

Internet Access as a Human Right and the Justiciability Question in the Post-COVID-19 World

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Abstract

The heavy reliance on the Internet during the COVID-19 lockdowns underscored the widening gap between the information-rich and the information-poor. While this digital divide is easily conceived as a problem of the Global South, COVID-19 also exposes the asymmetries among population segments within the Global North. The uneven diffusion of the Internet is strengthened by wider inequalities not limited to social, racial and economic imbalances. This paper decries the lack of normative support(s) for Internet access as a human right under existing international law. Building on existing scholarship, it provides an instrumental-pragmatic defence for Internet access as a new human right. Later, it turns to the problem of justiciability, which may hinder the enforcement of the rights as a specie of economic, social and cultural rights.

Keywords: internet access, human rights, justiciability, COVID-19.

1. Introduction

The digital surge during the COVID-19 lockdowns revives the debate on the public aspects of Internet accessibility as a public utility or public good in the traditional economic sense. Though controversial, the debate on the classification of Internet access as a human right or the creation of a broadband right has gained momentum in the last decade. Access to a reliable and affordable Internet connection remains a source of great consternation. The UN indicated that access to the information and communications technology (ICT) infrastructure is crucial for achieving sustainable

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development goals (SDGs).¹ Importantly, this includes the aspiration to ensure that inhabitants of the least developed countries have universal and affordable access to the Internet. For some countries, having such access has become an emblem of national economy and governance. And for citizens, the Internet has fostered an open and participatory communication culture.² Arguably, there is no aspect of daily life which has not been either impacted, altered or improved by this technology. The commercial, economic and political sectors are a few of the areas that have embraced the digital technology.

This incursion of the Internet into people's lives was deepened by the COVID-19 pandemic. Like Internet technology itself, the COVID-19 pandemic startled the world. The world was thrown into a policymaking stalemate as confusion arose among policymakers and experts on how best to tackle the pandemic. The introduction of movement restrictions and social distancing by many national governments as part of the strategies to flatten the infection curve and maintain a functional society culminated in a heavy reliance on the Internet. Practically, every aspect of society went online. Many quotidian activities for which the Internet had previously sat at the periphery became heavily dependent on it. Apart from the educational and commercial sectors, which were already accustomed to using different online platforms to support their services, there was an increased use of the Internet for socio-cultural and religious activities. Worldwide, this represented a 60% increase in Internet traffic.³

Critically, the extensive reliance on the Internet during the lockdowns underscored the widening gap between the information-rich and the information-poor. The International Telecommunication Union (ITU) concluded that during this period 'some 2.9 billion people remain offline', 96% of them being residents of the Global South.⁴ Human Rights Watch comprehensively curated the hardship encountered by many learners in Africa.⁵ Conceivably, this digital divide seems like a problem of the Global South, but COVID-19 also exposed the asymmetries among population segments within the Global North countries. Such uneven diffusion was strengthened by wider inequalities not limited to social, racial and economic imbalances. For some

¹ United Nations, 'Transforming Our World: the 2030 Agenda for Sustainable Development' (Resolution adopted by the General Assembly on 25 September 2015) A/RES/70/1 available at <https://sustainabledevelopment.un.org/post2015/transformingourworld/publication> (accessed 31 January 2024).

² See M. Horten, *The Copyright Enforcement Enigma: Internet Politics and the 'Telecoms Package'* (Palgrave Macmillan UK, 2012) 24.

³ OECD, 'Keeping the internet up and running in times of crisis' OECD May 2020 available at <https://www.oecd.org/coronavirus/policy-responses/keeping-the-internet-up-and-running-in-times-of-crisis-4017c4c9/>.

⁴ International Telecommunication Union, 'Measuring Digital Development: Facts and Figures 2021' (ITU Publications 2021).

⁵ Human Rights Watch, 'Impact of COVID 19 On Children's Education in Africa: Submission to the African Committee of Experts on the Rights and Welfare of the Child' 35th Ordinary Session 31 August–4 September, 2020.

context, according to the UK Local Government Association, only 51% of households earning between £6,000 to £10,000 had home Internet access during the pandemic, compared to the 99 per cent of households with an income over £40,000.⁶ Similarly, millions of people were without broadband subscription in countries like France and Ireland.⁷ This problem of digital exclusion also resonated across the Atlantic as 59% of parents with lower incomes indicated their children could not participate online due to the high cost of broadband subscription.⁸

Before the pandemic, there had been calls from scholars, policymakers and civil society itself for the inclusion of Internet access and the eradication of Internet access-related barriers in international and national policy agenda.⁹ They advocated for Internet access to be recognised or treated as a standalone human right and not to be subsumed under other rights, such as freedom of expression, etc. Within the EU, none of the available jurisprudence of either of the European Court of Human Right (ECtHR) or the Court of Justice of the European Union (CJEU) has determined a means by which an individual can compel states to provide Internet access. Understandably, Internet access has always been tethered to other rights such as freedom of expression and information.¹⁰ This trend is noticeable in the constitutions of some Council of Europe Member States. When the French Constitutional Court described Internet access as a specie of a fundamental right in the seminal *HADOPI* case, it did not suggest the existence of any positive obligation on the government.¹¹ The ECtHR also granted prisoners the right to Internet access on the basis of their rights to education and information.¹² Cali opines that such developments support the inclusion of a new legal human right to Internet access in international law.¹³

⁶ Local Government Association, 'Tackling the digital divide' – House of Commons, 4 November 2021 available at <https://www.local.gov.uk/parliament/briefings-and-responses/tackling-digital-divide-house-commons-4-november-2021#background> (accessed 20 December 2023).

⁷ S. Vincent-Lancrin and W. Thorn, *Schooling During a Pandemic: The Experience and Outcomes of School children During the First Round of COVID-19 Lockdowns* (OECD Publishing, 2021).

⁸ E. A. Vogels, 'Digital divide persists even as Americans with lower incomes make gains in tech adoption' Pew Research Centre (June 2021) available at <https://www.pewresearch.org/fact-tank/2021/06/22/digital-divide-persists-even-as-americans-with-lower-incomes-make-gains-in-tech-adoption/> (accessed 20 December 2023).

⁹ For example, see L. Szoszkiewicz, 'Internet Access as a New Human Right? State of the Art on the Threshold of 2020' (2018) 8 *Adam Mickiewicz University Law Review* 49–60; ML Best 'Can the Internet Be a Human Right?' (2004) 4 *Human Rights and Human Welfare* 23; J. Rifkin, *The Age of Access: The New Culture of Hypercapitalism, Where All of Life is Paid-For Experience* (Putnam Publishing Group 2000).

¹⁰ W. Benedek and M. Kettemann, *Freedom of expression and the Internet* (2nd ed) (Council of Europe Publishing, 2020).

¹¹ See Conseil Constitutionnel, 2009-580 DC, 10 June 2009.

¹² *Jankovskis v Lithuania*, ECtHR, 17 January 2017 Case with application No 21575/08.

¹³ B. Çali, 'The case for the right to meaningful access to the internet as a human right in international law' in A. Von Arnault, K. Von der Decken and M. Susi (eds), *The Cambridge Handbook of New Human Rights. Recognition, novelty, rhetoric* (Cambridge University Press 2020) 276–283.

Without Internet access other human rights cannot be adequately realised.¹⁴ Access to an Internet service has a direct link to the enjoyment of human rights and fundamental freedoms, including democratic citizenship. However, while those without access to the Internet are constrained in exercising some of these rights, the nature of a standalone Internet access right is complicated because it straddles civil and socio-economic rights. As a potential economic, social and cultural right (ESCR), an Internet access right would have to respond to the question of justiciability. ESCRs, unlike civil and political rights (CP), are seen as lacking immediate application, their realisation being subject to the availability of resources.

