EVOLUTION OF THE FUNDAMENTAL HUMAN RIGHTS AND FREEDOMS CATALOG: ACCESS TO THE INTERNET

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Abstract

The Internet is today the main source of information for the individual. Taking such a large scale, the question arises whether Internet access should not be a fundamental right. There is, undoubtedly, an evolution of the catalog of fundamental rights and freedoms, but we are proposing to debate the issue of classifying access to the Internet as fundamental rights. A first step in this direction has been made by the United Nations, through the resolution that states should refrain from restricting free access to the Internet. At the same time, access to the Internet is considered an integral part of freedom of expression.

Thus, in this article we will identify incidental legislation and aspects of constitutional jurisprudence and the European Court of Human Rights. Also, the central body of the article focuses on the punctual analysis of the fundamental rights features, and in conclusion we will conclude if Internet access is at the moment or not a fundamental right.

Keywords: *fundamental rights; Internet access; the evolution of rights; the features of fundamental rights; constitutionalization*

As part of the process of constitutionalizing the law through the consecration of new fundamental rights, the work of constitutional courts is put to the test by the evolution and modernization of the state. Computer revolution, materialized in the use of the Internet as an indispensable means of communication, has invariably touched law as a science. The time when constitutional courts will have to declare access to the Internet as a fundamental right varies depending on the country and also on its degree of development.

Internet access as a fundamental right raises two issues: on the one hand, the right to information can also be considered to include free access to the Internet and, on the other hand, the limits of Internet access should be identified in terms of security and,

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implicitly, terrorism. It is equally important to identify the characteristics of a right that turn it into a fundamental right and, implicitly, to tailor them on Internet access, in order to fund an answer to the question: is access to the Internet a fundamental right?

International and National Legislative Framework

On 27 June 2016, the United Nations adopted Resolution no. A/HRC/ 2/L.20, on the promotion, protection and exercise of rights on the Internet[2]. Through this resolution, the UN called on all countries to address their concerns about Internet security in line with international human rights obligations in order to ensure the protection of freedom of expression, freedom of association, the right to privacy and other online human rights, especially through democratic and transparent national institutions. All these actions must be carried out in a manner that guarantees freedom and security on the Internet so that it remains a dynamic force generating economic, social and cultural development.

Moreover, the UN unambiguously condemns measures aimed at deliberately preventing or disrupting access to information or the dissemination of information on the Internet, in violation of international human rights law, and calls on all countries to refrain from such practices or to put an end to them.

At European level, the European Parliament adopted on 26 March 2009 a recommendation on fundamental freedoms on the Internet (Recommendation 2008/2160[3]), which states that "unrestricted and secure" Internet access must be guaranteed and that countries must ensure that freedom of expression is not subject to arbitrary restrictions. It is also necessary for countries to avoid any legislative or administrative measure that could have a deterrent effect on all aspects of the freedom of expression. We note that the European Parliament adopts the same line as the UN, in the sense that it condemns, without obligation, any interference of the state with the freedom of expression.

Both documents therefore recognize that access to the Internet is an integral part of the freedom of expression, which is why the right in question is considered to be a fundamental right without being so declared for the time being.

The evolution of the information and communication media materialized in two legislative initiatives, one in France, embodied in the Law no. 2016-1321 of 7 October 2016 for a digitized republic[4], and the other in Romania, which is still at the stage of legislative proposal.

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[2] The resolution is available at *https://documents-dds-ny.un.org/doc/UNDOC/LTD/G16/131/90/PDF/G1613190.pdf?OpenElement*, accessed on 14 August 2017.

[3] *http://eur-lex.europa.eu/legal-content/RO/TXT/?uri=CELEX:52009IP0194*, accessed on 16 August 2017.

[4] *http://www.vie-publique.fr/actualite/dossier/loi-internet/republique-numerique-que-change-loi-du-7-octobre-2016.html*, accessed on 18 August 2017.

In France, the law passed in October 2016 provides, besides the facilitation of free access to public Internet connections, for a chapter dedicated to the protection of fundamental rights and liberties. For instance, the law stipulates that the personal data of a person may be preserved or deleted after his or her death; another legislated right is the so-called right to forgetfulness for minors, according to which a minor can get the definitive deletion of certain pieces of information that concern him from social networks much easier.

Another aspect regulated in the law and that guarantees free access to the Internet is the one according to which, in case an individual is in a financially difficult situation, his or her access to the Internet shall not be restricted.

