

THE PARADOX OF PREVENTION: INDIVIDUALISTIC ASPECT OF INTERNET SHUTDOWNS

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ABSTRACT

Contradictory to the Government's promotion of a digitised ecosystem that prioritises the use of the internet and its services under the banner of 'Digital India', India has been labelled as the 'Internet Shutdown Capital'. This label owes its credit to the frequency of internet shutdowns in the country over the past few years. While dependency on the internet has been induced upon the people through incentives by the Government of India, the authority has evidently been swift in depriving the people of utilities provided by the internet. The government has escalated control over the medium to a point where it renders the internet and its services temporarily dysfunctional for the protection of 'National Security' and 'National Interest' on the mere speculation of emergency. While fulfilling its responsibility to avert situations that threaten national security, the government falls short in preventing the infringement upon an individual's internet access rights. The ambiguity in the domain

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provides ample space for arbitrary use of shutdowns as a tool to camouflage any agitation into obscurity merely on flimsy grounds of speculation. The pondering question is whether, in the absence of requisite parameters, such a subjective assessment of a circumstance would adequately justify imposing restriction over internet access to a considerable size of population? Moreover, whether shutting down of the entirety of internet services is justified, when the circumstance demands restriction upon a mere section of such internet services? The paper attempts to argue that while curtailing the escalation of any matter in the name of national security is paramount and justified, it cannot be carried out while there exists a subjective assessment of a circumstance due to lack of defined parameters. The paper argues that the consequences of internet shutdowns, coupled with international recognition of internet access as a basic human right, should prompt India to consider this recognition domestically. The article attempts to put forth that the right to access internet must be recognised and the power to deprive people of internet must be used justifiably and sparingly. Moreover, the shortcomings of the Indian Telecommunication Draft Bill, 2022 are discussed, including the lack of data maintenance, the potential failure of shutdowns to achieve their purpose, ambiguity

in the term ‘public emergency’, and the practice of shutting down the entire internet.

I. INTRODUCTION

In light of the introduction of the *Indian Telecommunication Draft Bill, 2022*,¹ opinions have been earmarked by people and experts alike. A matter of perpetual debate has been reinstated in modern discourse, which is that of Internet Shutdowns. In the Bill, the legislative intent of providing powers to the state to curtail internet access has been made glaringly obvious.² After the intervention of the Supreme Court of India in the matter, through the case of *Anuradha Bhasin v. Union of India*,³ it was expected that the legislature would approach the topic of instating internet shutdowns with mild restraint and thoughtful consideration. However, the same has not been the case. In addition to this, the 26th report of the *Standing Committee on Communications and Information Technology*, which pertained to ‘*Suspension of Telecom Services/ Internet and its Impact*’,⁴ reported that the suspension of telecom services/internet was an excessive action with substantial repercussions for the general public. The government had failed to sufficiently justify the suspension, lacking evidence of its necessity to prevent turmoil. It resulted in an economic upheaval and hindered access to vital services like healthcare and education. The findings of the report have not been considered or accounted for in the draft bill

¹‘Indian Telecommunication Bill, 2022’, <<https://dot.gov.in/sites/default/files/Draft%20Indian%20Telecommunication%20Bill%2C%202022.pdf>>.

²GS Bajpai and Saurabh Sharma, ‘Demystifying the Draft Indian Telecommunication Bill, 2022’ (2023) SSRN Electronic Journal.

³*Anuradha Bhasin v Union of India* (2020) SCC Online SC 25.

⁴Standing Committee on Communications and Information Technology (2021-22), Ministry of Communications (Department of Telecommunications) 17th Lok Sabha <https://eparlib.nic.in/bitstream/123456789/820699/1/17_Communications_and_Information_Technology_26.pdf> accessed 22 August 2023.

either. The implications arising from this omission within the draft bill is reflective of the lack of governmental accountability.

While the draft bill in its entirety has garnered a polarising response for several other factors too⁵, the focus on internet shutdowns has been rather specific. India has showcased to the world its dedication to create a digital reality.⁶ It has campaigned to promote digital technology and innovations at every front, whilst promising to create a cyberspace with internet and interconnectivity at its core.⁷ In light of the circumstances of the Draft Bill, not only does such a campaign seem imperatively hypocritical but also reflects the inability of the State to understand the gravity of why the internet is needed as a right.