The central argument of this paper is that the interconnection between and relationship of Internet access with other rights provide adequate justification for its recognition as a standalone human right. However, its justiciability may present some hurdles in its realisation. Part 2 revisits the absence of provisions in international human rights legal frameworks recognising Internet access as a human right. Section 3 examines defences supporting admission of Internet access into the pantheon of human rights from a blend of instrumental and pragmatic perspectives, while section 4 looks at criticisms of the proposed right. Section 5 examines the hurdle of justiciability, and section 6 concludes the paper.

2. International Law and the Right to Internet Access

Crucial to the recognition of Internet access as a human right is the existence of a robust normative framework of international human rights law that advocates such rights. Creation of a new human right under international law is a lengthy process requiring the consensus of academic scholars, civil societies and national governments. A new human right must be feasible, relevant and of universal importance.¹⁵ Further, existing practices must be insufficient to remedy the perceived threat for which a new human right is sought.

This section evaluates existing international human rights law to determine the extent to which it recognises or could accommodate Internet access as a standalone human right. It argues that there is no express provision for this under current international human rights legal frameworks.

Ordinarily, universal, ubiquitous, equitable and affordable access to an ICT infrastructure and services remains a mirage. Two decades before the COVID-19 outbreak, the UN proposed in its Millennium Declaration that the benefits of new technologies, specifically ICT, be made available to everyone.¹⁶ Later, the World

¹⁴ J. J. Barry, *Information Communication Technology and Poverty Alleviation Promoting Good Governance in the Developing World* (Routledge 2019) 198.

¹⁵ P. Alston, 'Conjuring Up New Human Rights: A Proposal for Quality Control' (1984) 78(3) *American Journal of International Law* 607.

¹⁶ UN General Assembly, United Nations Millennium Declaration A/RES/55/2 (18 September 2000) available at

Summit on Information Society (WSIS) stated that 'ICTs should be regarded as tools and not as an end in themselves.'¹⁷ This submission, although failing to declare Internet access a human right, spearheaded future debate for universal ICT access. There was a deliberate recognition of the growing significance of the Internet and other ICTs, and the need to ensure that no one is excluded from participating and sharing in the benefits associated with the Information Society.¹⁸

Unlike the WSIS, the famously quoted report of the UN Special Rapporteur on the Promotion and Protection of the right to freedom of opinion and expression makes a more forceful instrumental case for Internet access.¹⁹ Evaluating the scope of Article 19 of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights (ICCPR), the report submits that there are grounds under international law to treat Internet access as a human right.²⁰ Article 19 UDHR states: 'Everyone has the right to ... seek, receive and impart information and ideas through any media and regardless of frontiers.' Contrary to arguments elsewhere,²¹ Article 19 does not expressly proclaim Internet access as a human right; instead, it recognises the sameness of human rights online and offline; in this case, freedom of expression. Regardless, UDHR is not a binding treaty. However, Article 19(2) of the International Covenant on Civil and Political Rights (ICCPR) widens the scope of UDHR to accommodate future communication technology. Strictly speaking, Article 19 lays the groundwork for a right to Internet access. Land argues that the 'the text and structure of the clause also protect access to technology'.²² What this means is that the scope of this right goes beyond the protection of expression itself, but includes the ability to access the medium that is needed to realise the right.²³ While affirming the instrumental nature of the Internet in the access and dissemination of information, the Human Rights Committee, the body that oversees the implementation of the ICCPR, falls short in proclaiming Internet access a human right.²⁴ Nonetheless, it concluded that all steps must be taken to ensure the independence of these new

https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_55_2.pdf (accessed 20 December 2023).

¹⁷ International Telecommunication Union, 'Declaration Principles: Building the Information Society: a global challenge in the new Millennium' Document WSIS-03/GENEVA/DOC/4-E World Summit on the Information Society (12 December 2003) available at <http://www.itu.int/net/wsis/docs/geneva/official/dop.html> (accessed 20 December 2023).

¹⁸ *ibid*

¹⁹ F. La Rue, 'Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression' Human Rights Council (16 May 2011) para 85.

²⁰ *Ibid* para 21.

²¹ For example, see J. Tenenbaum, '503 Error, Service Unavailable – Access to the Internet as a Protected Right' (28 August 2013) available at <http://dx.doi.org/10.2139/ssrn.2422566>; C. Petri, 'Rural Libraries and the Human Right to Internet Access' in B. Real (ed.), *Rural and Small Public Libraries: Challenges and Opportunities* (Emerald Publishing Limited 2007) 13–35.

²² M. Land, 'Towards an International Law of the Internet' (2013) 54(2) *Harvard International Law Journal* 419.

²³ *ibid*.

²⁴ OHCHR, International Covenant on Civil and Political Rights General Comment No. 34, Article 19: Freedoms of opinion and expression.

media and individuals' access to them.²⁵ The Human Rights Committee position is capable of different interpretations. On one hand, it may suggest that government should restrain from activities which may interfere with enjoyment of the Internet, such as slow speed, censorship or arbitrary filtering, blocking and takedowns.²⁶ On the other hand, it may mean that government should make provisions for access, e.g. infrastructure, broadband or other specific form of services.

Arguably, the International Covenant on Economic, Social and Cultural Rights (ICESCR) offers a stronger view in support of an Internet access right. Article 15(1)(b) of the Covenant provides *the right to benefit from scientific progress and its application* (REBSP). For many years, the meaning and scope of this right have been hazy and undefined.²⁷ Among the very few available scholarly interpretations, Schabas contends that REBSP has the capacity to support the realisation of other economic, social and cultural rights.²⁸ He argues that, considering the connection between Article 15(1)(b) and Article 2(1), the ICESCR speaks respectively of the right to 'scientific progress' and of the obligation of states to 'achieve progressively' the full realisation of the rights of the ICESCR. For example, the 'progressive' implementation of the REBSP may be an important factor in the progressive improvement of the availability and quality of food, housing and health. Therefore, Article 15(1)(b) REBSP has a direct effect on the obligation contained in Article 2(1). The Venice Statement adds that the normative content of REBSP requires non-discriminatory access to the benefits of scientific progress and its applications, including technology transfer and capacity-building, and that governments have a duty 'to adopt a legal and policy framework and to establish institutions to promote the development and diffusion of science in a manner consistent with fundamental human rights'.²⁹ It is submitted that despite the absence of clear reference to the Internet, there is nothing precluding Internet access to be circumscribed within the application of scientific progress.

²⁵ Ibid para 25.

²⁶ S. Tully, 'A Human Right to Access the Internet? Problems and Prospects' (2014) 14(2) *Human Rights Law Review* 175.

²⁷ See generally A. R. Chapman, 'Towards an Understanding of the Right to Enjoy the Benefits of Scientific Progress and Its Applications' (2009) 8 *Journal of Human Rights* 1.

²⁸ W. A. Schabas, 'Study of the Right to Enjoy the Benefits of Scientific and Technological Progress and Its Applications' in Y. Donders and V. Volodin (eds), *Human Rights in Education, Science and Culture: Legal Developments and Challenges* (Ashgate/UNESCO 2007) 273; see also the Report on the Experts' Meeting on the Right to Enjoy the Benefits of Scientific Progress and its Applications, Amsterdam (6–7 June 2007) available at: <http://unesdoc.unesco.org/images/0015/001545/154583e.pdf> (accessed 18 November 2023).

²⁹ 'Venice Statement on the Right to Enjoy the Benefits of Scientific Progress and its Applications', adopted during the conference that was held in Venice, Italy on 16–17 July 2009 available at https://www.aas.org/sites/default/files/Venicestatement_July2009.pdf (accessed 18 August 2023).