In Romania, free access to internet public connections was the object of a legislative proposal[5]. In the explanatory memorandum of the project it is provided that such a law ensures the necessary underpinning for the development of an informational society, but also the constitutional right to free speech.

The bill remained at this stage, considering the impossibility of the application of legislative dispositions, inasmuch as in Romania there still exist localities that do not benefit from electricity, access to the Internet being regarded as a luxury facility.

Jurisprudence of the European Court of Human Rights and Constitutional Court

The European Court of Human Rights judged the matter of access to the Internet in relation to free speech in the *Ahmet Yildirim decision v. Turkey* on 18th December 2012[6].

According to Turkish law, a judge can decide to block access to publications disseminated on the Internet, if there exist clues that these represent a crime. A Turkish court issued a resolution through which it decided to block access to a website hosted by *sites.google.com*, a website in which there existed the crime of disrespect for the memory of Atatürk. Because the only possibility of blocking the contentious website was to completely block access to Google websites, the court proceeded accordingly. The procedure of blocking all the websites was also aimed at the plaintiff, who used *sites.google.com* services in order to publish his research works, as well as his different points of view.

The European Court of Human Rights (ECHR) stated that freedom of access to the Internet is an integral part of freedom of speech and that any curtailment of the

[5] A legislative procedure ceased through definitive rejection by the Chamber of Deputies, according to *http://www.cdep.ro/pls/proiecte/upl_pck2015.proiect?idp=15648.*

[6] A decision available at *http://hudoc.echr.coe.int/eng#{"fulltext":["\"AFFAIRE AHMET YILDIRIM c. TURQUIE\""],"documentcollectionid2":["GRANDCHAMBER","CHAMBER"],"itemid":["001-115401"]}* and accessed on 16th August 2017.

Internet, if it is not proportioned with the aimed purpose and if it hinders access to other websites is contrary to freedom of speech, all the more if there are also other means of blocking the contentious website.

The jurisprudence of constitutional courts represents the essential means of constitutionalization of law, by assigning a fundamental value to the rights and liberties of man.

French law saw one such evolution alongside the Resolution of the Constitutional Council no. 2009-580 DC issued on 10th June 2009[7], through which it was proclaimed for the first time that access to the Internet is an integral part of freedom of speech. Thus, although the Council does not establish access to the Internet as a fundamental right literally, it is considered that the fundamental right to free communication of thoughts and opinions implies freedom of access to the Internet. In equal measure, the Council states that this right is protected, with the stipulation that there might exist countless attenuations of this right, given that its exercise is detrimental to other rights that are constitutional recognized.

What does the right to access to the Internet entail as a fundamental right?

In order a right to be catalogue as fundamental, it needs to meet several conditions: it is subjective, essential for citizens and, due to its importance, it is inserted in declarations of fundamental rights or laws[8]. It was assessed[9] that the fundamental rights of citizens make reference to those rights that are subjective for their life, freedom and dignity, indispensable for the free development of the human responsibility, rights settled through the constitution and guaranteed through the constitution and laws.

The fundamental right is a subjective right

The condition laid down involves the debate of the concept of subjective right and the identification of all the meaning that it implies.

A *subjective right* makes reference to 'the power of a person by right to behave in a certain way as regards his possessions, and on the other hand, the liberty towards his or her person or in relation to other persons by right, a power or liberty recognized

[7] The decision concerns the law of dissemination and protection of creation on the Internet and can be accessed at *www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2009/2009-580-dc.*

[8] G. Iancu, *Fundamental rights, freedom and obligation in Romania*, All Beck Publishing House, Bucharest, 2003, p. 5.

[9] I. Muraru, S. Tănăsescu, *The constitutional block, particular concept in the french constituional system*, in Law no. 4/1998, p. 163.

through the judicial regulation or born from a principle containing an idea of justice not validated yet by the positive right'[10].

The subjective right must be interpreted as an interest protected by the legal order, admitting that subjective rights had existed before the objective right, the last one being established in order to penalize and protect subjective rights[11]. As long as a right is not guaranteed through the legal order, it is not catalogued yet as a subjective right[12]. The legal order covers the total of the legal relationships and situations that concern in equal measure the public authorities and the individuals who work on the territory of a state[13].

Is, therefore, access to the internet a right guaranteed trough the legal order? Inasmuch as we admit that once access to the Internet is the object of constitutional judgment and can represent the underpinning of a legal relationship, then the answer is in the affirmative.