The purpose of this paper, therefore, persists in multiple aspects. This paper examines the reasons for government-initiated internet shutdowns, focusing on India. It first defines the scope of an internet shutdown, including methods like website blocking and network throttling. It highlights the reasons like *national integrity*, *security*, *incitement of offence*, and *public order* justify shutdowns. The paper presents statistics on India's frequent internet shutdowns, particularly in Jammu & Kashmir, and their negative impact on economy and society. It discusses the legality of shutdowns under Article 19 of the Constitution and questions whether the right to internet access should be recognized as a fundamental right, considering its importance in various aspects. It highlights the shortcomings of the *Indian*

⁵Soumyarendra Barik, 'Draft Telecom Bill: Negative impact on digital ecosystem, say tech companies' *The Indian Express* (Mumbai, 12 November 2022) < <https://indianexpress.com/article/business/draft-telecom-bill-negative-impact-on-digital-ecosystem-say-tech-companies-8263849/>>.

⁶Shashi Shekhar Vempati, *India and The Artificial Intelligence Revolution* (Carnegie Endowment for International Peace 2016).

⁷Saket Modi, 'India in 10 years: Cyberspace, the new frontier' (*LiveMint*, 3 February 2017) < <https://www.livemint.com/Industry/dICH6HpmgPtDjzs7o6GDDO/India-in-10-years-Cyberspace-the-new-frontier.html>>.

Telecommunication Draft Bill, 2022, whilst highlighting the international recognition of internet access as a basic human right.

II. NEED FOR INTERNET SHUTDOWN

In order to comprehend the reasons behind the government's emphasis on implementing internet shutdowns when necessary, it becomes crucial to define the scope of internet shutdown, identify the factors that may lead to a shutdown, and assess the frequency of such occurrences.

A. *Meaning of internet shutdown*

In discussions concerning internet shutdowns, it is imperative to go beyond the literal interpretation and encompass broader implications. While the direct meaning is frequently emphasized, acknowledging these extended dimensions is essential for a comprehensive understanding of the right of internet freedom to the extent of averting shutdowns.

In contrast to conventional media, the internet does not function as a broadcaster or a distinct entity; rather, it serves as a medium. Individuals utilize this medium to exchange information of diverse nature.⁸ Therefore, in the context of internet, the term *shutdown* pertains to restricting the flow of information through this medium. While the literal translation is explicit in implying that the term *Internet Shutdown* refers to the suspension of the functionalities and services of the internet, the ambit of the term extends beyond its literal meaning.⁹

⁸How does the Internet work? (*Cloudflare*) <<https://www.cloudflare.com/learning/network-layer/how-does-the-internet-work/>> accessed 13 August 2023.

⁹Steven Feldstein, 'Government Internet Shutdowns Are Changing. How Should Citizens and Democracies Respond?' (2022) Carnegie Endowment for International Peace <<https://carnegieendowment.org/2022/03/31/government-internet-shutdowns->

In its practical application, the term also encompasses the blockage of specific websites as well as throttling the network speed to function at a lower rate of transfer. The latter is done to impede the speed at which information can be transferred through the medium and not inhibit the transfer entirely.¹⁰ In *Anuradha Bhasin*, the Supreme Court had considered these methods of internet shutdown as less intrusive in comparison to a blanket ban.¹¹ Therefore, any reference to internet shutdowns, in the course of exploring the right to internet, must also acknowledge these methods.

B. Justification for internet shutdowns

Pursuant to the powers given to the State, *national integrity, security, inciting of offence and public order* are domains within which an internet shutdown can be instated and enforced.¹² The emphasis in this regard is mainly upon the term *public order* because, owing to its significantly large ambit of understanding, others are derivatives from the very meaning of the term.

At the level of the Supreme Court, J. Subba Rao has remarked that “*public order is synonymous with public peace, safety and tranquillity.*”¹³ In the same judgment, J. Hidayatullah has remarked how public order must occupy a seemingly larger circle over national security, if they were to be represented in concentric circles of

are-changing.-how-should-citizens-and-democracies-respond-pub-86687> accessed 13 August 2023.

¹⁰Cassondra Mix, ‘Internet Communication Blackout: Attack Under Non-International Armed Conflict?’ (2014) 3 *Journal of Law & Cyber Warfare* 70, 70-102.

¹¹*Anuradha Bhasin v Union of India* (2020) SCC Online SC 25.

¹²Diksha Munjal, ‘In India, are internet shutdowns in accordance with law? Not always’ (*newslaundry*, 29 October 2021) <<https://www.newslaundry.com/2021/10/29/in-india-are-internet-shutdowns-in-accordance-with-law-not-always>> accessed 13 August 2023.