Furthermore, the Committee on Economic, Social and Cultural Rights (CESCR) considered the issue of access to the Internet in 2013,³⁰ linking it to the right to education and cultural rights. In respect of the right to education, it nudged state parties to establish educational and information centres that are equipped with the Internet and allied ICTs.³¹ Such provision must prioritise access to vulnerable and marginalised groups, and inhabitations of rural and remote areas.³²

Recently, the CESCR might have incorporated Internet access as part of the evolving human right to science established under Article 15(1)(b). In 2020, the CESCR adopted the General Comment No 25 on science and economic, social and cultural rights. General Comment No 25 elaborates that the human right to science entails both freedoms and entitlement. Freedom presupposes the right to participate in scientific progress and enjoy the freedom indispensable for scientific research. Entitlements, on the other hand, include the right to enjoy the benefits of scientific progress without discrimination; in other words, it must be accessible. As a result, state parties have an obligation to guarantee the human right to science through the conservation, development and diffusion of science. States must be deliberate and proactive in allowing scientific progress to take place by ensuring that scientific knowledge and its applications are effectively protected and disseminated. This availability could be through well-resourced research infrastructures, the financing of scientific educations, provision of libraries and museums, or the Internet.³³ 'Accessibility' means that the benefits of scientific progress and its applications are available for everyone 'without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or status'.³⁴ To this end, states must ensure equal access to the applications of science, particularly when they are instrumental to the enjoyment of other economic, social and cultural rights.³⁵

Drawing from the argument of Schabas and the content of General Comment No 25, the ICESCR provides a stronger foundation for Internet access as human right under RBSP. However, Article 15(1)(b) is not without its problems, and raises questions: What does Article 15(1)(b) protect? What could and should be the object of scientific right? Also, Article 15(1)(b) refers to 'science' as opposed to 'technology', but ICESCR contains no definition of the term 'science'. UNESCO offered a definition which

³⁰ CESCR Committee, Concluding observations: Ecuador (2012), E/C.12/EU/CO/3, §34 available at <https://www.refworld.org/docid/52d551274.html> (accessed 15 December 2023).

³¹ CESCR Committee, Concluding observations of the Committee on the third periodic report of Ecuador as approved by the Committee at its forty-ninth session E/C.12/EU/CO/3§34 (14–30 November 2012).

³² CESCR Committee, Concluding observations: Poland (2016), E/C.12/POL/CO/6, § 56.

³³ Committee on Economic, Social and Cultural Rights, General Comment No. 25 (2020) on science and economic, social and cultural rights (article 15 (1) (b), (2), (3) and (4) of the International Covenant on Economic, Social and Cultural Rights), UN Doc. E/C.12/GC/25 (30 April 2020) (hereinafter 'General Comment No 25').

³⁴ ICESCR Art 2(2).

³⁵ General Comment No. 25 para 17.

defines 'science' as 'a complex of knowledge, fact and hypothesis, in which the theoretical element is capable of being validated in the short or long term, and to that extent includes the sciences concerned with social facts and phenomena.'³⁶ This definition does not clarify the difficulty around other important terminologies such as 'progress', 'knowledge' or 'best available evidence'. Should we be speaking of 'technology' instead of 'science'? It is common to see both terms conjoined as 'science and technology', while in some instances they have been used interchangeably. Sun suggests that upon a closer reading of Article 15(1)(b) ICESCR and its predecessor, Article 27(1) UDHR, 'technology' is favoured since 'science' 'only refers to academic research processes, not the practical application of their knowledge outputs'.³⁷ Therefore, a clear and coherent explanation of the normative content of the RBSP must incorporate the definitions and norms emerging from scientific practices.³⁸

At the regional level, the Council of Europe Conference of Ministers Responsible for Media and New Communication Services observed that the strong reliance on the Internet as a staple tool implies that its services will be accessible and affordable, secure, reliable and ongoing.³⁹ Thus, Member States' policies must make provision for universal Internet access. In Africa, the African Commission on Human and People's Rights (ACHPR) issued in 2016 a resolution on the Right to Freedom of Information and Expression on the Internet in Africa. The resolution calls on African states to implement legislative and other measures to guarantee, respect and protect citizens' right to freedom of information and expression through access to Internet services.⁴⁰ This resolution builds on the ACHPR objective advocating the right to freedom of information and expression as enshrined under Article 9 African Charter and other international human rights instruments. In a broader context, this is important if those rights protected offline are to enjoy protection online. Further, a Pan-African initiative, the African Declaration on Internet Rights and Freedoms, was intended 'to promote human rights standards and principles of openness in Internet policy formulation and implementation on the continent'.⁴¹ Like the Council of Europe Member States, African states should adopt policies and regulations that promote universal and equal access to the Internet such as transparent market regulation and

³⁶ UNESCO, 'Recommendation on Science and Scientific Researchers, Adopted by the General Conference at its 39th Session' (UNESCO 2017) available at <https://unesdoc.unesco.org/ark:/48223/pf0000260889#page=116> (accessed 2 February 2024). (hereinafter 'Recommendation on Science and Scientific Researchers').

³⁷ H. Sun, 'Reinvigorating the Human Right to Technology' (2020) 41 *Michigan Journal of International Law* 279.

³⁸ A. Boggio 'The Right to Participate In and Enjoy the Benefits of Scientific Progress and its Applications: A Conceptual Map' (2021) 34(2) *New York International Law Review* 43.

³⁹ First Council of Europe Conference of Ministers Responsible for Media and New Communication Services (Reykjavik, Iceland, May 29, 2009), MCM (2009) 011, Political Declaration, para 5.

⁴⁰ African Commission on Human and Peoples' Rights *Resolution on the Right to Freedom of Information and Expression on the Internet in Africa – ACHPR/Res.362(LIX)* 2016.

⁴¹ African Declaration on Internet Rights and Freedoms available at <https://africaninternetrights.org/en/about> (accessed 15 July 2023).

fair licensing agreements.⁴² However, the African Declaration is soft law and merely advisory. Besides, the African continent is awash with different universal access policies. These policies in some instances have been poorly drafted and inconsistently implemented.⁴³

In conclusion, there is a confusing orthodoxy under the existing international human rights law as it relates to the status of Internet access as a standalone human right. In some instances, there are clear calls for Internet access to be made a human right; these can be found in reports that aim to expatiate on provisions of law. On the other hand, most laws have regarded it as an extension or corollary of other rights. For example, there is a practice of treating the Internet as part of the right of citizens to participate in the information society, which requires government intervention not just in commitment not to interfere with the enjoyment of this right, but to ensure the provision of access to the Internet as a prerequisite of other fundamental rights. The REBSP ignited some hopes, but the right itself is enmeshed in uncertainties. The meaning and scope of the right needs to be clearly defined. Is the REBSP or the right to science a standalone right in itself? For example, the right is regarded as a vehicle to realise other human rights like the right to adequate food and the right to health.⁴⁴ Subsuming the right to Internet under the REBSP will preserve the existing practice of lumping it in with other rights, such as freedom of expression, whereas its classification as a social right under a constitution will prevent public authorities from reneging on their duties.⁴⁵ Besides, the REBSP is vague and somewhat broad. Without its own independence, the right to Internet will be lost within myriad rights being created under it.

3. In Defence of Internet Access as a Human Right: An Instrumental-Pragmatic Analysis

So far, this article has established that Internet access is not yet a standalone human right under international law. Against this background, the next question is whether there are justifications to accord Internet access an autonomous human right status.

A primary argument is that the Internet serves as a catalyst in the realisation of other human rights. Rawls argues that the actualisation of formally equal freedoms depends on other means such as money, influence and knowledge.⁴⁶ In other words,

⁴² Ibid.

⁴³ B. Faturoti, 'Online learning during COVID19 and beyond: a human right based approach to Internet access in Africa' (2022) 36(1) *International Review of Law, Computers & Technology* 68.

⁴⁴ L. London, H. Cox and F. Coomans, 'Multidrug-resistant TB: implementing the right to health through the right to enjoy the benefits of scientific progress.' (2016) 18(1) *Health and Human Rights* 25.

⁴⁵ O. Pollicino, 'Right to Internet Access: Quid iuris?' in A. von Arnould, K. von der Decken and M. Susi (eds), *The Cambridge Handbook on New Human Rights. Recognition, Novelty, Rhetoric*, (Cambridge University Press 2020) 263.