A subjective right is rather a will recognized by the state or a power granted by right than an interest protected by law[14]. By adapting this statement to access to the Internet, we conclude that this facility represents an interest protected by law and not a will recognized by the state. The interest protected by law is closely related to freedom of speech, access to the Internet being a way of facilitating speech through any means, even an electronic one, given that a digitalized society is taking shape nowadays worldwide.

Another problem raised by the subjective right is the one according to which is it an absolute or a relative right? As long as there exists the possibility of restricting the exercise of the subjective right, it is undoubtedly a relative right. Access to the Internet is counted among the right whose exercise can be restricted, by complying with the principle of proportionality, the constitutional basis being provided in Article no. 53 from the Constitution of Romania, being stated that the exercise of a right cannot be generalized, by removing any barrier[15]. On the other hand, the Constitutional Court of Romania (CCR) states that the scope of the regulations of Article 53 from the Constitution is circumscribed to the restriction of the exercise of some rights provided by the fundamental Law, and not to the restriction of the exercise of any subjective right, although it results from a legislative act[16]. As a consequence, following the judgment of the Constitutional Court of Romania and admitting that access to the

[10] I. Dojană, *The subjective law*, Universul Juridic Publishing House, Bucharest, 2010, p. 10.
[11] H. Kelsen, *Théorie générale du droit et de l'État*, Bruylant LGDJ, 1997, p. 129.
[12] *Ibidem*, p. 131.
[13] A. Iftimiei, *Constitutionalization of the romanian and french criminal law*, Universul Juridic Publishing House, Bucharest, 2016, p. 42.
[14] H. Kelsen, *cited paper*, p. 132.
[15] The Decision of CCR no. 587 from 8th November 2005, published in the Official Gazette no. 1159 from 21st December 2005, in T. Toader, *The Romanian Constitution reflected in constitutional jurisprudence*, Hamangiu Publishing House, Bucharest, 2011, p. 176.
[16] The Decision of CCR no. 65 from 27th January 2011, published in the Official Gazette no. 133 from 22nd February 2011, in T. Toader, *cited paper*, p. 177.

Internet can be restricted for the reasons stated by the constituent lawmaker in Article 53 (especially those regarding national security), we can maintain that access to the Internet is a subjective right, which, although it is not clearly established in the Constitution, it acts as a fundamental right.

Following another judgment, which comes from international jurisprudence and the documents stated at the beginning of the article, we notice that there arises a new typology of protection of subjective rights. Access to the Internet is regarded as an integral part of freedom of speech, and by applying the judgment *accesorium sequitur principale*, any measure of protection and any guarantee applied to freedom of speech will be also effective on access to the Internet.

The fundamental right is essential for citizens

The notion of essential right involves the fact that its absence does not allow the individual to freely exercise the prerogatives granted by the right under discussion. However, an essential feature existing within a state is different from the fundamental feature existing within another state. For example, developed and highly developed countries are entitled to consider access to the Internet as the integral part of daily life. On the other hand, in the states where the bare electrification of their localities represents a great challenge, access to the Internet can be interpreted as a right that goes beyond the limits of a normal existence.

In equal measure, the condition that the fundamental right must be essential for citizens remains open, because the capacity of the right to be 'alive' also bears the evolutionary capacity of human rights. The evolutionary character of human rights allows progressive commitments, which must permit a permanent symbiosis with the evolution of the society, with the mindset[17], so that it can provide efficient protection adapted to new challenges.

Without denying the essential character of access to the Internet, the limits of exercising it raises serious problems that concern on one hand the protection of personal data, and on the other hand there must be considered the protection of children from obscene content. Thus, the essential character becomes, as concerns access to the Internet, strongly limited to the measures of protection that must be taken whenever a free access is desired.

The protection of personal data is established (inclusively through European directives[18]) for guaranteeing private life, any kind of electronic communication having to ensure, through imposed regulations, the confidence of users in information technology. The means of protection of personal data are effected in the prohibition of

[17] J.-F. Renucci, *Droit européen des droits de l'homme*, LGDJ, Paris, 2012, p. 33.
[18] The Directive issued by the European Parliament and Council no. 2002/58/CE.

spam-type messages, installation of cookies, as well as the regime of the prior agreement of the user[19].

After all, the states must have the initiative in prohibiting any other user than the one in question from listening, intercepting or storing communications without the consent of the one entitled to do so. Certainly, other problems intervene in this case, one related to national security, and the other one concerning interception for revealing criminal offences. In all these situations, the state is entitled to restrict access to information or to use the necessary means for applying Article 53 from the Constitution – *The restriction of the exercise of some rights and liberties*. In the same direction, the European Court of Human Rights (ECHR) stated in the *Vereniging Weekblad 'Bluf'! Cause v. the Netherlands* that the containment of freedom of information must meet the following conditions: they must be provided by the law, have a legitimate purpose and be necessary within a democratic society[20].

