



RECOGNITION OF THE RIGHT TO INTERNET ACCESS AS AN INDEPENDENT RIGHT: NATIONAL LEVEL

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Abstract

The article analyzes the recognition of the right to Internet access at the national level. It examines the constitutional experience of Mexico, Nepal, Venezuela, Portugal, Ecuador, and other states, as well as the judicial practice of France, India, Greece, and Costa Rica regarding different ways of recognizing this right. Article 33 of the new edition of the Constitution of the Republic of Uzbekistan is separately analyzed, along with existing gaps in national legislation.

Keywords: National legislation, constitutional law, judicial practice, right to Internet access, Constitution of Uzbekistan, universal service.

INTERNETDAN FOYDALANISH HUQUQINING ALOHIDA MUSTAQIL HUQUQ SIFATIDA TAN OLINISHI: MILLIY DARAJADA

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ПРИЗНАНИЕ ПРАВА НА ДОСТУП К ИНТЕРНЕТУ В КАЧЕСТВЕ САМОСТОЯТЕЛЬНОГО ПРАВА: НАЦИОНАЛЬНЫЙ УРОВЕНЬ

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ANNOTATSIYA

Maqolada Internetdan foydalanish huquqining milliy darajada tan olinishi masalalari tahlil qilinadi. Meksika, Nepal, Venesuela, Portugaliya, Ekvador va boshqa davlatlarning konstitutsiyaviy tajribasi, shuningdek Fransiya, Hindiston, Gretsiya va Kosta-Rika sud amaliyoti misolida Internetdan foydalanish huquqini tan olishning turli usullari ko‘rib chiqiladi. Alohida O‘zbekiston Respublikasi Konstitutsiyasining yangi tahriridagi 33-moddasi tahlil qilinib, milliy qonunchilikdagi mavjud kamchiliklar aniqlanadi.

Kalit so‘zlar: milliy qonunchilik, konstitutsiyaviy huquq, sud amaliyoti, Internetdan foydalanish huquqi, O‘zbekiston Konstitutsiyasi, universal xizmat.

АННОТАЦИЯ

В статье анализируются вопросы признания права на доступ к Интернету на национальном уровне. Рассматривается конституционный опыт Мексики, Непала, Венесуэлы, Португалии, Эквадора и других государств, а также судебная практика Франции, Индии, Греции и Коста-Рики в отношении различных способов признания данного права. Отдельно анализируется статья 33 Конституции Республики Узбекистан в новой редакции и выявляются существующие пробелы национального законодательства.

Ключевые слова: национальное законодательство, конституционное право, судебная практика, право на доступ к Интернету, Конституция Узбекистана, универсальная услуга.

Introduction

The “recognition” of the right to Internet access exists, although not universally. It can be observed both at the state and international levels. This right is often expressed in court decisions. At the same time, the documents under review may concern technical and non-technical factors simultaneously, or may address them separately.



We begin with the national level of legal regulation. We will describe the cases in which states have enshrined this right in their constitutions and provide examples of how it is implemented in national legislation. We will then examine cases in which constitutions contain provisions directly relating to the technical and/or non-technical factors of access, after which we will turn to instances in which courts and constitutional review bodies have recognized the right to Internet access in their decisions. Subsequently, we will separately examine cases in which the right to Internet access has been formalized in legislation without being directly enshrined in the states' basic laws.

We will then examine, in chronological order, a number of inter-state agreements and documents of international organizations relevant to the recognition of this right as independent, and will analyze provisions relating to the technical and non-technical factors of access.

Direct recognition (establishment) of the right to Internet access in the basic law at the national level.

One of the states to have directly enshrined the right to Internet access in its basic law is Mexico. Under paragraph 3 of Article 60 of that state's Constitution of 5 February 1917 (as amended by the decree of 11 June 2013[1]), the state was made responsible for guaranteeing access to information and communication technologies, broadcasting services, and the Internet. To this end, the state was required to create conditions for effective competition in the provision of these services. As can be seen, these obligations of the state concern both the technical and non-technical factors of access simultaneously.

Another state to have followed the path of directly establishing guarantees relating to the non-technical factor of access to the Internet is the Republic of Nepal. Under Article 19(2) of the Constitution of Nepal of 20 September 2015, the publication, broadcasting, or dissemination of various content via radio, television, the Internet, or other forms of digital electronic equipment may not serve as grounds for closure, seizure, or cancellation of the registration of the relevant medium[2].

Some states have also enshrined in their constitutions separate provisions relating to the technical and/or non-technical factors of Internet access. Their examination is also important, since it demonstrates that these states have



assumed a number of obligations related to Internet access. It may be said that these states stand on the threshold of formalizing the right to Internet access at the constitutional level. A noteworthy provision in this regard is contained in the Constitution of Venezuela, adopted by referendum on 15 December 1999[3]. Article 108 of the Venezuelan Constitution establishes a provision whereby the state, in order to ensure universal access to information, guarantees the proper functioning of public radio and television, as well as of libraries and computer networks.