⁴⁶ J. Rawls, *A Theory of Justice* (Harvard University Press 1999) 179.

it is insufficient that people have fundamental freedoms: they must have resources to exercise these freedoms. For example, the right to a fair trial will only be meaningful where there is access to a court and the opportunity to present one's defence. In the case of the Internet, it has acquired a centripetal power and has become a reagent in the realisation of other rights. La Rue argues that 'the Internet has become a key means by which individuals can exercise their right to freedom of opinion and expression as guaranteed under Art 19'.⁴⁷ Barry conceptualises Internet access as an instrumental right,⁴⁸ claiming it is intertwined with the provision of civil, economic and political rights. For example, Internet access interlocks with other human rights such as freedom of expression, access to information, political participation and employment.

Increasingly, educational establishments have continued to integrate digital technologies into the delivery of teaching. The intermingling of the Internet and education has led to the rise of remote classrooms, referred to as 'distance learning' and 'blended learning'. Additionally, there is an increase in the emergence of online libraries and databases that provide access to vast amounts of information. Access to the Internet allows learners to be fully involved in their learning process and develop essential skills for future enterprises and success. Scholars have noted that ICTs offer educational benefits such as improved learning outcomes, employability and personal skills such as self-esteem and self-efficacy.⁴⁹

An educational environment that fosters innovation and improvement requires a technology infrastructure with sufficient broadband capacity to connect the growing number of Internet devices used by students and educators with powerful online tools.⁵⁰ Thus, access to a comprehensive infrastructure is imperative to implementing innovative models of teaching and learning, engaging in online learning, and participating in online professional learning communities. A technology-rich learning environment allows for data, standards and assessments to flow across the education system, providing transparency and accountability to all stakeholders. According to the Broadband Commission, broadband connectivity carries the unprecedented potential to bridge education divides, transform learning and improve skills for the globalised economy.⁵¹ Governments must make broadband accessible, empower teachers and students to use technology, support the production of local language content and promote open educational resources.

⁴⁷ F. La Rue, 'Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression' Human Rights Council (16 May 2011).

⁴⁸ J. J. Barry (n 14) 205–208.

⁴⁹ C. Davies and R. Eynon, *Teenagers and Technology* (Routledge 2012) 26.

⁵⁰ W. Ali, 'Online and Remote Learning in Higher Education Institutes: A Necessity in Light of COVID-19 Pandemic' (2020) 10(3) *Higher Education Studies* 16.

⁵¹ ITU *Technology, Broadband and education: Advancing the Education for All Agenda* (Broadband Commission for Digital Development, 2013).

Marshall articulates the tripartite relationship among freedom of speech, right to education and the Internet thus: ‘...the right to freedom of speech has little real substance if, from lack of education, you have nothing to say that is worth saying, and means of making heard if you say it’.⁵² Although substituting face-to-face teaching with online learning during the COVID-19 pandemic helped mitigate the impact of disruption on education, the benefits of online learning could not be fully maximised in many African⁵³ and South Asian⁵⁴ countries as a significant number of learners could not access quality Internet connections. Learners in the Global North are not excluded;⁵⁵ in the UK, digital exclusion remains a challenge⁵⁶ – affordability is a major issue, as are accessibility and poor mobile and broadband coverage.

Beyond the realisation or enhancement of specific fundamental rights, Internet access has become crucial for individuals’ membership of and participation in society. Internet access promotes development and social inclusion.⁵⁷ It is an example of the collective interests in public freedom derived from technological progress. From a political rights perspective, there are diverging views on the effects of the Internet on political participation. Some sceptics assert that the Internet does not cause people to suddenly become politically active or even interested; Davis, for example, contends that the Internet may contribute to the further atomisation of society.⁵⁸ On the other hand, Bonchek argues that the Internet may enhance voter knowledge about candidates and elections, thus increasing political participation.⁵⁹

Nonetheless, political participation has been widened and redefined by the Internet. As Selian indicated, ‘the more enhanced the basic communications infrastructure of a county, the more likely this will be conducive to the assertion and manifestation of liberties and rights for the citizenry’.⁶⁰ Shirky added that *political* freedom must be accompanied by a densely connected civil society to discuss the issues.⁶¹ Before the

⁵² T. H. Marshall, ‘Citizenship and Social Class’ in J. Manza and M. Sauder, *Inequality and Society: Social Science Perspectives on Social Stratification* (W. W. Norton & Company 2009) 35.

⁵³ B. Faturoti (n 43) 68.

⁵⁴ S. Khan et al., ‘Pre and Present COVID-19 Situation: A Framework of Educational Transformation in South Asia Region’ (2022) 7 *Emerging Science Journal* 81.

⁵⁵ V. Coleman, ‘Digital divide in UK education during COVID-19 pandemic: Literature Review’ Cambridge Assessment Research Report (Cambridge, UK 2021); for the experience in Germany see L. Woessmann et al., *Die Schulkinder Die Zeit Der Schulschließungen Verbracht, Und Welche Bildungsmaßnahmen Befürworten Die Deutschen?* (2020).

⁵⁶ House of Lords, ‘Digital Exclusion - Communication and Digital Committee 3rd Report of Session 2022–23’ (The Stationery Office 2023)

⁵⁷ C. H. Powell and T. Schonwetter, ‘Africa, the Internet and human rights’ in M. Susi *Human Rights, Digital Society and the Law: A Research Companion* (Routledge 2019) 319.

⁵⁸ R. Davis, *The Web of Politics: The Internet's Impact on the American Political System* (Oxford University Press 1999) 45.

⁵⁹ M. S. Bonchek, ‘From Broadcast to Netcast: The Internet and the flow of political information’ Unpublished PhD dissertation, Harvard University 1997.

⁶⁰ A. N. Selian, ‘ICTs in Support of Human Rights, Democracy and Good Governance’ (International Telecommunications Union 2002).

⁶¹ C. Shirky, ‘The Political Power of Social Media’ 2011 (90) *Foreign Affairs* 28.

advent of the Internet, the traditional media – television, radio and print media – played a significant role in disseminating political information. However, the Internet has challenged the dominant role of these traditional media. Significantly, it has disrupted the monopolies enjoyed by state-controlled information outlets.

Moreover, the Internet has the potential to shelter and nourish opposition groups who are seeking democratic change under repressive regimes. It has assisted in holding elected, non-governmental bodies and supranational institutions accountable. In *Packingham v North Carolina*, the US Supreme Court underscored the powerful role of social media as a pervasive part of the Internet in engineering different forms of dialogue.⁶² Coordinators of political protests have leveraged this power of the Internet.⁶³ The Arab Spring and the prosecution of the officer involved in the death of George Floyd in the US, which invigorated the Black Lives Matter movement, have proved that people with the tools to participate can shape political debates. The Internet facilitates solidarity in the global arena as power and political issues take on an ever-stronger international character. It also allows for the spread of political misinformation and disinformation, commonly known as ‘fake news’. During the COVID-19 pandemic, the Internet was used for the dissemination of false treatments, such as gargling with lemon or salt water and injecting yourself with bleach,⁶⁴ and claims that the virus resulted from the installation of the 5G cellular network.⁶⁵ Some political leaders, like President Trump and Brazilian President Jair Bolsonaro, also used the Internet to further political and economic propaganda, and the belief that hydroxychloroquine could be used to treat the virus.⁶⁶ This adds to existing concerns around Internet use, such as fraud, surveillance and privacy.

Finally, the Internet has become crucial to the realisation of the human right to health.⁶⁷ It has alleviated the difficulty that patients face in accessing healthcare. Terms like ‘telehealth’ and ‘telecare’⁶⁸ are a reminder of the growing intersection between healthcare systems and Internet technology. The human right to health does not mean the right to be healthy. Rather, it means the right to adequate healthcare

⁶² 137 S. Ct. 1730 (2017).

⁶³ For example, the Internet played a significant role in political protest in Kiev, Istanbul, Cairo, Tripoli, Lagos, Tunis, Athens, Madrid, New York, Los Angeles, Hong Kong and Ferguson, Missouri.

⁶⁴ World Health Organization, ‘Coronavirus disease (COVID-19) advice for the public: Mythbusters’ (2020) available at <https://www.who.int/emergencies/> (accessed 23 December 2023).

