krishnana v. State of Andhra Pradesh* that the court imposed on the States an obligation to provide free education to children up to the age of fourteen, and this resulted in an amendment of the Constitution in the year 2002 and article 21A was inserted. The Single bench of P.V Asha J. made a commendable connection between the Right of education and the role played by the internet in facilitating the same.

Faheema Shirin who was a student of Sree Narayanaguru College, Chelannur, Kozhikode, alleged that she was expelled from her college as she failed to abide by the restrictions imposed by her college authorities with respect to the time which was prescribed for the usage of mobile phone in her college hostel. According to the rules of the hostel the inmates were not allowed to use their phones after 6:00 pm till 10:00 pm. The petitioner argued that this time imposition was hampering her process of learning as not using of mobile phones clearly prevented her from having access to information. The petitioner also alleged that she along with other inmates had made an attempt to explain the inconveniences caused by this rule to their warden but no steps were taken or no effective discussion ever took place. A reference to the budget speech made by the Kerala Finance Minister in the year 2017 was also made by the petitioner where the minister had categorically stated that the universal basic internet facility will be made available to all people of Kerala at lower rates and hence poised Kerala as a rare state where internet facility will be the right of a citizen. He further stated that this right will further facilitate hindrance free access to government and non-government services to the people Kerala.³

³ Budget Speech, Govt. of Kerala (2017-18) T M Thomas T Issac, Finance Minister, *available at:* para 131-132 at 53, *available at:* <https://kerala.gov.in/documents/10180/f04399a1-e891-4400-a05a-b68d64251d34> (last visited on July 18, 2020)

The hostel authorities who are the respondents in this case emphasized on the need for discipline in the hostel and they claimed that this restriction was imposed for ensuring that there was no misuse of mobile phones within the hostel premises during the study time. They also made a reference to clause 7 of Chapter 7 of the Calicut University First Ordinances 1978 which lays down that the students residing in the hostel would be subject to the disciplinary control of the warden/superintendent of the hostel. The authorities also claimed that the parents and the students signed a declaration at the time of taking admission whereby they consented to abide by the rules and regulations of the hostel and hence they are in no position to object to the rules made by the hostel authorities.

Following were the matters which were to be considered by the court:

- Does restriction imposed by the hostel authorities stand in the way of acquiring knowledge by the inmates

While responding to this question the court played a very important role in recognizing the autonomy of the students in making decisions for themselves and in using their time wisely. The court delved into the observations made in the *Anuj Garg's* case⁴ in order to explain how *parens patriae* should be viewed through the lens of constitutionality, statutes and social interdicts.

After hearing both the parties the Single judge bench made the following observations:

- Curtailing the use of mobile phones resulted in the violation of Fundamental Right of Speech and expression under Art 19(1) of the Indian Constitution.
- The restriction is arbitrary in nature as the same restriction has not been imposed on the boys in their hostel and hence keeping the various international instruments of which India is a signatory, this step is extremely discriminatory.
- It is important to read the rights declared by the United Nations into Indian law. The Court even referred to the resolution 26/13 of the United Nations General Assembly on the promotion, protection and enjoyment of human rights on the internet and emphasized on the direct link between accessing internet and promoting inclusivity in education.⁵ Even the thirty second session of the United Nations Human Rights Council which

⁴ (2008)3 SCC 1.

⁵United Nations General Assembly, Human Rights Council 26th Session on 14th July 2014 at 2, available at: http://hrlibrary.umn.edu/hrcouncil_res26-13.pdf (last visited on July 18, 2020).

reiterates the role of internet in facilitating the realization of right of education was referred to by the court. This resolution emphasizes on the right to education and recognizes the global nature of internet and the rapid advancement of information.⁶

- College students are adults who are capable of taking decisions for themselves. Any law which is discriminatory in nature will not stand the test of Constitutionality if the discrimination is not based on sound legal principles.

Here are some of the observations of the author commenting on the aforesaid verdict.

