

IS INTERNET ACCESS A HUMAN RIGHT?

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Abstract: In June 2009, the highest court of France, The Constitutional Council, declared internet access to be a basic human right. Many people are now campaigning to have it recognized as a human right by the United Nations, along with those human rights already recognized by the world body. The main motivation behind the campaign is the desire to close the digital divide, particularly that between rich and poor nations. However, while having internet access recognized as a human right might go some way towards addressing the digital divide issue, the theoretical case for recognition has not been clearly established. Without a solid theoretical case, recognizing something to be a human right is a misunderstanding of the nature of that something as well as of human rights. The former kind of misunderstanding may result in misdirected efforts at promoting the activity in question and the latter in a debasement of human rights. This paper will provide an account of human rights and will argue that on the basis of such account, internet access is not a human right, even though it is an important right in itself and one that enables the promotion of other human rights.

1 INTRODUCTION

One of the first acts of the newly created United Nations was to adopt and proclaim, on 10 December 1948, the Universal Declaration of Human Rights. The human rights proclaimed in the Declaration include the rights to “life, liberty and security of persons” (Article 3), the rights not to be “held in slavery or servitude” and not to be “subjected to torture...” or to “arbitrary arrest” (Articles 4, 5 and 9), the rights to “recognition ... before the law,” to “equal protection of law” and to “effective remedy ... by law” (Articles 6-8) and various other rights pertaining to “life, liberty and security of persons.” Since 1948, various other “declarations” have been made, enlarging the list of human rights, such as the “rights of the child,” the “rights of indigenous peoples” and so on. These rights have been formally recognized in two international covenants and several other international treaties and have become enforceable.

In recent years, there has been a growing recognition of, on the one hand, the importance of internet access and, on the other, the inequality of access. This recognition has led to a concerted effort to have internet access declared a human right. Indeed, the United Nations itself has made a

tentative move towards such outcome. In 2003, the UN and the International Telecommunication Union convened and organized the World Summit on the Information Society with the aim of generating the political will and formulating a concrete plan of action for achieving the goals of the information society in line with the Universal Declaration of Human Rights. No progress has been made since then but this only motivates many activists to push for the elevation of internet access to the status of a human right. The activists’ effort received a legal boost in June 2009 when the Constitutional Council of France, the country’s highest court, declared that internet access is not just a human right but a “fundamental human right” in its judgment against an anti-piracy law. One activist, the Canadian journalist and science fiction writer Cory Doctorow, confidently predicts, in the blog *Boing Boing* that he co-edits, that “in five years, a UN convention will enshrine network access as a human right ... In ten years, we won’t understand how anyone thought it wasn’t a human right” (Doctorow, 2009).

In all the calls for internet access to be recognized as a human right, no effort is made to define what a human right is and whether internet access satisfies the conditions for something to be a human right. It will be argued below that on a

plausible account of human right, internet access does not qualify as one, even though it is certainly an important right and indeed one that is instrumental to the promotion of human rights proper.

2 INTERNET ACCESS AND HUMAN RIGHTS

In a recent volume on human rights and the internet (Hick et.al., 2000), the contributors argue persuasively for the link between internet access and the promotion of human rights, even though some authors also acknowledge that abuses of the internet can impede promotion efforts. Many contributors claim that the internet has had a positive effect on human rights work in two ways: (1) it “has become a tool for the promotion and protection of human rights, being utilized to obtain, communicate and disseminate information” (Hick et.al., 2000: 7) and (2) it “provides the obvious tool for rapid, cheap and accurate information to be supplied and disseminated in response” to human rights abuses (Hick et.al., 2000: 7-8). More importantly, as “the capabilities and capacity of the Internet increases [*sic*], new uses and methods for promoting human rights will continue to emerge” (Hick et.al., 2000: 8). However, many authors also have serious reservations, claiming that the internet has been used (or rather abused) by “the enemies of human rights,” for which reason the editors choose to situate the book in the middle ground between enthusiasm and caution, “neither to champion nor to dismiss [the] technology” (Hick et.al., 2000: 13). Works such as that by Hick et.al., while establishing a strong link between the internet and human rights, do not provide any solid support for the claim that internet access should be made a human right. None of the authors in this volume makes such claim. For the editors themselves, this is so because it is difficult to balance the promise of the internet against the threat, its positive effects against the negative ones. However, many other authors have gone beyond the positive effects of the internet on human rights promotion and argued that there is a solid basis for making internet access a human right.

Going beyond the volume by Hick et.al., Best (Best, 2004) argues that internet access should be made a human right on the basis of Article 19 of the Universal Declaration of Human Rights. Article 19 states: “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold

opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.” The relevant phrase, it seems, is the following: “... the right ... to seek, receive and impart information and ideas...” Indeed, Best cites this phrase, highlighting “seek, receive.” His argument seems to be that since internet access is the means to secure “freedom of opinion and expression,” which is a human right, it too must be a human right.