⁶⁵ BBC News, ‘Ofcom: Covid-19 5G Theories are “Most Common” Misinformation’ (21 April 2020) available at <https://www.bbc.co.uk/news/technology-52370616> (accessed 23 September 2023).

⁶⁶ J. Constine, ‘Facebook Deletes Brazil President’s Coronavirus MisinfoPost’ Tech Crunch (31 March 2020) available at <https://techcrunch.com/2020/03/30/facebook-removes-bolsonaro-video/> (accessed 23 September 2023).

⁶⁷ M. Reglitz and A. Rudnick, ‘Internet access as a right for realizing the human right to adequate mental (and other) health care’ (2020) 49(1) *International Journal of Mental Health* 97.

⁶⁸ Telehealth technology enables the remote diagnosis and evaluation of patients in addition to the ability to remotely detect fluctuations in the medical condition of the patient so that medications or specific therapy can be altered accordingly. It also allows for e-prescribe medications and remotely prescribed treatments.

to maximise the chances of attaining and maintaining sufficient health and a standard of living adequate to health.⁶⁹ For healthcare practitioners, the Internet provides rapid access to information that assists the diagnosis of health conditions, or the design of appropriate treatment plans.⁷⁰ For example, health personnel can consult with each other electronically to discuss treatment plans or operative procedures, while patient records, test results and other clinical information can be accessed with ease. In the area of mental health, digital apps and online psychotherapy are emerging and effective ways of providing healthcare.⁷¹ The integration of Internet technology into healthcare is significant to the inhabitants of the circumpolar region. It has been noted that telehealth is beneficial in providing non-emergency care, minimising the risk of infection transmission and in particular reducing the cost of healthcare provision.⁷² According to research on Internet use in the UK health sector, during the COVID-19 lockdowns, registrations on the NHS app⁷³ increased by 111%, while the use of e-prescription services⁷⁴ also increased, with 1.25 million nominations.⁷⁵ However, there are concerns that the digital divide orchestrated by lack of Internet access (among other reasons) may lead to social exclusion and health inequalities.⁷⁶

In a nutshell, the extensive reliance on the Internet for banking, health, commercial activities, etc., mean those without access may be excluded. The use of 'click and collect' by supermarket chains and digital banking preserve vulnerable citizens' access to vital services while shielding from the virus. Thus, the inability to access technology that facilitates participation in society compromises citizenship.⁷⁷

⁶⁹ J. Wolff, 'The Content of the Human Right to Health' in R. Cruft, S. Matthew Liao and M., Renzo *Philosophical Foundations of Human Rights* (Oxford University Press 2015) 491.

⁷⁰ National Research Council (US) Committee on Enhancing the Internet for Health Applications: Technical Requirements and Implementation Strategies. *Networking Health: Prescriptions for the Internet*. (National Academies Press (US) 2000).

⁷¹ E. G. Lattie, E. C. Adkins et al., 'Digital Mental Health Interventions for Depression, Anxiety, and Enhancement of Psychological Well-Being Among College Students: Systematic Review' (2019) 21(7) *Journal of Medical Internet Research* e12869.

⁷² B. L. Charles, 'Telemedicine can lower costs and improve access' (2000) 54(4) *Healthcare Financial Management* 66.

⁷³ This enables patients to access a range of NHS services on their smartphones or tablets.

⁷⁴ This allows patients to choose which pharmacy they would like their prescription to be sent to electronically.

⁷⁵ NHS Digital, 'Coronavirus (Covid-19) increase in use of NHS Digital tech: NHS login' available at <https://digital.nhs.uk/coronavirus/nhs-digital-tech-analytics#nhs-login> (2020) (accessed June 2023).

⁷⁶ R. Hutchins, 'The impact of Covid-19 on the use of digital technology in the NHS' (Briefing, Nuffield Trust 2020).

⁷⁷ T. Oyedemi, 'Internet Access as Citizen's Right? Citizenship in the Digital Age' (2015) 19(3–4) *Citizenship Studies* 450.

4. Arguments Against Internet Access as a Human Right

The proposal to include the Internet in the pantheon of human rights has not been widely favoured. This section examines some of the arguments against the introduction of the new right; it is not within the scope of this work to examine all such arguments.

Vinton Cerf, who is regarded as one of the founders of the Internet, opined in 2012 that the instrumental nature of the Internet is not enough to accord it a human right status.⁷⁸ Two years earlier, Nuyen had explained that ‘...[j]ust 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.’⁷⁹ Unfortunately, their position ignores the intrinsic nature of the Internet beyond its instrumental value.⁸⁰ For example, the right to education is instrumental to economic empowerment, etc. It is also seen as being intrinsically good, and this is also applicable to the Internet. Although it may be instrumental to political participation, it is also capable of being enjoyed on its own. De Hertz and Kloza are concerned that creation of such a right may lead to the inflation and possibly proliferation of human rights.⁸¹ Beyond the right to freedom of expression, they believed that, for example, the right to privacy and the freedom of thought, conscience and religion as enshrined under the European Convention would safeguard the Internet as a means of their realisation. One response, highlighted above in relation to the REBSP, is the temptation to regard Internet access as an inferior right when subsumed under other rights. Also, when De Hertz and Kloza concluded that protection of correspondence and communication, which falls within the right to privacy, will also protect email and social networking sites, they missed the nature of the Internet right as a positive right that compels provision. Although it is acknowledged that restrictive practices, such as blocking and filtering, interfere with enjoyment of Internet access, it does not equate with outright lack of access.

One other criticism of the Internet access right is that it would be too burdensome, especially to governments, to provide it. To begin with, this argument ignores the existential confinement of universal access service obligations to provide Internet

⁷⁸ V. Cerf, ‘Internet Access is Not a Human Right’ *New York Times* (4 January 2012). See also B. Skepys, ‘Is There a Human Right to the Internet?’ (2012) *Journal of Programming Languages* 15, arguing that the invaluable role of the Internet in communication and membership is not enough to confer it a human right status.

⁷⁹ A. T. Nuyen, ‘Is Internet Access a Human Right?’ Proceedings of the 6th International Conference on Web Information Systems and Technology (2010) 287, 288.

⁸⁰ D. M. Chirwa and D. O. Oriakhogba, ‘Access to the Internet as a Human Right’ in D. M. Chirwa and C. Ncube, *The Internet, Development, Human Rights and the Law in Africa* (Routledge 2023) 23.

⁸¹ P. De Hert and D. Kloza, ‘Internet (access) as a new fundamental right. Inflating the current rights framework?’ (2012) 3(3) *European Journal of Law and Technology* 3.

within corporate social responsibility spheres or policy documents as one of the factors responsible for the tardiness of both the government and investors in providing access.⁸² As a human right, it is submitted that Internet access as a standalone right will have more credibility, authority and enforceability. Another response to this criticism is that ESCRs, e.g., the right to education, adequate housing and healthcare, are always burdensome. There is no reason to deny Internet access simply because of this. More importantly, the implementation of ESCRs has never been subject to absolute provision, but minimum core obligations and progressive realisation.⁸³ In many cases, ESCRs have failed to be realised not just because of lack of resources, but because of misallocation.

One final objection to the Internet access right relates to its artificial nature. In other words, it is not a primary right with a basis in natural law, such as the right to life. That noted, not all human rights are primary rights; some are derivative.⁸⁴ Griffin clarifies that a derivative right flows from a primary right 'with increasing attention to circumstances'.⁸⁵ For example, the right to freedom of the press is a derivative of free speech. In other words, the right to free press does not have a basis in natural law, but is a corollary of freedom of speech and was created in response to technological development. The emergence of printing technology and its role in society necessitated the right's creation. This right has subsequently evolved from just being the right to a free press to a right to the freedom of journalists to report the news and the right of people to use the printing press to spread their views without state interference. Brownsword and Goodwin note that technological innovations have the propensity to compel the creation of new rights.⁸⁶ Human rights must continue to evolve to address new challenges; otherwise, they will become redundant.⁸⁷ Emerging rights, like the right to genetic privacy, the right to be forgotten, and the right to a unique identity, are fundamental rights that are not within the contemplations of the drafters of the UDHR.