II. Right to internet as a fundamental right

The position with respect to the nature of fundamental right is very well settled. All the Fundamental right as has been laid down in part III of the Constitution is a negative right, which means that no person shall be denied the list of rights that have been described under the said part of the Constitution. The only exception to this list is article 21A which is described as a positive right where the State has an obligation to provide education to children up to fourteen years of age. A very riveting discussion happened in the Supreme Court while discussing the validity of internet shut down in Kashmir⁷ where the Supreme Court made a reference to Vinton G Cerf who objects to the ideology that internet should be considered as a fundamental right, rather he considers internet as only a means which facilitates the realization of fundamental rights.⁸ He views technology only as an enabler and distinguishes it very clearly with rights of the higher order such as conscience, equality etc. Even though the court delved into this view as a part of its discussion it did not resist to reiterate that the process of law making should imbibe the technological development and accordingly mold its rules in order to cater to the needs of the society.⁹ At this point the observations made by the apex court in the case of *Anuradha Basin v. Union of India*¹⁰ is worth mentioning. In this case the petitioners approached the apex court to set aside any order/direction or circular issued by the state which has shut down or suspended or in any way made inaccessible the different modes of communication including the internet. After giving due recognition to the point made by Vinton G Cerf, the court emphasized how important

⁶ Report of the Human Rights Council 26th Special Session (2016), available at: <https://www.un.org/unispal/wp-content/uploads/2018/03/A.72.53.pdf>

⁷ Writ Petition(C) No.1031 of 2019.

⁸ Vinton G Cerf, 'Internet access is not a Human Right' *The New York Times* (New York, Jan. 4, 2010).

⁹ *Supra* note 1 at 21.

¹⁰ WP (C) No. 1031 of 2019.

it is to recognize the role of technology within the sphere of law and not doing so is only underestimating the importance of internet.¹¹ Further expanding its observation the apex court stated that the Freedom of Speech and Expression through the medium of internet is an integral part and is well protected under article 19(1)(a) of the Constitution. Since the petitioners in this case had not asked the court to declare right to internet as a fundamental right, the Supreme Court did not do so but it very well established the fact that right to access information through the internet was protected under article (19)(1)(a) which in turn is a fundamental right under Part III of the Constitution.

Hache and Cullen (2009)¹² state that digital inclusion shall be seen as a wagon to social inclusion that ensures individual and disadvantaged groups have access to the various development schemes and also the skill to use them. If they are prevented from both then they are unable to participate in and benefit from the increasingly electronically mediated knowledge. This above case is very relevant in the Indian context as it has laid down a nascent foundation to the jurisprudence around right to internet in India. This judgment definitely gives us hope that the courts would soon acknowledge the fact that internet and its effect is not only limited to individuals but it impacts and affects us as a community. In this case the court limited itself and acknowledged the role of internet in the lives of students and how it is a resource provider and how it plays an important role in empowering us. But if we extend and look at the application of these observations in a wider spectrum we can very easily conclude that internet plays a much more significant role in not only making us an economy that facilitates providing of ample resources but it also makes us a well-informed economy. Even in the 59th Report of the standing committee on the different digital literacy programmes in India an emphasis on digital literacy has been made as an integral part of the government's vision of an empowered society as envisaged under the "Digital India" initiative.¹³ This report also reiterates the benefits that it would bring to especially to the rural population in areas such as health, employment generation and education. There is also a direct impact of access to internet in extending the benefits of

¹¹ *Id.* at 25.

¹² Hache Alexandra, Migrants, Ethnic Minorities and ICT: Inventory of good practices in Europe that promote ICT for socio-economic integration in culturally diverse contexts (Bridge it Thematic Network, 2009) available at: <http://publications.jrc.ec.europa.eu/repository/handle/JRC57045> (last visited on Apr. 7, 2020).

¹³ 59th Standing Committee Report, of Information Technology (2018-19), available at: http://164.100.47.193/lsscommittee/Information%20Technology/16_Information_Technology_59.pdfunited (last visited on July 18, 2020).

government schemes that are directed towards benefiting the socially and economically marginalized communities. The report exclusion from digital infrastructure and access prepared and submitted by the digital empowerment foundation clearly shows a link between the access to having internet and the effect of the government schemes which are aimed at securing the interests of the marginalized.¹⁴ The two factors that are inter twined to each other in making all of the internet dependent schemes a success are access to internet and the skill set that is required to use it.

