THE NATURE OF RIGHTS AND ACCESS TO THE INTERNET*

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SUMMARY

The question of whether a right to Internet access exists often centres around whether it "should" be a right and not whether it "could" be a right. Although some proponents of Internet-access-as-a-right might hold lofty and praiseworthy ideals, something does not become a right simply by being proclaimed as a right. That would be a superficial and hollow perception of the nature of rights. The admirable desire to grant a "rights" status to access to the Internet is as seductive as it is problematic. The Internet is a medium that enables the exercise of other rights but access to the Internet is not a right in itself. Moreover, the Internet as a medium is not intrinsic to being human. To proclaim access to the Internet as a right therefore unthoughtfully diminishes the very nature of rights. The proposition is perilous, given the context of South Africa's struggle to ensure rights for all who live here, and it cheapens those rights that have been won.

1 INTRODUCTION

The Internet has arguably become the most important communication platform in our contemporary world.[1] Therefore, the question whether access to the Internet could and should be considered a legal right has become increasingly relevant, but whether such access can be considered a right remains open for debate.

The focus of this article is two-fold. First, the article discusses the nature of rights and various philosophical perspectives on the nature of rights. Secondly, this article delves into whether access to the Internet *could* be considered a right, as well as whether it *should* be considered a right.

When referring to rights, the terms "human rights" and "natural rights" are often used interchangeably. However, these terms do have vastly different interpretations and meanings, which are discussed below.

This article analyses whether there exist compelling semantic, conceptual and constitutional grounds to suggest that access to the Internet should be a

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* This contribution is based on research conducted for the author's dissertation titled "A Comparative Inquiry Into Internet Neutrality in South Africa" (LLM dissertation, University of Pretoria) 2021.

1 Papadopoulos and Snail *Cyberlaw@ SA III: The Law of the Internet in South Africa* (2012) 1.

right. A comprehensive analysis of each and every theoretical framework of rights is beyond the scope of this article. From the outset, discussion is limited to the concept of rights from a natural law perspective. This article mainly and broadly focuses on the theory of natural law, as it developed from Greek and Roman natural rights to the Hobbesian and Lockean theories of rights, and on to how this has affected contemporary South African jurisprudence.

2 WHAT ARE NATURAL RIGHTS?

Although the focus of post-1994 jurisprudence in South Africa placed a heavy emphasis on human rights, the concept of natural rights remains central to our understanding of justice and the law.[2] It is therefore necessary to consider that the Constitution states in section 7(1) that the rights contained in the Bill of Rights are the cornerstone of our democracy and that the Bill of Rights enshrines the rights of all people.

The term "right" simply means to be entitled to a particular thing, any deprivation or denial of which will constitute an injustice.[3] The concept of natural rights or *ius naturale* dates back to ancient Greece and has been developed throughout history.[4] The detailed history of the development of human thought regarding natural rights is worthy of extensive study in itself but, as mentioned previously, is not discussed here in any detail. Instead, a synopsis of certain highlights in its development is given.

2 1 Greek and Roman natural rights

During the early development of the concept, natural rights were seen as having a divine foundation.[5] They were, therefore, seen as being both objective and universal.[6] Aristotle was an early writer who referred to natural rights. He drew a distinction between *nature* and *law*, stating that the law might differ from community to community but nature, or rather the law of nature, was consistent and the same in every community (*polis*).[7]

The *polis* in Aristotle's view developed from early forms of human associations such as villages and households.[8] It is important to note that the *polis* or political society that Aristotle described differs vastly from political society as we know it today. In contrast with modern states, the *polis* did not have a monopoly on the use of force to administer laws.[9]

Aristotle argued that the community and its laws pre-existed the individuals within the community.[10] In his view, the community as a grouping

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2 *Soobramoney v Minister of Health* (Kwazulu-Natal) 1997 (12) BCLR 1696 (CC) par 8 and 9.
3 Ashford "Human Rights: What They Are and What They Are Not" Political Notes No. 100 (1995) www.libertarian.co.uk (accessed 2021-03-04) 1–3.
4 Miller "Aristotle and the Origins of Natural Rights" 1996 *The Review of Metaphysics* 873.
5 Le Bel "Natural Law in the Greek Period" 1949 2 *Nat L Inst Proc* 3 8.
6 *Ibid*.
7 Miller 1996 *The Review of Metaphysics* 877.
8 Miller 1996 *The Review of Metaphysics* 878.
9 Berent "The Stateless Polis: A Reply To Critics" 2006 5 *Social Evolution & History* 141 142.
10 Miller 1996 *The Review of Metaphysics* 879.