¹³*The Superintendent, Central Prison, Fatehgarh v Ram Manhar Lohia* AIR 1960 SC 633.

priority.¹⁴ Much in the same line of thought, disorders of law and order pertain to having less significance than that of public order.¹⁵ Despite the fact that J. *Hidayatullah*'s view of concentric circles was eventually discarded,¹⁶ the deduction worth retaining from this interaction is how the focus upon public order must supersede other factors, as disruption of public order would inescapably result in compromising security and integrity.

For the purpose of understanding the meaning of public order in the context of internet shutdowns, the Supreme Court has recently employed the following analogical representation:

“If two families quarrel over irrigation water, it might breach law and order, but in a situation where two communities fight over the same, the situation might transcend into a public order situation.”¹⁷

The connection between public order and the internet is derived from the belief that the internet, with its endless potential, is a primary tool for spreading information that can be used to mobilise and militarise people in any volatile incident.¹⁸

Moreover, given the sheer volume of information that is conveyed in a given period of time, it is not feasible for violence inciting, conspiracy spreading and militarising messages to be filtered and removed from the flow of digital conversation. Therefore, the act of

¹⁴ibid.

¹⁵*Kuso Sah v State of Bihar* (1974) 1 SCC 185.

¹⁶*Madhu Limaye v Sub-Divisional Magistrate, Monghyr* (1970) 3 SCC 746.

¹⁷*Anuradha Bhasin v Union of India* (2020) SCC Online SC 25.

¹⁸Outlook Web Bureau, ‘Fundamental Right: All You Need to Know About Longest Internet Shutdown In Kashmir’ (*OutlookIndia*, 13 February 2022) < <https://www.outlookindia.com/website/story/india-news-sc-says-internet-fundamental-right-all-you-need-to-know-about-kashmirs-longest-internet-shutdown/345478> > accessed 14 November 2022.

internet shutdown precludes the commission of the act itself and is preventive in nature.

On the contrary, when public order has already been disrupted and the focus of the authorities is to de-escalate and prevent any further violence, internet shutdowns are resorted to in the same manner but in a different light. The nature of such shutdowns is therefore reactive. It is in direct response to an act of disrupting public order which is either on-going or has been completed. The major belief with regard to such imposition is that by depriving the medium of communication, either the information inciting the act would be prevented from getting accessed or no information would reach out, so as to curtail the matter. Hence, with regard to such shutdowns, it is imperative that the nature of the lockdown remains dynamically responsive to the circumstances.

C. Statistics around internet shutdowns in India

Having initially garnered recognition for its endeavours to digitize the nation ahead of developed western counterparts, India's reputation has been tainted by its frequent imposition of internet shutdowns, leading to the unfavourable label of 'The Internet Shutdown Capital of the World' and attracting nation. From mere 3 internet shutdowns in 2012 to peaking at 135 shutdowns in 2018, India's intolerance towards the right to internet access was visible in the passage of the last decade.¹⁹ What can be traced alongside this statistical increase in lockdown is the increase in the number of internet users in India as well. Post-2016, India has seen a rise in the number of internet users.²⁰

¹⁹Info at <https://internetshutdowns.in/>.

²⁰Tina Gurnaney, 'Estimated internet penetration in India reaches 27% with 355 million internet users: Kleiner Perkins' *ETTelecom* (1 June 2017) <<https://telecom.economictimes.indiatimes.com/news/estimated-internet-penetration-in-india-reaches-27-with-355-million-internet-users-kleiner-perkins/58942667>> accessed 22 August 2023.

Currently, India has 658 million active internet users, which amounts to 47% of the population.²¹ It is also the second largest in terms of population that is online, behind only China.²² The place with the most frequent internet shutdowns is the state of Jammu & Kashmir where 415 shutdowns have been imposed, or 61% of the total shutdowns in India.²³ India has also ranked as the country with the most internet shutdowns for 2018, 2019, 2020 and 2021.²⁴ Out of the total shutdowns in India till 2020, only 93 lasted under 24 hours.²⁵ The longest internet shut down in history was also in Jammu & Kashmir, where 552 days went by between 4th August 2019 till 6th February 2021, as the territorial matter was finally resolved when Jammu and Kashmir was formally acknowledged and retained within the territory of India.²⁶

Progressively over time, the Indian economy has become intrinsically reliant upon e-commerce and various other e-services. It is because of this reliance that India reported a loss of 2.8 billion dollars in 2020 for 8,927 hours of shutdown in total.²⁷ As a proportionate record, it was reported that the sum was twice as much as what 20 countries next to India lost, combined.²⁸

²¹Tanushree Basuroy, 'Internet usage in India' (*Statista*, 22 September 2022) <www.statista.com/topics/2157/internet-usage-in-india > accessed 10 November 2022.