A similar norm is also found in the Constitution of Portugal of 25 April 1976. Constitutional Law No. 1/2001 of 12 December 2001[4] added a provision to paragraph 6 of Article 35 of the Portuguese Constitution stating that every person should be guaranteed free access to computer networks. However, it contains no explicit indication that the Internet specifically is meant. This leaves a theoretical possibility of ensuring access to some computer network other than the Internet.

In our view, in both of these cases (Venezuela and Portugal), reference is being made simultaneously to both technical and non-technical factors of access. A publicly accessible computer network should, in the first instance, be understood as referring to the Internet, since it is the most well-known, developed, and widely used public computer network.

The non-technical subjective factor of access is mentioned in paragraph 7 of Article 347 of the Constitution of Ecuador, adopted by referendum on 28 September 2008[5], which establishes the state's obligation to eliminate illiteracy, including digital illiteracy. A similar provision is also found in Article 25 of the new Constitution of Egypt[6], approved by referendum on 14–15 January 2014.

Although these norms are not identical to the direct establishment of the right to Internet access, they are closely related to it, since specialized education has a positive effect on the subjective factor of access, expanding an individual's opportunities to use the Internet.

At this point, let us also consider the experience of Uzbekistan. On the basis of the referendum of 30 April 2023, the Constitutional Law of the Republic of Uzbekistan “On the Constitution of the Republic of Uzbekistan” (Law No.



O'RQ-837 of 1 May 2023) was adopted. Pursuant to this law, the Constitution of the Republic of Uzbekistan was promulgated in a new edition. Under Article 33 of the Constitution in its new edition[7], the state recognized Internet access at the constitutional level as one of the guarantees of the right to seek, receive, and disseminate information. That is, the state assumed obligations related to ensuring access to the global information network (technical and non-technical factors).

However, an analysis of Article 33 of the Constitution shows that Uzbekistan has not recognized the right to Internet access as a separate, independent right. The state has assumed only the obligation to ensure access to the global information network as a guarantee of the right to seek, receive, and disseminate information.

Furthermore, our legislation also lacks positive obligations of the state relating to the technical and non-technical factors of Internet access.

Elvira Talapina examines the right to Internet access as one of the guarantees for exercising the right to receive information, and concludes that “we stand on the threshold of the international recognition of a new fundamental right — the right to Internet access”[8].

Recognition (establishment) of the right to Internet access by courts, including constitutional review bodies, at the national level.

We now turn to other instances in which courts, including constitutional review bodies, have recognized the right to Internet access.

France is a state with noteworthy experience concerning the right to Internet access. In France, this right is not enshrined at the constitutional level. Law No. 2009-669 of 12 June 2009 “On Promoting the Distribution and Protection of Creative Works on the Internet” (HADOPI)[9] caused significant public controversy. Its essence lay in creating a “three-strikes” system, whereby persons who had downloaded an illegal copy of a copyrighted work from the Internet would face increasingly severe sanctions for each subsequent infringement. In the law's original version, a court could order that an infringer be deprived of the right to use the Internet, meaning that, in effect, there was interference with the technical factors of network access. However, throughout the entire period the law was in force, this sanction was applied only once[10].



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Ultimately, on 22 April 2016, at a session of the French National Assembly, Amendment No. 8 to the HADOPI law was adopted, providing for the gradual abolition of this copyright-protection mechanism by 2022[11].

This law is noteworthy for the significant role it played in the recognition of the right to Internet access in France. The Constitutional Council of France received a request from members of the National Assembly to review the conformity of a number of provisions of the HADOPI law with the Constitution. The constitutional review body, in its decision No. 2009-580 DC of 10 June 2009, classified Internet access among the fundamental rights and freedoms of the individual. It also emphasized the importance of the Internet for democratic processes and for the dissemination of ideas and opinions (paragraph 12)[12].

The experience of India is also noteworthy: a number of important questions relating to Internet access were placed before its Supreme Court[13]. These were the following questions (paragraph 10): do freedom of speech and expression, the conduct of any professional or other activity, and trade or business via the Internet fall within the fundamental rights provided for in Part III of the Constitution? The Court answered this question in the affirmative, noting that the dissemination of information on the Internet falls under Article 19(1), while its restriction falls under Article 19(2).

The interpretation of paragraph 26 of the Constitution shows that activity carried out via the Internet also enjoys constitutional protection under Article 19(1)(g), while it may be restricted under Article 19(6). Notably, the Court, on the ground that none of the advocates had addressed the matter, refrained from directly recognizing Internet access as a fundamental right (paragraph 28). Nevertheless, the Court criticized the position of Vinton Gray Cerf, one of the scholars who played an important role in creating Internet technologies (paragraph 23). Cerf believes that Internet access should not be elevated to the status of a human right, since it is merely a means of exercising rights. In response, the Court noted the need to properly assess the degree to which the Internet has spread and the extent to which it has become embedded in the life of every individual. The Court also indicated that it would be impossible for the state to partially restrict access to Internet resources, and that a complete restriction would therefore be inappropriate (paragraph 75). All of this reflects the Supreme Court of India's



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inclination toward recognizing the right to Internet access as an independent human right.