of people came first; without the community, the individuals did not exist.[11] In Aristotle's view, natural rights are derived from living within the *polis* and through rational thought.[12] This diverges from the traditional view that natural rights are obtained from a Creator and rather posits that natural rights are obtained by living within a community. Aristotle believed people were first and foremost social and political beings predisposed to living within groups.[13]

He argued that "rights" should be constituted to be sovereign over all matters and that these "rights" or laws should be binding on both the individuals and the "magistrates" or interpreters of the law.[14] Despite placing great emphasis on individualism, Aristotle believed that the individual could not exist outside of the *polis*; justice or the application of natural rights could only be achieved within the *polis*.[15] The natural rights that Aristotle argued for were enforceable against all other individuals in the *polis*, including the rulers within the *polis*, but these rights were not enforceable against the *polis* itself.[16]

In Aristotle's view, the natural law and natural rights existed independently of human laws and all within the *polis* were subject to them. In short, natural rights existed without governments mandating or approving their existence. Although Aristotle's work was more philosophical in nature than concrete legal work, it did provide the foundation upon which the concept of natural rights could be further developed by those to follow.[17]

The Roman philosopher Cicero built on the work by Aristotle and said that natural rights contributed to the well-being of society as a whole. Cicero expressly stated that rules and societal customs were not, in their nature, *laws*.[18] Rather, he argued that laws were a reflection of what was objectively just and true. Therefore, any rules enacted by the community (or by rulers of the community) that were not objectively just or moral could not be considered as law. He maintained that justness and morality were determined through rationality and that all people had reason in common.[19] Therefore, because all people had the ability to reason, human nature was, at its core, a reflection of natural law.

In his great work, *De Legibus,* Cicero defines the word "law" as having two senses. First, he states that the law can be defined as that which society places in writing to command and prohibit certain actions.[20] Cicero viewed

11 *Ibid*.
12 *Ibid*.
13 Miller 1996 *The Review of Metaphysics* 877.
14 Mirhady "Aristotle and the Law Courts" 2006 23 *Polis: The Journal of the Society for Greek Political Thought* 302 310.
15 Miller 1996 *The Review of Metaphysics* 879.
16 *Ibid*.
17 *Miller 1996 The Review of Metaphysics* 874.
18 West "Cicero's Teaching on Natural Law" 1981 32 *St John's Review* 74 76.
19 West 1981 *St John's Review* 77.
20 *Ibid*.

this as the superficial meaning of the word "law".[21] Instead, Cicero argued that the law was derived from nature itself.[22]

Since Cicero viewed natural rights as being derived from nature and objectively true, he viewed natural rights as a universal concept that was applicable to all societies all over the world.[23] He grounded the natural law and natural rights in God, reason and nature. Natural law, according to Cicero, was created by God, placed in nature, and discoverable through reason.[24]

Despite drawing a clear distinction between the concept of law in the popular sense of the word and what Cicero deemed to be its true meaning, Cicero argued that there existed an interplay between the two meanings.[25] The popular opinion of the law had to be shaped by the true natural law definition in order to achieve the ultimate public good and benefit.

Cicero viewed the law as an objective, fixed set of rules but believed that its interpretations vary and change over time as "philosophers" gain more wisdom through reason.[26] Therefore, according to Cicero, although natural rights were universal – a *ius gentium* as it was phrased by him – and they were discoverable, they were not always clear or applied similarly in all societies.[27] Although natural law and natural rights are not always clear to us, they are unchangeable and therefore not subject to the whims of the rulers of people.

In Cicero's view, governmental authorities (or the State) existed in order to uphold the natural law and to protect natural rights.[28] Since natural rights existed objectively and unchangeably, a state that did not uphold these rights was not considered a legitimate state. The State, therefore, did not determine which rights existed, and which did not, because rights existed universally.[29]

Both Aristotle and Cicero built the foundation for the concept of natural rights to be further developed and crystallised.