²²Ani Petrosyan, 'Internet users worldwide 2022' (*Statista*, 13 February 2022), <<https://www.statista.com/statistics/271411/number-of-internet-users-in-selected-countries>> accessed 10 November 2022.

²³Tanushree Basuroy, 'Internet usage in India' (*Statista*, 22 September 2022) <www.statista.com/topics/2157/internet-usage-in-india > accessed 10 November 2022.

²⁴Scroll Staff, 'India had world's highest number of internet shutdowns for fourth straight year in 2021, says report' (*Scroll*, 28 April 2022) <<https://scroll.in/latest/1022854/india-had-worlds-highest-number-of-internet-shutdowns-for-fourth-straight-year-in-2021-says-report>> accessed 8 November 2022.

²⁵Nitish Arya, *Internet Shutdowns in India: Understanding and Impact* (2022).

²⁶*ibid.*

²⁷Pranav Mukul, 'Economic Impact: India lost \$2.8 bn in 2020 to Internet shutdowns; over double of 20 others' *The Indian Express* (5 January 2021).

²⁸*ibid.*

The statistical evidence presents a very deplorable image of India. Not only are shutdowns leniently imposed, but there also exists no forum for accountability as the state is rigid and dismissive. For a measure as extreme, the emphasis must be on using shutdowns only as a matter of last resort²⁹ which seems to have been missing from the continuous impositions. As stated by Justice N.V. Ramana in the *Anuradha Bhasin* case, the repetitive orders under Section 144 of the Code of Criminal Procedure, 1973 (*hereinafter*, “CrPC”) would amount to abuse of the powers provided by the aforesaid section to the Executive Magistrate.³⁰

III. LEGALITY OF INTERNET SHUTDOWNS

A. *Internet access within the meaning of Article 19*

While the internet is merely a medium meant for utilisation by the population, the purpose for which such utilisation is made should be discussed. Conversations, exchanging of knowledge and dispersing of information are primarily carried out by the means of internet. Therefore, permitting the continuation of the internet as a medium essentially grants the right to freedom of speech and expression, as provided under Article 19.

For any discussion with regard to internet shutdown to persist, the acknowledgement of Article 19(2) is imperative. Article 19(2) provides the scope or the law to intervene and restrict the freedom of speech provided under Article 19(1)(a).³¹ The text provided under the aforesaid Article states, that:

“Nothing in sub clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable

²⁹‘Not right to resort to Internet shutdown every time: Parliament panel’ *Business Standard* (2 December 2021).

³⁰*Anuradha Bhasin v Union of India* (2020) SCC Online SC 25.

³¹*ibid.*

restrictions on the exercise of the right conferred by the said sub clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence”³²

In the context of internet shutdowns, if freedom of speech of the citizens is to be curtailed by restrictions, the Article mandates that it must be done by a procedure established by law. The emphasis laid in the above text is upon the existence of a *law* which imposes *reasonable restrictions*. Pursuant to the relevant sections under the IT Act, 2000, the CrPC and the Telegraph Act and Suspension Rules, 1885, internet shutdowns are imposed in India, thereby fulfilling the criterion of a *procedure established by law*.

Additionally, the necessity of a *reasonable restriction* is paramount in the eyes of law. For any internet shutdown to be held constitutionally valid within the consideration of Article 19, it must confer to the test of reasonable restriction, such that, the restriction which has been imposed upon the citizen as a consequence of the internet shutdown must be reasonable in the eyes of law.

As established in *State of Madras v. V.G. Row*, the procedural aspect of this test of reasonableness involves checking 5 domains:

- Determination of what right has been alleged to be infringed.
- The purpose for which the restriction was imposed.
- The extent and urgency of the evil sought to be remedied.
- The disproportion of the imposition.
- The prevailing conditions at the time.³³

³²The Constitution of India, 1950 art 19(2).

³³*State of Madras v VG Row* AIR 1952 SC 196.