5. Internet Access Right and its Justiciability

If the classification of Internet access as a human right is eventually agreed to, one of the many obstacles to its realisation is whether such a right will be justiciable under domestic laws where it is violated. Justiciability presupposes the existence of a review

⁸² P. Leith, 'Europe's Information Society project and digital inclusion: universal service obligations or social solidarity?' (2012) 20(2) *International Journal of Law and Information Technology* 102.

⁸³ CESCR, General Comment No. 3, 'The Nature of States Parties' Obligations', Fifth Session, UN Doc. E/1991/23 (1990).

⁸⁴ K. Mathiesen, 'The Human Right to Internet Access: A Philosophical Defense' (2012) 18 *International Review of Information Ethics* 13.

⁸⁵ J. Griffin, *On Human Rights* (Oxford University Press 2008) 212.

⁸⁶ R. Brownsword and M. Goodwin, *Law and the Technologies of the Twenty-First Century* (Cambridge University Press 2012) 225.

⁸⁷ M. Odello and S. Cavandoli (eds), *Emerging areas of human rights in the 21st century: the role of the universal declaration of human rights* (Routledge 2011) 3.

mechanism to determine non-compliance with the terms of the legal regime.⁸⁸ The inclusion of a human right in international frameworks does not necessarily guarantee that the right will be recognised by some states as an obligation to fulfil.⁸⁹ Some states often resist certain rights for not being compatible with their cultural practices and beliefs. For example, countries with state religions do not guarantee the right to freedom of religion or belief, or provide guarantees that, at face value, do not compare favourably with all aspects of international standards.⁹⁰ In other instances, some states can, within their sovereign right, expressly enter a reservation to exclude or to modify the legal effect of certain treaty provisions in their application.⁹¹ That noted, pre-empting resistance or reservation by some states is not sufficient to bar the creation of a new form of human rights. This section will turn to the justiciability question. Can individuals who think this right has been violated seek redress?

To be clear, although Internet access intersects with civil and political rights, it will fall under the category of ESCR.⁹² This class of rights imposes a legal obligation on states to utilise their available resources maximally to redress social and economic imbalances and inequalities. They imply a commitment to social integration, solidarity and equality, and include tackling the issue of income distribution. Thus, they require positive actions and interventionist policies from national governments. However, the justiciability of ECSR has been shrouded in controversies.⁹³ There are those who viewed them as directives or mere aspirations and goals without any legally binding duties.⁹⁴ They may argue that ESCR are not legal rights because they were not subject to immediate application, but progressive realisation subject to the availability of resources. And where they impose any obligation, these are simply 'obligations of

⁸⁸ This is different from enforceability of human rights which concern the identification of and the entitlements and duties created by the legal regime which must be maintained and executed. See J. K. Mapulanga-Hulston, 'Examining the Justiciability of Economic, Social and Cultural Rights' (2002) 6(4) *The International Journal of Human Rights* 29.

⁸⁹ A. R. Chapman, 'Towards an Understanding of the Right to Enjoy the Benefits of Scientific Progress and Its Applications' (2009) 8 *Journal of Human Rights* 1.

⁹⁰ T. Stahnke and R. C. Blitt, 'The Religion-State Relationship and the Right to Freedom of Religion or Belief: A Comparative Textual Analysis of the Constitutions of Predominantly Muslim Countries' (2005) 36 *Georgetown Journal of International Law* 4.

⁹¹ J. Fournier, 'Reservations and the Effective Protection of Human Rights' (2010) 2 *Goettingen Journal of International Law* 437.

⁹² ESCRs are human rights concerning the basic social and economic conditions needed to live a life of dignity and freedom.

⁹³ See generally R. Higgins, *Problems and Process: International Law and How we Use it* (Oxford University Press 1994). See also S. Alemahu Yeshanew, *The Justiciability of Economic, Social and Cultural Rights in the African Regional Human Rights System: Theory, Practice and Prospect* (Intersentia 2013).

⁹⁴ M. Scheinin, 'Economic and Social Rights as Legal Rights', in A. Eide, C. Krause and A. Rosas (eds.), *Economic, Social and Cultural Rights: A Textbook* (2nd ed) (Martinus Nijhoff Publishers 2001) 29–54.

conduct' unlike the civil and political rights that impose 'obligation of result'.⁹⁵ According to Tinta, this bifurcation of human rights as positive rights and negative rights is a product of legal fiction; in practice, human rights are interconnected.⁹⁶ For instance, the proposed Internet access right is linked to freedom of speech or the right to political participation on the one hand, while the right to life and the right to health could also be linked on the other hand.

The confirmation of justiciability of ESCRs by the ICESCR Optional Protocol and the subsequent recognition by the International Court of Justice of the equal status and interaction of ESCRs and CP rights have affirmed the oft-declared indivisibility of human rights. Thus, any classification should relate more to legitimate legal mechanisms (forms of applicability and delivery), as opposed to the legality of justiciability per se, that remain unaddressed.⁹⁷ Some scholars reason that it is illogical to deny a certain group of human rights justiciability and deny individuals the opportunities to enforce their rights.⁹⁸ Instead of treating ESCRs as an inferior form of rights because of weak applicability or delivery measures, focus should instead be on how to develop their justiciability.

Conceptually, the enforcement of the rights has been hindered by three different factors. First, unlike CP rights, ESCRs lack 'basic foundational fact'.⁹⁹ While civil and political rights could be traced to incidences such as the UK's Glorious Revolution and the American and French Revolutions, there are no commensurate events culminating in social rights. Events such as the 1848 Revolutions, the Paris Commune and the Bolshevik Revolution lacked the impact to translate into a collective and individual consciousness of social rights.¹⁰⁰

Second, the Covenant has been criticised for a lack of precision in respect of the nature and scope of its obligations. Admittedly, the lack of consensus as to the scope of a right will delay or make its implementation less likely. For a right like Internet access, which is intermingled with the sustenance or actualisation of other rights, a clear conceptualisation of its nature is imperative. Before the emergence of the

⁹⁵ G. J. H. van Hoof, 'The Legal Nature of Economic, Social and Cultural Rights: A Rebuttal of Some Traditional Views' in K. Tomaševski and P. Alston (eds), *The Right to Food* (International Studies in Human Rights) (Brill | Nijhoff 1984) 97–110.

⁹⁶ M. Ferial Tinta, 'Justiciability of Economic, Social, and Cultural Rights in the Inter-American System of Protection of Human Rights: Beyond Traditional Paradigms and Notions' (2007) 29 *Human Rights Quarterly* 431.

⁹⁷ K. Boyle and E. Hughes, 'Identifying routes to remedy for violations of economic, social and cultural rights' (2008) 22(1) *The International Journal of Human Rights* 43.

⁹⁸ A. Eide, C. Krause and A. Rosas (eds), *Economic, Social and Cultural Rights: A Textbook* (2nd ed) (Martinus Nijhoff Publishers 2001).

⁹⁹ E. J. Gomez Ciriano, 'The protection of economic, social and cultural rights from a diachronic and comparative perspective: A Study of five European countries' available at https://www.academia.edu/28913668/Human_Rights_on_Trial (accessed 17 December 2023).

¹⁰⁰ J. Sánchez, 'Crisis del Estado de Bienestar y Derechos Humanos' *ASAMBLEA: Revista Parlamentaria de la Asamblea de Madrid* n^o5, 131.