2 2 Hobbes and Locke

The theory of natural rights led to the wide-scale adoption of modern nation states; and English philosopher John Locke provided the modern foundation for inalienable individual rights within the framework of a nation state.[30]

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21 *Ibid*.
22 *Ibid*.
23 Levy "Natural Law in the Roman Period" 1949 2 *Nat L Inst Proc* 43 50.
24 West 1981 *St John's Review* 78.
25 West 1981 *St John's Review* 77.
26 West 1981 *St John's Review* 80.
27 Levy 1949 *Nat L Inst Proc* 45.
28 West 1981 *St John's Review* 78.
29 Levy 1949 *Nat L Inst Proc* 46.
30 Myers *From Natural Rights to Human Rights – And Beyond* The Heritage Foundation: Special Report No. 197 (2017) 7.

Locke wrote that rights are that which rightly and morally belongs to each individual and therefore cannot be taken away from the individual without an injustice being caused.[31] It is important to note that Locke wrote his famous work against a backdrop of the sovereignty of monarchy, where the sovereignty of the individual was a foreign concept.[32]

Locke argued that natural rights did not come into existence through human creation.[33] These rights were not produced by humans; rather, they are in existence and belong to all human beings by virtue of being and living within the state of nature.[34] Universally, all individuals have these rights in common, and they do not differ from individual to individual. Therefore, according to Locke, these rights exist regardless of whether they are acknowledged by different states or authorities, because these rights exist in the state of nature.

Natural rights, according to Locke, arise from what he described as the state of nature. The state of nature was a device used by Locke to clarify natural rights. The state of nature, according to Locke, is the perfect state of equality and freedom.[35] This state of nature is described as a space within which all people are equal and able to conduct their affairs and make their decisions as they deem fit, provided that this is done within the bounds of the laws of the state of nature.[36]

However, in view of the fallibility of human nature, Locke argued that natural rights are, in essence, uncertain and not guaranteed.[37] Locke therefore submitted that there is a need to create a political society that protects the natural rights and freedoms to be enjoyed by each individual. The natural rights that Locke identified include the right of free speech, the right to freedom of religion, the right of assembly, and the broad right of press freedom.[38]

To protect these rights, Locke found that a second class of rights is necessary.[39] These additional rights are not natural rights but they are needed to ensure that natural rights are protected within political society. These include limitations on state power to protect fundamental natural rights.[40]

Locke described human beings as social beings who are living within communities as social beings, and therefore distinct social contracts were

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31 Locke *Second Treatise of Government: An Essay Concerning the True Original, Extent and End of Civil Government* (2014) 4.

32 Faulkner "Preface to Liberalism: Locke's First Treatise and the Bible" 2005 67 *The Review of Politics* 451 452.

33 Locke *Second Treatise of Government* 2.

34 *Ibid*.

35 *Ibid*.

36 Dunn "The Contemporary Political Significance of John Locke's Conception of Civil Society" (1996) *The Jerusalem Philosophical Quarterly* 105 103.

37 Locke *Second Treatise of Government* 40.

38 Locke *Second Treatise of Government* 4.

39 Locke *Second Treatise of Government* 45.

40 Locke *Second Treatise of Government* 48.

necessary to protect the natural rights of all people from violations by others.[41]

The enjoyment of the natural rights described by Locke is, however, limited by the law of nature.[42] The law of nature creates obligations for each individual because of the equality in the state of nature.[43] As all are equal and independent, no individual should harm another individual's life, health, liberty or possessions.[44] In the state of nature, individuals are entirely free to dispose of their possessions but are not free to destroy themselves or others and their possessions. Liberty, therefore, does not equate to licence to abuse others because it is prohibited by the law of nature.[45]

The rights that are protected are, in Locke's view, expressed mainly as negative restrictions rather than positive entitlements. This entails that one is obligated to refrain from infringing on the pursuits of others to fulfil their rights because the rights themselves do not guarantee compliance with the rights. Locke's ambit of natural rights is therefore limited to that which is necessary for the civil authority to ensure the protection of rights and nothing more. The authority of the State to ensure natural rights is limited to the natural rights themselves and cannot, in his view, be elaborated or expanded upon.[46]