In *Shreya Singhal v. Union of India*, it was held that restrictions can be deemed acceptable only if they were “*narrowly tailored*.”³⁴ Meaning thereby, that the restriction must be precise and clear as to what it wishes to achieve and the action of the state with regard to imposing the restriction is reasonable only to the extent of achieving the aim it set out to accomplish. The constitutionality of a statute cannot be questioned on the ground that it imposes a restriction against the entire public.³⁵ In subsequent cases, however, the judiciary has diluted its stand on this regard by stating that “*less restrictive but equally effective alternative*” must be considered adequately before imposing any restriction upon freedom of speech.³⁶

In applying the aforesaid test of reasonable restriction, internet shutdowns have been upheld by the judiciary in *Anuradha Bhasin*.³⁷

B. Right to internet access as a fundamental right

under Article 21

For the time being, Right to Internet Access is not a fundamental right guaranteed by the Constitution under any article, as per the Supreme Court of India. However, in prior precedents, only way the constitutionality of internet shutdowns has been questioned is within the ambit of violation of freedom of speech guaranteed by Article 19. Despite the ruling of the Kerala High Court in *Faheema Shirin R.K. v. State of Kerala*³⁸ where the Right to Internet Access was held to be a fundamental right, owing to it being a subset within Right to Education and Privacy under Article 21 of the Constitution, there has been no affirmation in this regard by the Supreme Court. The judgement of the

³⁴*Shreya Singhal v Union of India* (2015) 5 SCC 1(India).

³⁵*Babulal Parate v State of Maharashtra* AIR 1961 SC 884.

³⁶*Justice K. S. Puttuswamy (Retd) and Anr v Union of India* (2017) 10 SCC 1.

³⁷*Anuradha Bhasin v Union of India* (2020) SCC Online SC 25.

³⁸*Faheema Shirin RK v State of Kerala* (2019) SCC Online Ker 2976.

Kerala High Court can be suggestive in this regard, but it cannot be held binding upon other courts of law. Moreover, the material facts of the case in *Faheema Shirin* are extremely different from that of internet shutdowns imposed by the State.

While adjudicating the matter of *Anuradha Bhasin*, the Supreme Court bench explicitly denied recognising right to internet access as a fundamental right, while citing that neither party had argued in that regard.³⁹ The court, however, affirmed that speech and trade conveyed through the medium of internet fall within the protection of fundamental rights and as such, are unalienable.

In the aforementioned cases, the consideration for Right to Internet as a fundamental right emerges from the viewpoint that limits it to being a mere tool for speech, knowledge and expression. The constraint of acknowledging the right as developing from Article 19 is that it sees the internet only as a way to share ideas and opinions. However, the internet is not just a medium for expression; it has evolved into a complex ecosystem that includes education, commerce, information sharing, innovation, social interaction, and more. Therefore, if internet is perceived to solely act as a means of communication, its multifaceted role and broader importance in the society would be overlooked. Therefore, to accommodate such a complex ecosystem, there exists a need to acknowledge internet as an inherent subset to Right to Life as guaranteed under Article 21, and not as a mere tool for expression.

IV. THE NEED TO RECOGNISE THE RIGHT TO INTERNET ACCESS AS A FUNDAMENTAL RIGHT

A. Consequence of internet shutdown

With regard to internet shutdowns, the years the government has spent in promotion of a digital India seems hypocritical. The inability to

³⁹*Anuradha Bhasin v Union of India* (2020) SCC Online SC 25.

recognise access to the internet as a fundamental right, while encouraging people to use and derive benefits from the internet seems contradictory.⁴⁰ The problem of internet shutdown would not have invited such harsh criticisms and intense debate, if people were not dependent upon the services and functionalities of the internet. The problem exists in the promotion of a digital environment, creating dependency on the digital environment and then depriving people of the digital environment.

The direct outcome of internet shutdown is reflective in many aspects. The inability to transact, disconnect from a remote job and the digital divide in the field of education are some out of many problems that have plagued India during Internet Shutdowns. For instance, it has been reported that lack of accessibility to education has been a fundamental issue in regions where shutdowns have been implemented for a prolonged period of time.⁴¹ Similarly, shutdowns having induced migration and social disconnect, has caused a great loss of jobs.⁴² The embedding of internet in the lives of people to such an extent, warrants a consideration that internet is an integral part of life. A variety of ancillary rights like the right to information, right to employment and right to education are directly cumbered by the imposition of internet shutdowns. In a digital age, such rights flow from the interconnectivity of internet. Therefore, internet cannot be considered as a mere right

⁴⁰Aditi Chaturvedi, 'Digital India Dream and Arbitrary Internet Shutdowns Can't Go Together. Just See the Loss' *The Print* (23 March 2022).

⁴¹Human Rights Watch, 'No Internet Means No Work, No Pay, No Food: Internet Shutdowns Deny Access to Basic Rights in "Digital India"' (2023) <<https://www.hrw.org/report/2023/06/14/no-internet-means-no-work-no-pay-no-food/internet-shutdowns-deny-access-basic>> accessed 13 August 2023.