The 2017 report of the World Bank indicates that around 1.063 billion Indians were offline even though India ranks fifth in terms of internet usage in the world. Even though India has come close to United States in terms of internet penetration it still constitutes merely 34 percent of the population compared to 87 percent in the United States.¹⁵ This report clearly indicates that a major percentage of our population does not have basic access to the internet and only because we are a highly populated country the figures indicate otherwise. Literacy levels and education attainment are indicators of the skill and knowledge that is possessed by a country's population and as observed access to internet is closely linked to both. The judgment also makes a reference to how such a restriction is an invasion to the right of a girl student to acquire knowledge through digital resource. Apart from e-books and e newspapers several open courses are available online which gives a platform to students across the world to have an access to various educational courses and such a restriction again directly affects such a right. A report by UNESCO in 2015 indicated that the Adult Literacy Rate in India is 79.31%¹⁶ which is far behind its counterparts, hence this judgment must be used as a tool for the purpose of making resources both available and accessible to the masses.

This United Nations Special Rapporteur on promotion and protection on the right to freedom of opinion and expression points that communication is a fundamental social process and everybody should have an equal opportunity to participate in the same and they should not be

¹⁴ India Exclusion Report, *Exclusion from Digital Infrastructure and Access* (Digital Empowerment Foundation, 2016) ch. 1, available at: https://defindia.azurewebsites.net/wp-content/uploads/2017/09/India-Exclusive-Report_DEF-Chapter.pdf (last visited on Apr. 4, 2020).

¹⁵ Available at: <https://data.worldbank.org/indicator/IT.NET.USER.ZS>

¹⁶ UNESCO Institute for Statistics, available at : stats.uis.unesco.org (last visited on June 10, 2020).

prevented from having an access to information on account of being excluded.¹⁷ The rapporteur also suggested that the right to use internet should be so facilitated that the chilling effect is reduced as much as possible.¹⁸ It is important to remember that this equal opportunity will not be realized if the people are excluded or are limited in their access to the internet. People will never be motivated to use the same if they are uncertain of the consequences that would follow from their free usage of the internet. As observed in this case the restriction imposed prevents the hostel inmates in exercising this right as the hostel authorities claim that the students are free to use laptops at the scheduled time and a restriction is imposed only in using mobile phones.

III. Detached efforts resulting in exclusion by the state

Even though several projects and policies have been initiated by the State for inclusion the result seems to be very far away. The ineffective project design is what builds such a gap between the intention and the actual ground implementation. The multidimensional nature of the different institutions of the government is the first hindrance which prevents the State from having a well-informed collaboration. While the Ministry of Electronics and Information Technology is the prime ministry which deals with Information and Communication Technology (ICT), education, health, public distribution and rural governance fall under other ministries. The Information Technology Act, 2000 (the IT Act) is an Act of the Indian Parliament (No. 21 of 2000) notified on October 17, 2000. This Act lays down the techno legal aspect of the usage of Information Technology and interestingly it does not have any major provisions which lay down penalties for exclusion. The section 124A of the Indian Penal Code defines ‘sedition’ and also prescribes punishment for the same.¹⁹ The usage of words which can have broad

¹⁷ Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N11/449/78/PDF/N1144978.pdf?OpenElement>(last visited June 20, 2020).

¹⁸ *Ibid.*

¹⁹ Indian Penal Code, 1860, s.124A reads: Sedition.—Whoever, by words, either spoken or written, or by signs, or by visible representation, or otherwise, brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards, [***] the Government established by law in [India], [***] shall be punished with ¹⁰⁴ [im-prisonment for life], to which fine may be added, or with imprisonment which may extend to three years, to which fine may be added, or with fine.

Explanation 1.—The expression “disaffection” includes disloyalty and all feelings of enmity. Explanation 2.—Comments expressing disapprobation of the measures of the Government with a view to obtain their alteration by lawful means, without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section. Explanation 3.—Comments expressing disapprobation of the administrative or other action of the Government without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section.

interpretations in this section also creates a chilling effect in the minds of the users and prevents them from making a legitimate use of their right of expression.