The protection of children from obscene content especially in regard to the best interest of the child. Preoccupation with this aspect became more intense alongside free access to information through the Internet. A new form of criminality took shape, namely pedopornography[21], which is aimed especially at teenagers. The Council elaborated and adopted a master decision concerning pedopornography on the Internet[22], thus establishing a series of measures, put into practice by the member states: encouraging users of the Internet to inform the authorities if they have taken note of such offences on the Internet; efficient repression, through means of criminal law and through authorized institutions, of all offences of this kind; ensuring a quick and efficient reaction of the authorities, when they are informed about the existence of such offences.

It is worth noticing that the phenomenon was spread to such a great extent, that the efficient means of stopping and alleviating it are particularly the penal ones, in their repressive form and not the preventive one.

Due to its importance, the fundamental right is inserted in declarations of fundamental rights or laws

Access to the Internet is not entered as such neither in the Constitution of Romania nor in other declaration of rights. As stated above, a step towards the declaration of access to the Internet as a fundamental right was taken through the jurisprudential declaration of access to the Internet as an integral part of freedom of speech.

Undoubtedly, the constituent power has the mission to determine which of the subjective rights have the characteristics of fundamental rights and, implicitly, which of

[19] J.-F. Renucci, *cited paper*, p. 798.
[20] T. Toader, *cited paper*, p. 181.
[21] J.-F. Renucci, *cited paper*, pp. 795-796.
[22] On 29th May 2000.

them will be established in the Constitution. This is also the explanation of the fact that throughout the history of the Constitution, the catalogue of fundamental rights underwent countless changes, generated by the continuous evolution of the society.

Another aspect that concerns the insertion of fundamental rights in declarations of rights or fundamental laws is related to the notion of 'constitutional block'. An innovation of the French constitutional system, the constitutional block involves the existence of several fundamental documents, which supplement the content of the fundamental law. Thus, besides the Constitution, in France, the universal Declaration of human and citizen rights from 1789, as well as the Preamble of the Constitution from 1958 are fundamental documents.

Inasmuch as access to the Internet is inserted in one of the documents of the constitutional block, then it has one more characteristic specific to fundamental rights. The two documents, however, whose content is adapted to past times do not include one such right.

There is still open the possibility of inserting new rights in constitutional texts, with the help of constitutional courts, an expression of constitutionalization. In other words, rising a right to the rank of fundamental right can be the prerogative of constitutional courts, which thus shows the direction towards which the derived constituent power can be effective. The bare identification of access to the Internet as an integral part of freedom of speech and implicitly the one of the right to information does not turn it into a fundamental right.

In an evolutionary perspective of the right in which it takes shape, besides the three generations of laws[23], a fourth generation, access to the Internet, can fall into this category. Once the fourth generation of laws concerns the protection of human dignity, without the existence of a generally accepted definition of this concept (the one of human dignity), access to the Internet can represent one of the factors that will contribute to the crystallization of the notion. As the right to private life was regarded as an integral part of human dignity, being later to take shape as a stand-alone right, access to the Internet, through the creation of a new generation of rights, can supplement the catalogue of fundamental rights and liberties.

If the fourth generation of rights will also include access to the Internet, then there remains a matter of time until the moment when each state will include it on the list of fundamental rights, the main means being the one of declaring so through the control of constitutionalization and later through the revision of the fundamental right, respectively the introduction of new rights and liberties.

[23] The tripartite classification of rights according to generations (J.-F. Renucci, *cited paper*, p. 81) is as follows: the first-generation rights – political and civil rights; the second-generation rights – economic and social rights; the third-generation rights – solidarity rights.

Conclusions

Although the Internet has become an omnipresent means of communication and information, the path to being classified as a fundamental right is only at the beginning. The bare declaration of access to the Internet as an integral part of a fundamental right, respectively the one of freedom of speech, does not automatically rise it to the rank of constitutional value.

Moreover, by analyzing the characteristics of fundamental rights, we notice that access to the Internet does not have them, so that the constituent lawmaker has the mission to make access to the Internet a fundamental right.

There is certainly no doubt that access to the Internet sees the prerequisites of becoming a fundamental right and the constitutionalization process of the right can be also extended to it anytime. However, at this moment, we conclude that access to the Internet is not a fundamental right, but a prerogative that is necessary for the exercise of freedom of speech and freedom of information.