⁴²Hakeem Irfan Rashid, 'Many Lose Jobs, Migrate due to Internet Shutdown in Kashmir' *The Economic Times* (14 November 2019) <<https://economictimes.indiatimes.com/news/politics-and-nation/many-lose-jobs-migrate-due-to-internet-shutdown-in-kashmir/articleshow/72057198.cms?from=mdr>> accessed 13 August 2023.

flowing from Article 19 but a right stemming from right to life under Article 21 itself.

The agitations against lockdowns stem also from the fact that while depriving people of internet, the object sought by lockdowns has rarely been met. Research has shown that the mobilisation rate of people increases significantly more upon the imposition of internet shutdown, than without it.⁴³

B. International recognition as a basic human right

When the internet has grown to be such an integrated part of human life, there exists no reason why it should not be recognised as a basic human right in India. As early as 2016, the UN had made its bid to include the right to internet access as an unalienable right of humans.⁴⁴ While not binding in nature, it was reflective of the global acknowledgement of the need for internet as a basic necessity. The same has been recognised by various countries.⁴⁵

Moreover, the United Nations Human Rights Council has denounced practices involving the filtering of online content, the employment of communication ‘kill switches’, which entail the complete shutdown of communication systems, and the forcible seizure of broadcasting stations. The council has remarked that such measures can never find justification under the domain of Human Rights Law.⁴⁶ Furthermore,

⁴³Jan Rydzak, ‘Of Blackouts and Bandhs: The Strategy and Structure of Disconnected Protest in India’ (2019) <<https://ssrn.com/abstract=3330413>> accessed 23 February 2023.

⁴⁴James Vincent, ‘UN condemns internet access disruption as a human rights violation’ *The Verge* (2016) <<https://www.theverge.com/2016/7/4/12092740/un-resolution-condemns-disrupting-internet-access>> accessed 26 February 2023.

⁴⁵*ibid.*

⁴⁶Joint Declaration on Freedom of Expression and Responses to Conflict Situations, OHCHR (2015) <<https://www.ohchr.org/en/statements/2015/05/joint-declaration-freedom-expression-and-responses-conflict-situations#:~:text=Individuals%20who%20expose%20wrongdoing%2C%20serious,sanction%2C%20even%20if%20they%20have>> accessed 13 August 2023.

in a Resolution passed by the Human Rights Council in 2016, there is a clear condemnation of deliberate actions by States that aim at obstructing or interfering with the availability or spread of information on the internet.⁴⁷ The Resolution has urged all countries to avoid and halt such actions which goes against established principles of International Human Rights Law.

Various states across the globe have expressed their commitment towards formulating an inclusive, people-centric and development-based society where information is paramount and accessibility to information, to create, to utilise and to share are common features.⁴⁸ The UN Millennium Declaration, in consonance with this view, has prioritised the accessibility to Information and Communication Technology and has envisioned a society where such accessibility reaches all.⁴⁹ There has been a call for policies that advocate, promote and promulgate the need for internet access universally.⁵⁰ The members making such demands are mostly European and other western countries, who have not only adopted a progressive viewpoint but also incorporate an inclusive agenda. The decentralised nature of the Internet has often led to the belief that Internet is not merely an access tool present within the territorial bounds of a country, but is rather an inexhaustible resource shared and protected by all people in the world alike.

The Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression concluded that while limitations placed on the internet often involves justifications related to national security or public order, they frequently lack the

⁴⁷The promotion, protection and enjoyment of human rights on the Internet Res 32/13 (2016) A/HRC/RES/32/13.

⁴⁸International Telecommunications Union, 'Building the Information Society: A Global Challenge in the New Millenium' (Geneva Declaration of Principles, World Summit on the Information Society, December 2003).

⁴⁹United Nations Millennium Declaration Res 55/2 (2000) A/RES/55/2.

⁵⁰Rec CM/Rec (2007) 16 'Committee of Ministers to Member States on Measures to Promote the Public Service Value of the Internet' (2007) Council of Europe.

essential evidence to support their legality, necessity, and proportionality.⁵¹

V. SHORTCOMINGS OF THE INDIAN

TELECOMMUNICATION DRAFT BILL, 2022

In light of the agitations, confrontations and protests regarding internet shutdowns, the legislature was expected to undertake an overhaul in the area of digital space and cyber law. Catalysed by the Supreme Court's decision in *Anuradha Bhasin*, a change in the scene was expected insofar as internet shutdowns were considered. These speculations were further fuelled by the lower number of internet shutdown cases in 2022 compared to that of 2017.