In a similar vein, Anne Peacock (Peacock 2005) has appealed to Article 19 to argue for the claim that internet access, or access to information technologies generally, is a human right. However, she has bolstered her argument with the claim that making access to information technologies a human right is the means to narrowing, if not closing, the “digital divide” between rich and poor countries. That there is a great digital divide is undeniable. Indeed, it was only in September of 2009 that undersea internet cables reached Africa! Peacock suggests that we need to guarantee human rights in practice rather than just on paper, and that only the human rights approach to the digital divide will bring this about.

There is no doubt that making internet access a human right will considerably help towards closing the digital divide and securing the human right to “seek, receive and impart information and ideas.” However, arguments offered by Best and Peacock show at best that internet access is the means to securing certain human rights (such as the right declared in Article 19). The trouble is that just because something is a means to promoting or securing a human right, it does not follow that it too is a human right. The means itself must be judged on its own to see if there is any basis for putting it on par with the end that it helps to promote. What we need, and what is lacking in the arguments offered by Best and Peacock, is an account of what a human right is. Internet access is a human right only if it fits such account. The folly of making internet access a human right just because it is the means of securing the declared rights can be seen by considering the possibility that information technologies will in the near future develop beyond, or away from, the internet and the world wide web. Would it still be considered a human right? How could a human right cease to be one on the basis of a shift in technologies? Notice that no matter how technologies shift, the “right to freedom of opinion and expression” as declared in Article 19, as well as other rights, will remain human rights.

It is important to base the judgment that something is a human right on a conceptual basis not just because of the risk that a declared human right with no conceptual basis can cease to be one as circumstances, technological or otherwise, change. Human rights are an important protection against injustice world-wide. Unless it is ensured that something is recognized as a human right only if it deserves to be so recognized, we run the risk of undermining the existing rights, or diluting their force and dignity. One undeserving right managing to get recognized as a human right could well encourage efforts to have all kinds of rights made into human rights. Given the imperfect politics of human rights, some such efforts might well succeed and the danger is that if every right is a human right then nothing really is.

What about the recent decision of the Constitutional Council of France to declare internet access to be a human right? It is important to keep in mind the fact that the Council's decision was made in the context of a ruling against the French Government's law, passed two months earlier, which would track activities that infringe copyright and ensure that offenders would be deprived of internet access. The Council's decision should at best be treated as an internal matter with no international implications. Indeed, its moral basis is rather dubious, being based on the claim that free access to public communication services online is implied in the "Declaration of the Rights of Man and of the Citizen," which is part of the preamble to the French constitution. The "rights of man" referred to in this "Declaration" are reserved only to free and white men, specifically excluding slaves, women and non-white people. Furthermore, critics of the Council's judgment have claimed that the Council has ignored the rights of authors and artists. Indeed, it might be argued that the judgment goes against Article 17 of the UN Declaration which states that everyone "has the right to own property" and "No one shall be arbitrarily deprived of his property."

3 HUMAN RIGHTS: A CONCEPTUAL ANALYSIS

What counts as a human right? One possible answer is that it is whatever declared as such by an international body such as the United Nations and ratified by an acceptable number of nations. It is perhaps this institutional approach to human rights that underpins the various efforts to have internet

access declared a human right by the UN. However, using this approach is like putting the cart before the horse. The UN should recognize something as a human right because it is conceptually one, not the other way round. As a compromise, it may be assumed that all the rights declared by the UN to be human rights are already properly so and all we need to do is to take their key characteristics to be the defining ones and apply them to any candidate. This approach is unsatisfactory because it assumes that the UN is infallible in its judgments (which is not to say, as we will see, that being recognized by an international body like the UN is not part of being a human right). Indeed, it may turn out that some of the rights recognized by the UN as human rights should not be so recognized. There does not seem to be any way out of giving a conceptual answer to the question "What counts as a human right?" In this question, the stress is on "human" rather than on "right." Indeed, it will be taken for granted here that a human right is a right and an account of it will have to fit in with the account of right generally.

What a right is, in general, is well enough understood. Skorupski's formal statement captures well enough the basic intuitions about rights:

X has a right to Y against Z if and only if it is morally permissible for X or X's agent to demand that Z does not take Y from X, or does not prevent X from doing Y, or delivers Y to X (as appropriate), and to demand compensation for X from Z in the event of damage resulting from Z's non-compliance (Skorupski, forthcoming: 7).

Rights defined as such entail "duties of right" such as the duties not to seize from others what belong to them by right, not to harm or damage it, and "to play a fair part in supporting legitimate institutions" to ensure "fair distribution of jointly owned resources" and to protect rights (Skorupski, forthcoming: 9).