The situation regarding the right to Internet access has taken a distinctive form in Greece. Article 5A(2) of the Greek Constitution of 11 June 1975 (as amended in 2001 and 2008) enshrines a right indirectly related to Internet access, namely the right of every person to participate in the information society. It states: “It is a state obligation to facilitate access to information transmitted electronically, as well as its production, exchange, and distribution”[14]. Article 5A is entitled “Right to Information,” and it does not directly state that the right to participate in the information society is connected with the right to Internet access.

The question of the relationship between access to the Internet and the right to participate in the information society has been examined in Greek judicial practice. The Greek court system encountered a conflict between rights holders and Greek Internet service providers. In 2012, the Athens Court of First Instance, in the case “GRAMMO and other collective rights-management organizations v. Greek Internet Providers,” issued a decision on protection from the infringement of intellectual property rights on the Internet. In its decision No. 4658/2012 in this case, the court ordered special technical measures to be taken to restrict the use of Internet resources infringing copyright[15].

Two years later, in December 2014, the Athens Court of First Instance, in decision No. 13478/2014, found that the application of these measures was contrary to the constitutional principle of proportionality and to the constitutional right to participate in the information society. It was noted that these measures, even in part (for purposes of protecting intellectual property), did not satisfy the criteria of necessity and sufficiency[16].

The Greek example shows that blocking access to an information resource is a far more serious matter than merely restricting the dissemination of information, and that Internet access is directly connected with the right to participate in the information society.

The experience of Costa Rica in relation to the right to Internet access is also noteworthy. Although the Constitution of this state does not directly establish guarantees of access to the global computer network, the Constitutional Chamber of the Supreme Court, in its decision in Case No. 10627 of 18 June



2010, concluded that such access should be included among the fundamental rights of the individual. The Court noted that Internet access is a necessary means for exercising fundamental human rights. It was also decided to impose on the Costa Rican Electricity Institute an obligation to support public electronic communication services, in particular the Internet[17].

Recognition (establishment) of the right to Internet access at the national level on the basis of other normative legal acts.

Estonia is one of the leading examples of the systematic application of information technology to exercise human rights. Although the basic law of this state contains no guarantees directly relating to information technology, significant achievements have been made in this field. Owing to the active state policy on computerization proclaimed in 1996, the level of population access to information networks increased substantially[18].

Another state to have assumed an obligation to ensure Internet access is Finland. The basic law of this country does not directly establish the right of access to information networks. However, at the level of government regulatory acts, the situation is different. In 2009, the Finnish Government, through its Ministry of Transport and Communications, issued Decree No. 732/2009[19], ensuring for all citizens the possibility of connecting to the Internet at a speed of no less than 1 megabit per second.

The establishment of the right to Internet access is also observed in Spain, albeit not at the constitutional level nor within the concept of universal service. Under Article 52(1) of Law No. 2/2011 “On Sustainable Economy” of 5 March 2011[20], the ability to connect to the public network is provided within the framework of universal electronic communication service. It must also ensure access to the Internet, through any technology, with a data transmission speed of no less than 1 megabit per second.

CONCLUSION

An analysis of the practice of recognizing the right to Internet access at the national level shows that states are choosing various paths to establish this right, but all of them are aimed at achieving a common goal — ensuring equal and free access for citizens to the digital environment.



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According to the results of the study, at least four forms of national-level recognition can be distinguished. The first is the direct inclusion of the right to Internet access, or of directly related technical/non-technical guarantees, in the text of the constitution (as shown in the examples of Mexico, Nepal, Venezuela, Portugal, Ecuador, and Egypt). The second is recognition of this right by courts, in particular constitutional review bodies, in their decisions (striking examples include the 2009 decision of the French Constitutional Council in the HADOPI case, the corresponding decision of the Supreme Court of India, and the 2010 decision of the Constitutional Chamber of Costa Rica). The third is establishment as a universal service at the level of ordinary laws, in particular telecommunications laws (the experience of Estonia, Finland, and Spain). The fourth is recognition through indirect constitutional norms, such as the “right to participate in the information society,” as seen in the example of Greece.

It should be particularly noted that each of these methods has its own advantages and disadvantages. Establishment at the constitutional level provides the highest degree of legal guarantee, but amending a constitution requires a complex political and legal process. Recognition through judicial practice is flexible, but may reduce legal stability and predictability. Regulation at the level of ordinary laws is swift and practical, but provides a weaker level of protection compared with constitutional guarantees.

An analysis of the experience of the Republic of Uzbekistan shows that, as a result of the 2023 constitutional reform, Internet access was recognized in Article 33 of the Constitution as a guarantee of the right to seek, receive, and disseminate information; however, this right does not yet possess the status of an independent constitutional right. Furthermore, national legislation does not establish clear positive obligations of the state to ensure the technical (infrastructure, speed, cost) and non-technical (digital literacy, non-discrimination) factors of Internet access.

In light of the foregoing, the most optimal solution for the Republic of Uzbekistan would appear to be improving the relevant article of the Constitution, taking into account advanced foreign experience — in particular, the models of Greece and Portugal — so as to clearly define Internet access as an independent



right, and to establish the state's obligations regarding technical and non-technical infrastructure at the level of a separate law.

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