Thomas Hobbes was another seventeenth-century English philosopher who played a fundamental part in developing the theory of natural rights.[47] Hobbes's most famous political philosophy work is *Leviathan,* first published in 1651.[48] Unlike Locke, Hobbes believed that the state of nature should be avoided at all costs. Hobbes posits the question of how life would be without the State or any authority.[49]

According to Hobbes, within the state of nature, each individual will act in their own interest and therefore be their own judge, jury, and executioner in any potential dispute. Should the state of nature exist, life would be, in Hobbes's words, "[s]olitary, poor, nasty, brutish, and short".[50]

Despite disagreeing on the state of nature, Hobbes and Locke held similar views on the fact that natural law and natural rights were not to be confused with the law of man. Hobbes provided for a number of laws of nature that are *eternal and immutable*, yet which are weak and incapable of enforcing themselves in the state of nature.[51] Hobbes accordingly argued for the necessity of state authority to protect these rights that exist universally but which need to be protected.[52]

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41 *Faulkner* 2005 *The Review of Politics* 454.
42 Locke *Second Treatise of Government* 4.
43 *Ibid*.
44 *Ibid*.
45 *Ibid*.
46 Locke *Second Treatise of Government* 117.
47 Strauss *The Political Philosophy of Hobbes: Its Basis and Its Genesis* (1963) 155.
48 Hobbes *Leviathan* (2006) 1–10.
49 Hobbes *Leviathan* 177.
50 Hobbes *Leviathan* 110.
51 Hobbes *Leviathan* 138.
52 Hobbes *Leviathan* 86.

The natural rights that Hobbes listed gave freedom to individuals, yet Hobbes made a clear distinction between liberty and power.[53] Hobbes argued that should an external hindrance exist that restricts voluntary action, this is a lack of freedom, but when an internal hindrance exists to restrict voluntary action, this is rather a lack of power.[54] This was an early notion of the idea of negative rights that prohibit action and the impediment of rights.

In Hobbes's view, natural rights existed within the state of nature, but they were threatened by human nature. It was, therefore, necessary to create the authority of a civil government or state to ensure that these rights are protected and upheld.[55] Hobbes held that there were two main rights that should be protected, namely the right of the individual to pursue a peaceful life and the right of the individual to protect that pursuit of a peaceful life by any means necessary.[56]

Both Locke and Hobbes are seen to have held strong individualistic positions, albeit for vastly different reasons. Both writers believed that a form of civil government or a state is necessary so as to protect certain inalienable rights. This position led to the adoption of individual natural rights within the constitutional and legal frameworks around the world and, because of the focus on individuals, paved the way for human rights to be adopted the world over.

The development discussed above provides the basis for the liberal democracies of the world and the constitutionalism we enjoy. Had it not been for this foundational development, many freedoms we currently enjoy would not have existed.

2 3 From natural rights to human rights

The concept of natural rights morphed into the modern term "human rights" through three distinct generations of rights.[57]

In the United States Declaration of Independence of 1776, the founders of the United States of America stated that there are certain rights derived from the law of nature (natural rights) and from the Creator of nature. The second paragraph of the Declaration reads:

> "[W]e hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights that among these are Life, Liberty and the pursuit of Happiness. – that to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed."[58]

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53 Undersrud "On Natural Law and Civil Law in the Political Philosophy of Hobbes" 2014 35 *History of Political Thought* 683 686.

54 Hobbes *Leviathan* 47.

55 Undersrud 2014 *History of Political Thought* 691.

56 *Ibid*.

57 Vasak "A 30-Year Struggle; The Sustained Efforts to Give Force of Law to the Universal Declaration of Human Rights" 1977 11 *The Unesco Courier* 29.