Skorupski's account is perfectly adequate in spelling out the *moral* content of a right. For my purposes, however, it is useful to spell out the *logical* requirements for having a right. In doing so, it will be clearer how something can progress from being a right to being a *human* right. Thus, it is suggested that X has the right to Y if and only if:

- (1) X has an interest in, or a desire for, Y, or would have such interest or desire if X sufficiently understands the nature of Y,
- (2) It is not wrong for X to have an interest in or a desire for Y, or to seek to obtain Y,
- (3) It is wrong to prevent X from having Y, or to deprive X of Y.

(1) to (3) constitute the conditions for having a right generally. They do not require any party to do any specific thing to ensure that X has Y. Apart from the negative duty to refrain from preventing X from obtaining Y, no one has a positive duty to ensure that X has Y. The right to have children does not obligate any party to ensure that a couple have children (by, for example, providing fertility treatment). For a right to something to be claimable against another party, we need:

(4) X has the right to Y against Z if and only if (1) to (3) obtain and it is Z's duty, or obligation, or responsibility to ensure that X has Y.

The right to a job may be claimable against the government if it is written in the country's constitution that every citizen is entitled to a job, or if it is part of the platform of the political party in power. Failure to ensure that X has a job may entail compensation such as paying X unemployment benefit, providing job training etc.

For something to be a *human* right, we need all of (1) to (4) as well as:

(5) The interest in or desire for Y is universal among humans,

(6) The possession of Y is intrinsically valuable and the lack of Y is a serious deprivation,

(7) It is a duty of the international community to ensure that the relevant Z discharge Z's duty, or obligation, or responsibility to X, or at least encourage Z to do so,

(8) Z's duty, or obligation, or responsibility to X is clearly determinable, or alternatively, violation of X's right is clearly determinable.

(5) is required because for something to be a *human* right, it has to be universally desirable across all humans. It makes no sense to make the right, say, to eat meat a human right (assuming that eating meat satisfies (2)) because a significant proportion of humanity has no interest in or desire for eating meat; indeed many have an aversion to it. There are borderline cases such as "the right to marry and to found a family" as proclaimed in Article 16 of the UN Declaration. One might defend the inclusion of this right by arguing that, as things stand, the interest in or desire for marrying and having a family remains universal, and if there is any aversion to it, the aversion is personal and not directed at others, unlike the case of meat-eating where the aversion is typically directed at meat-eaters. On the other hand, there would be a case for dropping the right to marry and to have a family from the list of human rights if social trends moved significantly away from these practices. Indeed, it might be argued that something

that depends so much on social trends should not be regarded as a human right.

(6) is required because of the elevated moral status of a human right. The point of making a right into a human right is, in part, to indicate that the violation of such right should be treated with utmost seriousness. As Bernard Williams has put it, the "charge that a practice violates human rights is ultimate, the most serious of political accusations" and "it is a mark of philosophical good sense that the accusation should not be distributed too inconsiderately..." (Williams, 2005: 27). It follows that unless something is intrinsically valuable and not having it is a serious deprivation, serious in the sense of being a threat to human dignity, it does not make philosophical good sense to elevate it to the status of human right. For instance, the copyright of software writers to their creations is, arguably, not a human right because having copyright is valuable but not intrinsically so and not having it is a deprivation but not a serious one. Violation of copyright is serious enough but it hardly counts as the "ultimate, most serious of political accusations." Indeed, the decision of the French Constitutional Council mentioned earlier implies that copyright is not a human right.

(7) and (8) are required because, following from (6), the point of making something a human right is to underscore the seriousness of its violation and to gather all the necessary political means to ensure the enforcement of it. This means that if something is a human right then it ought to be declared so by an international organization such as the United Nations, and the declaration ought to be ratified by member nations. Furthermore, there ought to be an adequate international mechanism of monitoring and enforcement. Point (8) in particular stipulates that the right in question must be such that it is determinable whether the right is respected or violated (otherwise enforcement would be impossible). For this to be so, Z's duty to X has to be a Kantian perfect duty, which Z either discharges or fails to discharge, such as the duty to tell the truth, rather than an imperfect duty, which is a matter of degrees, such as the duty of benevolence. To illustrate, Article 26 of the UN Declaration states that everyone "has the right to education." Without qualification, the "right to education" fails Condition (8) because it is not clear how to respect this right or how to discharge the duty to provide education. To be educated, or providing education, is a matter of degrees. Sensibly, Article 26 goes on to specify that "Education shall be free, at least in the elementary and fundamental stages." Put this way, the right to

education “in the elementary and fundamental stages” does satisfy (8) insofar as it is clear enough whether any state respects this right or fails in its duty of right.