However, with the introduction of the Indian Telecommunication Draft Bill, 2022, this trajectory of hope has seen a downward slope. It was expected that the legislative intent would be more accommodative of internet shutdown alternatives however, the matter remained unaltered. Rather, by expansive definitions, the draft bill has tried to accumulate a wider variety of digital elements within its control. Should the draft bill pass, social media sites like Twitter and Facebook would fall directly within the ambit of control of the Government.⁵²

Apart from the aforementioned, the following concerns with respect to the Bill remain unaddressed:

A. *No maintenance of data by Ministry of Home Affairs*

For the proper assessment of a law, it is imperative that adequate information is available to the public regarding its impact on them.

⁵¹David Kaye, Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression (2016) UN Doc A/71/373 <<https://digitallibrary.un.org/record/842541?ln=en>> accessed 22 August 2023.

⁵²Soumyarendra Barik, 'Draft Telecom Bill: Negative Impact on Digital Ecosystem, Say Tech Companies' *The Indian Express* (11 November 2022).

Only then can a conclusion be drawn and the effect of the law be known. It is based on such knowledge that the law can be allowed to persist, amended or discarded. In the matter of internet shutdowns, the Ministry of Home Affairs (MHA) has responded to queries admitting that they do not have the requisite figures.⁵³ In the absence of such figures, the formulation of a bill let alone the functioning of the current law in place can be disastrous.

Informal sources have to be relied upon to even trace the statistical happenings around internet shutdowns. Similar responses have been given by representatives of Government of Delhi and of Bihar. It is representative of a disconnect between the issues of the public and the priority of the people in power. Despite public outcry and the sheer number of people affected, the Draft Bill in question fails to provide any compulsion for the maintenance of such data.

In the evaluation of effective legal frameworks, transparency and comprehensive data are pivotal for gauging their impact on the public. Without access to adequate information regarding the consequences of a law, the assessment of its efficacy remains incomplete, impeding the informed decision-making process of whether to uphold, revise, or discard the law. The lack of the necessary figures to quantify the outcomes of internet shutdowns underscores a deficiency in the policymaking process. The reliance on informal sources to ascertain statistical occurrences surrounding internet shutdowns and similar acknowledgments by representatives of various government entities, highlights a disconnection between the concerns of the public and the priorities of the government.

B. Internet shutdown failing to achieve its purpose

Due to the lack of available data, the success of internet shutdowns has not been determined with certainty. While internet shutdowns have

⁵³Isha Sahai Bhatnagar, 'No Centralised Data on Internet Shutdowns, Centre Tells Parliament' *Hindustan Times* (4 August 2022).

been implemented for the purpose of preventing mobilisation and impeding imminent violence, a paper from Stanford University suggests that internet shutdowns might actually help in mobilising crowds more than they would have if they were left alone.⁵⁴ The paper tracks and utilises published information to formulate a chart, which then helps show how violence proceeded to happen in more cases after the imposition of shutdowns than in the ones where no shutdown was imposed. The findings of the research have some practical credibility as in the case in Burkina Faso and Uganda, rather than quelling dissent and silencing young people who utilize social media for mobilization against oppressive political structures, internet shutdowns evidently sparked even stronger resistance and violence.⁵⁵

Furthermore, there is no concrete evidence supporting the fulfilment of the purpose of internet shutdowns. On the contrary, in the Report of the Office of the United Nations High Commissioner for Human Rights in 2022, a specific reference was made with regard to the enormous collateral damages that are caused by internet shutdowns, beyond their intended purpose.⁵⁶ In a state of chaos, shutdowns can severely impede vital communication channels, disrupting the flow of essential information and hindering the coordination of emergency response efforts. The absence of reliable news coverage during critical moments may give rise to public panic, as people are left in the dark about ongoing events and developments. Moreover, these shutdowns can inadvertently create an environment where misinformation flourish unchecked, further fuelling the confusion and chaos.

⁵⁴Jan Rydzak, 'Of Blackouts and Bandhs: The Strategy and Structure of Disconnected Protest in India' (2019) <<https://ssrn.com/abstract=3330413>> accessed 23 February 2023.

⁵⁵Mucahid Durmaz, 'Do African Autocrats Fear the Internet?' *TRT World* (2019).

⁵⁶Report of the Office of the United Nations High Commissioner for Human Rights, 'Internet shutdowns: trends, causes, legal implications and impacts on a range of human rights' (2022) UN Doc A/HRC/50/55 <<https://www.ohchr.org/en/documents/thematic-reports/ahrc5055-internet-shutdowns-trends-causes-legal-implications-and-impacts>> accessed 22 August 2023.