National policy on Universal Electronic Accessibility, 2013²⁰ states in its policy statement that universal access to Electronics and ICT products would be facilitated in order to provide equal and unhindered opportunities to the differently abled persons but as late as 2019 where Microsoft in collaboration with IIT Delhi conducted the Conference ‘Empower’ they only discussed the steps and procedures to be taken in order to create and make assisted technology.²¹ This lethargic attempt clearly narrates the lack of interest on the part of the state which has historically resulted in the exclusion of the differently abled persons. We often neglect the cause of the differently abled persons because we tend to think that they constitute a very small percentage of our population (2.21%) but in number they are close to 2.68 crore who are directly excluded merely because of their disability.

The National Telecom Policy 2012 is yet another initiative taken by the state in order to provide easy access even in the most remote rural areas of the country.²² The first paragraph of the policy states that:²³

National Telecom Policy-2012 is designed to ensure that India plays this role effectively and transforms the socio-economic scenario through accelerated equitable and inclusive economic growth by laying special emphasis on providing affordable and quality telecommunication services in rural and remote areas.

The vision of this policy states that it aims at providing secure, reliable, affordable and high quality converged telecommunication services anytime, anywhere for an accelerated inclusive socio economic development. Interestingly this policy is also talking about ‘Right to Broadband’ which recognizes telecom including broadband connectivity as a basic necessity like education and health. Even though this policy uses the language of ‘right’ no constructive step has been

²⁰ National Policy on Universal Electronic Accessibility, available at: <https://meity.gov.in/writereaddata/files/National%20Policy%20on%20Universal%20Electronics%281%29.pdf> (last visited on May 10, 2020).

²¹ Isha Arora, “Assistive Technology for persons with disabilities”, *Financial Express* 10 Nov. 2019.

²² National Telecom Policy- 2012, available at: [https://meity.gov.in/writereaddata/files/National%20Telecom%20Policy%20\(2012\)%20\(480%20KB\).pdf](https://meity.gov.in/writereaddata/files/National%20Telecom%20Policy%20(2012)%20(480%20KB).pdf) (last visited on May 20, 2020).

²³ *Ibid.*

taken to ensure the same and there is no penalty prescribed for the instances of exclusion. This judgment can hence play a very effective role in

The National e-Governance plan of 2016 aims at creating a country wide infrastructure even to the remotest village of the country in order to create a large scale digitization of records which would in turn result in an easy, reliable access of the internet.²⁴ The vision statement of NeGP lays down that the ultimate objective is to bring public services as closer to the homes of individuals as possible. The government data shows that in 2019, 3.65 lakh of Functional Common Service Centers have been established across the country which are the main point of contacts which would enable citizens to have access to internet at least in the villages or the remote parts of the country where access is limited because of poor IT infrastructure, lack of institutional frameworks and illiteracy.²⁵

According to the data given by the Telecom Authority of India the tele density at the end of March 2019 was recorded as 90.11 as compared to 92.84 as was recorded in March 2018.²⁶ This data includes both wireless and wired connection and hence can be deceptive for the purpose of understanding the user base because there is a stark disparity between urban usage (155.35) and rural usage (51.98).²⁷ This data is extremely relevant for our purpose in order to understand that mobile usage penetration is directly proportional to internet access. If the access is limited because of infrastructure, illiteracy, poverty or even disability then it would prevent an individual from realizing the benefits of this judgment. This data is also relevant because after demonetization in November 2016, the liquid cash which was circulating in the economy (about 86.4 percent)²⁸ at that point of time was rendered useless and hence forced a major portion of the population to switch to internet banking or other mobile payment or commerce platform which is also internet based. Even though the intentions of the government was noble while making this big announcement, the execution and the preparedness was nowhere closer to what should have been done. Especially in a country like India where a huge population is illiterate and is

²⁴ Ministry of Electronics and Information Technology, *National e governance plan* (Framework and guidelines for use of social media for government organizations), available at: <https://meity.gov.in/divisions/national-e-governance-plan> (last visited May 4, 2020).

²⁵ Ministry of Electronics and Information Technology, *Digital Village Set up*, available at: <https://meity.dashboard.nic.in/DashboardF.aspx> (last visited May 21, 2020).

²⁶ Telecom Regulatory Authority of India, *Annual Report 2017-2018* at 11, available at: https://main.trai.gov.in/sites/default/files/Annual_Report_15012020_0.pdf, (last visited on May 20, 2020).