Conditions (5) to (8) above are consistent with Skorupski’s conditions: Something is a human right only if it is “(a) an essentially universal right..., (b) whose active enforcement and promotion it is permissible for anyone, including all states, to demand of any state..., (c) and which it is efficacious to distinguish and recognize in international law as demandable of any state” (Skorupski, forthcoming: 18). Skorupski calls (a) the condition of “universality,” (b) of “cross-state demandability” and (c) of “efficacy.” Skorupski’s (a) corresponds roughly to (5) above and his (b) and (c) reflect the concerns in (7) and (8). However, (7) is somewhat weaker than “cross-state demandability” and (8) spells out more clearly what “efficacy” entails. All together, Skorupski’s conditions entail (6) but it is worth spelling it out more explicitly.

4 IS INTERNET ACCESS A HUMAN RIGHT?

That internet access is a right is clear enough. The interest in, or desire for, having access is unquestionable. Indeed, with increasing wealth in countries such as India and China, the demand for access world-wide is accelerating at a fast rate (and access will in turn fuel economic growth and increase the demand for access even more). Internet is a tool and as such it is neutral between legitimate and illegitimate uses. Being neutral, the demand for access is not wrong and indeed it is wrong to deny access or prevent someone from having access (without justification). Thus all three conditions ((1) to (3) above) are satisfied. In some countries, governments have made it a national policy to provide internet access, or adding it to the list of things that their citizens are accustomed to receiving, as a matter of right, from their governments, such as health care and education. For such countries, Condition (4) is also satisfied, making internet access a claimable right against some specific entity, or making the provision of access a duty of right.

Given its enormous potential to meet scientific, commercial, educational and entertainment needs, the right of access to the internet is a significant right. Indeed, despite some reservations from human

rights promoters, the internet is widely recognized as an essential tool in advancing human rights causes. Furthermore, one effective way of closing the digital divide is to make internet access a responsibility of the world community. The case for making internet access itself a human right is certainly weighty. Nevertheless, given the account of human rights above, it is not a human right; it would not make philosophical good sense, to borrow Williams’ words, to have it recognized as a human right.

We can begin with the last Condition above. Internet access is a matter of degrees, depending on variables such as the extent of satellite connections, bandwidths, broadband connectivity, wireless networks and so on. If there is a duty to provide access, it will be at best an imperfect duty (in the Kantian sense), like the duty to be benevolent, which does not entail any specific level of benevolence. As such, it would be difficult to determine whether and to what extent the responsible agent has fulfilled its duty to provide access, or has failed in such duty. Differently put, it would be difficult to determine whether the right to internet access has been respected or violated. It may be possible of course to specify the level of access, or defining technically the notion of “minimum access” to satisfy (8). If this can be done then it is this minimum access that is the candidate for the human right status.

Even if “minimum access” can satisfy (8), it is likely to fail other conditions. Politically at least, it is not clear how a case can be made out for making “minimum access” a matter of “cross-state demandability,” or making failure to provide it a matter of international condemnation and sanction. However, (7) above is a weaker condition than Skorupski’s “cross-state demandability.” It may be possible to make “minimum access” a matter of great concern to the international community, great enough to make it justifiable to put pressures on those states that fail to provide it.

The test for making “minimum internet access” a human right rests on whether (5) or (6) can be met, and it does not look like it will pass the test. There is clearly no universal interest in or desire for internet access. Many people are perfectly happy with having nothing to do with the internet. To be sure, it is likely that every life is touched in some way by the internet, but the fact remains that many people would rather that their lives are free from it. Certain evils may be necessary, even universally necessary, but they remain evils to which there is, or ought to be, an aversion rather than an attraction. Ubiquity is

not the same thing as universal desirability. Condition (5) is not met.

It has been conceded that the internet is a useful tool generally and indeed essential for human rights work. However, it remains a tool and its value lies in being a tool. Thus, it is not *intrinsically* valuable, that is, valuable of, in and by itself. Conceivably, technologies will develop in such a way that it will no longer be valuable, like many other valuable technologies in the past. The value of an intrinsically valuable thing (such as “life, liberty and security of person”) does not depend on the whims of technological progress, or anything else. In any case, being deprived of internet access does not count as a serious threat to human dignity and thus does not count as a serious deprivation as stipulated in (6).

5 CONCLUSIONS

The importance of and the need for internet access are undeniable. If it is declared a human right, there is a good chance that progress will be made towards narrowing the digital divide. The case for making it such is certainly weighty. However, the moral status of human rights is so lofty that it would be unwise to admit into their ranks anything that fails certain stringent conditions. Such conditions have been proposed in this paper and it has been argued that internet access, even of the minimum kind, fails to meet the crucial ones.

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