C. *Ambiguity within the meaning of the term 'Public Emergency'*

While it has been established by the judiciary that any act that wishes to promulgate a restriction upon the freedom of speech of an individual must proceed in doing so only when in a state of urgency or emergency,⁵⁷ there still exists an unanswered ambiguity as to what degree of severity of an event would comprise as *emergency*. While it is factual that disruption in public order would invite action, this action cannot always result in curbing the right to freedom of speech of the individual, while less severe alternatives would preferably help fulfil the same aim.

In the Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, the utilization of a vague notion like *national security* to validate intrusive restrictions on the exercise of human rights has been discussed as a matter of significant concern.⁵⁸ According to the report, this broadly defined concept of *national security* is susceptible to manipulation by the government, enabling it to justify actions targeting marginalized groups, including human rights defenders, journalists, and activists. Moreover, it facilitates unnecessary secrecy in investigations and law enforcement, undermining transparency and accountability principles.

It cannot be denied that at times of intense chaos, internet shutdowns might be sought by the legislature as a last resort. However, what criterion or criteria is to hold a circumstance worthy of imposing an internet shutdown is still unknown. While an objective answer cannot be sought, owing to the differences in each case, there still must exist a set of parameters that can be referred to determine the severity of the

⁵⁷*Madhu Limaye v Sub-Divisional Magistrate, Monghyr* (1970) 3 SCC 746.

⁵⁸Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue (2013) UN Doc A/HRC/23/40 <https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.40_EN.pdf> accessed 22 August 2023.

case. The Draft Bill in question provides no supplement to aid such determination.

D. Shutting down the entirety of the internet

In General comment No. 34 (Human Rights Committee), paragraph 3 highlights that freedom of expression is an essential prerequisite for upholding the principles of transparency and accountability, which are fundamental for the safeguarding and advancement of human rights.⁵⁹ Paragraph 43 states that any limitations on websites, blogs, or other internet-based information dissemination systems, as well as their supporting components like internet service providers and search engines, must be in harmony with the stipulations of paragraph 3. Such allowable constraints should primarily pertain to specific content, as broad prohibitions on certain sites or systems contradict the principles outlined in paragraph 3.⁶⁰

Therefore, insofar as violation of human rights are concerned, the international perception is that broad prohibition of internet must be avoided.

Though the aim of internet shutdowns is to curb the flow of information, in order to restrict mobilisation and militarisation of people, the same can be achieved while only suspending a fraction of the total available Internet services. If the ability to communicate is what causes people to plan and formulate their malicious intents, as acknowledged in the *Anuradha Bhasin* case, affecting the functioning of other essential elements of internet services is violative of human rights.

⁵⁹UN ICCPR, 'General comment No. 34' (2011) UN Doc. CCPR/C/GC/34 <<https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>> accessed 22 August 2023.

⁶⁰ibid at para 43; UN Human Rights Committee (HRC), 'UN Human Rights Committee: Concluding Observations: Syrian Arab Republic' (2005), UN Doc. CCPR/CO/84/SYR, <<https://www.refworld.org/docid/43f2ff770.html>> accessed 13 August 2023.

By suspending internet services insofar as access to websites is concerned, while whitelisting important features like payments, the aim sought would be achieved while merely denting the interest of the innocents. For this to happen, however, the legislature, by its implicit action, would have to informally consider the internet as a basic right and recognise it beyond just the ambit of just Article 19. The Draft Bill in question fails to accommodate such a provision.

VI. WAY FORWARD AND CONCLUSION

Instead of embracing alternative solutions to internet shutdowns, the Indian Telecommunication Draft Bill, 2022, through expansive definitions, seeks to exert greater control over various digital elements of the cyber space. It fails in bringing about the anticipated accountability and transparency insofar as restraint over internet access was concerned.

While there currently exists a lack of acknowledgment by the legislature of the embedded nature of internet in our day-to-day life, it is inevitable, optimistically, that the individual's view of what internet functionalities comprises of would be thought of, accounted for and adequately envisioned by the government in the modern day. It is necessary to discard the perspective of internet as a mere medium of communication in the light of all the functionalities and utilities that are derived from it on a regular. The power to curtail internet and its reach is a power that must be possessed with caution. Transparency with regards to shutdowns is desirable. Accountability must be demanded in the form of the government's acknowledgment of the plethora of inadvertent consequences that internet shutdowns may have over the day-to-day life of individuals.

In the era of digital interconnection, it is impossible to alienate the internet from humans and humans from the internet. The soundest way of going about human evolution is to accept our dependence on technology and the internet. The first step in that domain would involve

acknowledging the interdependence of internet with human life both socially and legally. In light of the developing collective consciousness in favour of the internet, suitable alternatives would be relied over strict imposition of shutdowns in the future.