ICESCR Optional Protocol, Alston had argued that the underdevelopment of justiciability of ESCRs is caused by the vagueness of many of the rights formulated in the Covenant and the resulting lack of clarity as to their normative implication.¹⁰¹ Melish agreed that '[W]hen a right is established in the law without explicit or clearly implicit elaboration as to its scope, content, and counterpart obligations, such a right is legally inoperative and cannot be claimed in the courtroom.'¹⁰² That noted, the vagueness argument does not mean that civil and political rights are more precise. In the case of freedom of expression, reliance must be placed on the court to expatiate and delineate the scope of the right.¹⁰³

Finally, it is unclear whether domestic courts can legitimately adjudicate economic and social issues. The pronouncement of judges on ESCR issues is tantamount to making a policy decision, and this would violate the principle of separation of power. Worse still, individuals have also been unaware of the possibility of claiming social rights through the invocation of administrative or judicial processes. Dwyer noted that this idea of citizenship promotes passivity to the detriment of participation where states are obliged to provide necessary services, but individuals are not empowered to make a claim.¹⁰⁴ This type of welfare model, especially in the UK, generated a welfare state without citizens. In other words, social rights were conceived as deriving from the welfare system rather than as human rights.

The UK is one of the countries accused of failing in the implementation and enforceability of ESCRs.¹⁰⁵ There is a gap under the UK domestic constitutional framework on the implementation and observance of international human rights law:¹⁰⁶ domestic statutes are not measured with full reference to international human rights law. Instead, the UK has always contended that 'there is no provision in the

¹⁰¹ P. Alston, 'No Right to Complain About Being Poor: The Need for an Optional Protocol to the Economic Rights Covenant' in A Eide and J. Helgesen (ed) *The Future of Human Rights Protection in a Changing World: Fifty Years Since the Four Freedoms Address: Essays in Honour of Torkel Opsahl* (Norwegian University Press 1991) 79.

¹⁰² T. J. Melish, *Protecting Economic, Social and Cultural Rights in the Inter-American Human Rights System: A Manual on Presenting Claims* (Yale Law School & CDES 2002) 34.

¹⁰³ In an important advisory opinion on Article 13(2), the Court explained that a state may validly impose liability for abuse of freedom of expression only where the following four requirements are met: the grounds of liability must (a) be previously established in law (not retroactive); (b) expressly and precisely defined by law (not vague); (c) pursue legitimate ends (in a democratic society); and (d) be 'necessary to ensure' those ends (strictly tailored). See Inter-Am. Ct. H.R., *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 of the American Convention on Human Rights)*, Advisory Opinion OC-5/85 of Nov. 13, 1985 (Ser. A) No. 5, paras 30–50. It emphatically concluded that 'the guarantees contained in the American Convention regarding freedom of expression were designed ... to reduce to a bare minimum restriction impeding the free circulation of ideas.' Ibid para 50.

¹⁰⁴ P. Dwyer *Understanding Social Citizenship*. (The Policy Press 2010) 44.

¹⁰⁵ ESCR Committee, Concluding Observations: United Kingdom of Great British and Northern Ireland E/C.12/1/add79.

¹⁰⁶ K. Boyle *Economic and Social Rights Law Incorporation, Justiciability and Principles of Adjudication* (Routledge 2022) 105.

ICESCR that requires States Parties to incorporate the Covenant into domestic law or to accord to it a specific status in domestic law.¹⁰⁷ The ESCR Committee has advocated for the availability of justiciable remedies in case of violation of any of the concerned rights:¹⁰⁸ 'there is no Covenant right which could not, in great majority of systems be considered to possess at least some significant justiciable dimensions.'¹⁰⁹ Any attempt to oust jurisdiction of the court in considering ESCR-related issues run contrary to the principle that human rights are indivisible and interdependent.

Within the existing Council of Europe legal frameworks, a positive Internet access right would sit well within the European Social Charter. However, despite containing positive obligations, the Charter lacks inherent enforcement.¹¹⁰ Under the more authoritative European Convention on Human Rights (ECHR), the same orthodoxy persists,¹¹¹ although Peacock believes that the court may still carve out an autonomous right to Internet access from Article 10 ECHR.¹¹² However, it should be noted that the Charter and the ECHR contain both positive and negative obligations. With regard to certain aspects of social rights, states have some flexibility on the means chosen to comply with this obligation.¹¹³ A caveat is the difficulty of reconciling positive rights which require a deliberate intention by the government, such as the right of the Internet in this case with fundamental laws.¹¹⁴ When it comes to the provision of certain goods or services, positive obligations are imposed on the states or individuals who are granted limited positive rights. In that situation, those fundamental obligations are not entitlements and therefore lack justiciability. As a result, the judiciary is also reluctant in intervening until the state (the executive and legislature) has intervened, giving rise to a sort of limited justiciability.¹¹⁵

¹⁰⁷ United Nations International Covenant on Economic, Social and Cultural Rights, United Kingdom, British Overseas Territories, Crown dependencies 6th Periodic report (2014) E/C.12/GBR/6.

¹⁰⁸ UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 9: The domestic application of the Covenant, 3 December 1998, E/C.12/1998/24, para 10.

¹⁰⁹ *Ibid.*

¹¹⁰ *Airey v Ireland*, ECtHR, 6 February 1981.

¹¹¹ G. Stafford, 'The Implementation of Judgments of the European Court of Human Rights: Worse Than You Think – Part 1 and Part 2' EJIL:Talk! (7 and 8 October 2019) available at <https://www.ejiltalk.org/the-implementation-of-judgments-of-the-european-court-of-human-rights-worse-than-you-think-part-1-grade-inflation/> accessed (1 February 2024).

¹¹² A. Peacock, *Human Right and Digital Divide* (Routledge 2020) 108–161.

¹¹³ Council of Europe, *Improving the Protection Of Social Rights In Europe Analysis of the legal framework of the Council of Europe for the protection of social rights in Europe, Volume 1* (Council of Europe, September 2019) 32–33.

¹¹⁴ B. Çali, 'The case for the right to meaningful access to the internet as a human right in international law' in A. Von Arnould, K. Von der Decken and M. Susi (eds), *The Cambridge Handbook of New Human Rights. Recognition, novelty, rhetoric*. (Cambridge University Press 2020) 276–283.

¹¹⁵ Council of Europe, *Improving the Protection Of Social Rights In Europe: Analysis of the legal framework of the Council of Europe for the protection of social rights in Europe* (Council of Europe, September 2019) 32–33.

Adopting principles of general international law, the Inter-American Court has demonstrated the justiciability of issues implicating ESCR under the American Convention on Human Rights. The Court has the practice of adopting a holistic approach to the interpretation of the American Convention.¹¹⁶ Tinta noted that, rather than treating the instrument in a silo, the Court is cognisant of every other convention and instrument, whether regional or international, that influenced the Convention.¹¹⁷ Thus, the Court has developed a jurisprudence that undermines false categorisation, but favours the indivisibility and interdependence of human rights.

From an African perspective, Yeshanew argues that the protection of socio-economic and cultural rights as substantive norms and their subjection to adjudicatory enforcement by the African Commission means that the rights are generally justiciable.¹¹⁸ Like the Inter-American Court, the African Commission on Human and Peoples' Rights has also used integrative approaches in making ESCRs justiciable. Unequivocally, the Commission advanced its willingness to accommodate legal arguments that regard all human rights as universal, indivisible, interdependent and interrelated.¹¹⁹ The Commission is nudged by the African Charter on Human Rights, which declares that 'the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights'. South Africa's Constitution contains express provisions guaranteeing ESCR, including access to education, housing, food and water.¹²⁰ As a corollary right under the right of access to information, it also provides a constitutional basis for access to the Internet.

These socio-economic rights are clearly justiciable under South African law,¹²¹ but they are not in many other African countries.¹²² For instance, in Nigeria, socio-economic rights listed under Chapter II of the Nigerian Constitution are not regarded as enforceable.¹²³ Even where the court has been creative in adjudicating on the right to health and a clean environment, as demonstrated in the *Jonathan Gbemre v Shell*

¹¹⁶ *Villagran Moarles et al*, Case Int-Am Court. H.R (SER A) No.63, 192 (19 Nov 1999); see also *Moiwana Village v Surname* Int-Am Ct. H.R., Series C No 124 (15 June 2005).

¹¹⁷ M FERIA TINTA (n 96).