²⁷ *Ibid.*

²⁸ Dutta Prabhash, 'Demonitization: What India gained and lost' *India Today* (New Delhi Aug. 30, 2018).

dependent on agriculture for their survival this sudden declaration created several barriers for them preventing them to function normally and even today a great section is left out.

Even though India is aiming at Universal Internet Access under its Digital India Plan, it did not become a signatory of the United Nations non-binding resolution titled ‘The promotion, protection and enjoyment of Human Rights on the internet’ which was proposed at the 32nd session of the United Nations Human Rights Council.²⁹ This resolution was aimed at entering into an agreement with all the signatories to make internet accessible to all in order to realize the tenets of UDHR and ICCPR more effectively. It acknowledges the fact that internet plays a very vital role and is an important tool for inculcating a sense of and fostering citizen and civil society participation. One of the major intentions of this resolution was to build confidence and trust in the usage of internet and to regard freedom of expression, privacy and other human rights as components of paramount importance. The value of applying comprehensive human rights based approach was also discussed at length and making internet open and accessible for multi stakeholders was another point of consideration.

IV. Conclusion

The consequence of digital exclusion is way more than we can ever estimate. The above discussion on the factors contributing to such exclusion clearly shows the nexus between the exclusion and the effect that it would have on the groups who are limited in accessing the same. Through the different initiatives taken by the government as discussed above we can clearly know that the benefits of it cannot be availed if internet is not accessible to the masses especially in the remotest areas of this country, hence this judgment hence comes as a respite. The need for making internet accessible in each and every corner of this country is no more a matter of choice but is rather a necessity. The observation made by Justice Asha P is extremely relevant as she makes a close connection between Right to internet, right to education and right to privacy and while elaborating on the right to privacy of an individual. Her emphasized on the autonomy of an individual also speaks volumes of how she is vouching for minimum interference which is extremely important as any interference creates a chilling effect on the people and prevents them from exercising their fundamental rights. Her comment on the ‘responsibility of a major to make

²⁹ UN General Assembly, *The promotion and protection and enjoyment of Human Rights on Internet*, GA Res 32/13 GAHRC, UN Doc A/HRC/RES/32/13 (July, 1 2016), available at: <https://digitallibrary.un.org/record/845727?ln=en>(last visited on June 20, 2020).

decisions suited for themselves' is extremely relevant in our Indian context because we are often surrounded by instances where majors are forced to face the consequences of the choices that they make. By making this observation Justice P V Asha not only established a landmark but she also reiterated the position that was established in the case of *Anitha K Jose v. State of Kerala*³⁰ where moral paternalism was highly criticized. If we look at the heart of the contentions made by the respondents, we can very clearly conclude that the objective was to govern the usage of mobile phones within the hostel premises behind the garb of discipline. By making reference to international instruments that we are a part of, Asha P. V J. is making the point that as a country we are obligated to make internet accessible to all the sections of the society as it plays a very close role in empowering the citizens. She also seems to be using this opportunity to extend the benefit of this judgment as much as possible. As an aspiring country which aims at listing itself among the 'developed' nations of the world, access to internet is something very basic. Through the various initiatives and programmes of the government we can very well conclude that the journey to make internet accessible should not be delayed any further and for all of it this judgment comes as an effective tool. Before concluding the author would like to make a special mention about the State of Jammu and Kashmir as it continues to grapple without proper internet for more than a year now despite the concern that has been repeatedly shown by the Office of the High Commissioner Human Rights. It was right after seventeen days of imposing this lockdown where the High Commissioner categorically stated that "the shutdown of the internet and the telecommunication networks, without justifications from the Government are inconsistent with the fundamental norms of necessity and proportionality. The blackout is a form of collective punishment of the people of Jammu and Kashmir, without even a pretext of a precipitating offence."³¹ The author sincerely hopes that this judgment will be a ray of hope for many people.

³⁰ WP(C).No. 40645 of 2017

³¹ UNHR Office of High Commissioner, *Rights experts urge India to end communications shutdown in Kashmir* (Aug. 22, 2019), available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24909> (last visited June 19, 2020).