¹¹⁸ S. A. Yeshanew, 'Approaches to the justiciability of economic, social and cultural rights in the jurisprudence of the African Commission on Human and Peoples' Rights: Progress and perspectives' (2011) 11 *African Human Rights Law Journal* 317.

¹¹⁹ *Purohiy & Another v The Gambia* (2003) AHR LR 96 (ACHPR) 2003 para 84.

¹²⁰ For example, Section 25 deals more broadly with property rights); Section 26 addresses access to housing, which expressly includes protection against unjustifiable and arbitrary evictions; Section 27 covers access to healthcare services (including reproductive healthcare) and a guarantee that 'no one may be refused emergency medical treatment'; access to sufficient food and water (Section 27); access to social security, including 'appropriate social assistance' where people are 'unable to support themselves and their dependents' (Section 27); and 'basic education, including adult basic education' (Section 29).

¹²¹ *Republic of South Africa v Grootboom 2000 (11) BCLR 1169 (CC) (S. Afr.)*.

¹²² On justiciability in Malawi, see *Ministry of Finance ex-parte SGS Malawi Limited Miscellaneous Civil Cause Number 40 of 2003*.

¹²³ Nigerian Constitution 1999 s 6(6)c as amended; see also *Archbishop Anthony Okogie v AG Lagos State* (1981) 2 NCLR 337 at 350.

Petroleum Development Company, the government has never yielded to judicial innovation.¹²⁴ In Uganda, the Constitutional Court in *CEHURD & Others v Attorney General of Uganda* underscored the difficulty of enforcing a socio-economic right - in this case, the right to health.¹²⁵ In countries where these rights are enforceable, they remain limited by litigation costs, limited access to courts and complicated legal structure.¹²⁶

Even with varied approaches to their implementation, some countries have considered Internet access as either a fundamental right or a human right. In Europe, Estonia,¹²⁷ Finland,¹²⁸ Greece¹²⁹ and Italy,¹³⁰ under either their constitutions or specific statutes, have accorded Internet access as a fundamental right or legal right. Beyond these national arrangements, Article 84 European Electronic Communications Code (EECC) offers some respite by mandating Member States to guarantee universal Internet access.¹³¹ This provision goes beyond Article 4 Universal Service Directive, which requires Member States to provide *functional Internet access*.¹³² Whereas Article 84 imposes an obligation on Member States, it does not in itself guarantee a right. However, based on the CJEU jurisprudence in *Dominguez*, an individual can rely on the provision of a Directive before a national court where a state has failed to domesticate the Directive in as much the subject matter is unconditional and sufficiently precise.¹³³

Outside Europe, it is worth noting the constitutional amendment in Mexico which expressly mandates the government to provide Internet access. Pressurised by civil society groups, the Mexican government amended Article 6 of the country's Constitution and made Internet access a right.¹³⁴ This amendment introduced

¹²⁴ B. Faturoti, G. Agbaitoro and O. Onya, 'Environmental Protection in the Nigerian Oil and Gas Industry and *Jonah Gbemre v Shell PDC Nigeria Limited: Let the Plunder Continue?*' (2019) 27(2) *African Journal of International and Comparative Law* 225.

¹²⁵ Constitutional Petition No. 16 of 2011.

¹²⁶ S. Gloppen and F. E. Kanyongolo. 'Courts and the Poor in Malawi: Economic Marginalization, Vulnerability and the Law' (2007) 5 *International Journal of Constitutional Law* 258.

¹²⁷ In 2000, the Estonian Parliament (*Riikogu*) enacted the Telecommunication Act 2000 (*'Telekommunikatsiooniseadus'*) which expands universal service to include Internet access.

¹²⁸ Finland's Ministry for Transportation and Communications adopted decree no 732/2009 which provides for the minimal function. Article 60(3) Communications Market Act requires ISP companies to guarantee all citizens with a minimum Internet connection at the speed of least 1Mb per second.

¹²⁹ Article 5A(2).

¹³⁰ O. Pollicino 'Right to Internet Access: Quid iuris?' in A. von Arnould, K. von der Decken and M. Susi (eds), *The Cambridge Handbook on New Human Rights. Recognition, Novelty, Rhetoric*, (Cambridge University Press 2020) 263, arguing that a justiciable social right to Internet access could be introduced in Title II of the Italian Constitution.

¹³¹ Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (Recast)Text with EEA relevance.

¹³² Directive 2002/22/EC.

¹³³ C-282/10.

¹³⁴ The Political Constitution of the United Mexican states 2014 Art 6.

competition to the Mexican telecommunications market, which had been dominated by three giant providers, and the formulation of the Digital Inclusion Strategy and Digital Connectivity Programme.¹³⁵ Apart from this express provision, there is a growing constitutional judicialisation that protects new rights. Pollicino noted that constitutional judicialisation has helped in filling the regulatory gap between the activities of the government and lawmakers and Internet development. This is especially important when jurisdictional issues may implicate fundamental rights protection.¹³⁶

In Costa Rica, the Supreme Court (the *Sala Constitucional*) pronounced Internet access to be a human right. The case pertains to the failure of the Costa Rican government to promptly open the country's telecoms market to competition. The Court reasoned that such an act violated Article 46 of the Constitution, which provides for, among others, a right of access to new information technologies and the eradication of the digital divide; as well as Article 33 of the Constitution, which grants the right to access the Internet through the interface that the user or consumer chooses, and free enterprise and trade. Understandably, the barrier to Internet access is not confined to the absence of or costly infrastructure. At times, access is hindered by monopolies and a lack of competition. Increased competition has the propensity to reduce the cost of access. This decision forced the revision of the national telecommunications plans because the country lacked provision for universal access of the service.

Although they were met with some resistance, the arguments against non-justiciability of ESCRs are waning as the false dichotomy created between civil and political rights on the one hand, and economic and social rights on the other, are being closed. At both regional or national levels, there is a growing receptiveness to empowering citizens to challenge government policies. One clear point is the variation of the implementation of justiciability.

6. Conclusion

As highlighted in this article, Internet usage is no longer limited to the discreet area of scientific research and academic communications its inventors had in mind. Its incursion into every aspect of life has made it a staple technology. Yet, more than one-third of the world population is offline.¹³⁷ The experience during the COVID-19 lockdowns was catastrophic and necessitated a public-private partnership which was

¹³⁵ OECD, *Telecommunication and Broadcasting Review of Mexico 2017* (OECD Publishing 2017).

¹³⁶ O. Pollicino 'Right to Internet Access: Quid iuris?' in A. von Arnould, K. von der Decken and M. Susi (eds), *The Cambridge Handbook on New Human Rights. Recognition, Novelty, Rhetoric*, (Cambridge University Press 2020) 263.

¹³⁷ ITU 'Facts and Figures 2021: 2.9 billion people still offline' News (29 November 2021) available at <https://www.itu.int/hub/2021/11/facts-and-figures-2021-2-9-billion-people-still-offline/#:~:text=An%20estimated%2037%20per%20cent,still%20never%20used%20the%20Internet> (accessed 17 August 2023).

designed to mitigate digital exclusion.¹³⁸ This article has probed whether, in a post-COVID world, it is high time Internet access is accorded the status of a standalone human right beyond being an appendage of other rights. It has demonstrated that even in the absence of a clear international normative framework there are strong arguments to support this proposition. These justifications are not simply theoretical, but they are found in the instrumental nature of the Internet as a technology vis-à-vis its pragmatic adoption in various sectors, such that those without access may be excluded from digital citizenship. Outside the recognition of Internet access as a right lies the problem of justiciability. The false dichotomy between civil and political rights on one hand, and economic and social rights on the other hand, may hinder the actualisation of the Internet access right. However, this may not be a problem *per se* as evolving regional and national developments have shown a variety of approaches to taking the provisioning of access out of mere policy statements. This is promising, as international law does not demand identical realisation of the right, as can be evidenced in the implementation of the right to health and the right to education.

¹³⁸ B. Faturoti, 'Online learning during COVID19 and beyond: a human right based approach to internet access in Africa' (2022) 36(1) *International Review of Law, Computers & Technology* 68.