58 Jefferson *Copy of Declaration of Independence* (1776).

The idea that "all men" hold "certain inalienable rights" means that all human beings possess these rights.[59] All human beings have these rights owing to our very existence as human beings, which makes them inalienable regardless of any personal characteristic such as race, sexual orientation or class but, most importantly, regardless of which time they lived in. As proposed by political theorist Maurice Cranston, these rights apply to all people at all times and in all situations.[60]

The American founders placed great emphasis on the fact that these inalienable rights stem from a higher authority.[61] The rights espoused by the American founders are first-generation rights that closely relate to natural rights.[62]

The most prominent and early use of the term "human rights" was shortly after the Second World War in the Universal Declaration of Human Rights, which was adopted by the United Nations General Assembly in 1948.[63] The adoption of this document served as a statement of intent by the adopting countries, but it had no provisions to enforce the 30 listed and adopted rights.[64] Yet, despite not factually being applied by all adopting nations, the Universal Declaration of Human Rights to this day still functions as a foundational document, informing international law and indeed domestic laws around the world.[65]

The important distinction between natural rights and human rights is that the inalienability of natural rights does not come from the State; rather, it is secured by State authority.[66] The State secures these rights through creating and maintaining the political society in which rights can be exercised or protected.

Human rights are conceived of as the fulfilment of human needs and not as natural rights given to individuals owing to the distinctive value of being human.[67] Although human rights have been used interchangeably with natural rights, the contemporary use of the term "human rights" does not have the same meaning as "natural rights" does.[68]

2 4 Three generations of human rights

One of the most generally accepted categorisations of human rights is into three distinct generations of human rights. The first classification of human rights into three distinct generations of rights was made in 1977 by Karel Vasak.[69] Vasak categorised human rights into: first, civil and political rights;

59 Kleyn and Viljoen *Beginner's Guide for Law Students* (2010) 112.
60 Cranston *Human Rights, Real and Supposed* (2002) 49.
61 Myers *From Natural Rights to Human Rights* 4.
62 Myers *From Natural Rights to Human Rights* 2.
63 Myers *From Natural Rights to Human Rights* 12.
64 Cranston *Human Rights, Real and Supposed* 4.
65 Myers *From Natural Rights to Human Rights* 1.
66 Myers *From Natural Rights to Human Rights* 15.
67 Myers *From Natural Rights to Human Rights* 13.
68 Myers *From Natural Rights to Human Rights* 1.
69 Vasak 1977 *The Unesco Courier*.

secondly, economic, social, and cultural rights; and, thirdly collective or solidarity rights.[70]

Two years later, in 1979, Vasak used the three concepts of the French Revolution, namely liberty, equality and fraternity (*liberté, egalité, fraternité)* to illustrate the three generations of rights that he identified.[71]

2 4 1 First-generation rights

The concept of human rights in its initial phase was identical to natural rights. These first-generation rights are described as civil and political rights.[72] They are what writers such as Locke and Hobbes wrote about and are the rights that were developed by these seventeenth- and eighteenth-century legal scholars. As the authority and influence of states grew, the necessity for these civil and political rights became increasingly important.[73] These universal rights focused on the individual and the concept of non-intervention, which essentially protected individuals from the states that governed their activity.[74]

The key characteristic of these rights is that they are so called negative rights.[75] Negative rights ensure that individuals are not subjected to the actions of other individuals or authority; they prohibit the use of force or coercion when consent is not given.[76] Negative rights protect against the action of other individuals or the State. In short, negative rights exist until they are negated through another's action.

It is, however, important to note that first-generation rights are not completely negative. Although first-generation rights generally require states or individuals to refrain from particular actions, some first-generation rights require positive action from state authorities to ensure that these rights are guaranteed.[77] For example, in order to ensure the right to life, which is a negative right, states around the world are required to act positively through state-sponsored protection to protect this right.

The concept of first-generation rights finds its roots in the United States of America Bill of Rights and the French Declaration of Rights of Man and of the Citizen.[78] Both these documents built on the ideas enshrined in the *Magna Carta* and elaborate on further rights.

First-generation rights include the right to life, the right to equality, the right of free speech, and the right to freedom of religion, as well as political voting rights.[79]

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70 Vasak 1977 *The Unesco Courier* 29.

71 Macklem "Human Rights in International Law: Three Generations or One?" 2015 3 *London Review of International Law* 12.

72 Macklem 2015 *London Review of International Law* 5.

73 Macklem 2015 *London Review of International Law* 6.

74 Myers *From Natural Rights to Human Rights* 10.

75 Myers *From Natural Rights to Human Rights* 7.

76 Vasak 1977 *The Unesco Courier* 29.

77 Myers *From Natural Rights to Human Rights* 11.

78 Vasak 1977 *The Unesco Courier* 30; Myers *From Natural Rights to Human Rights* 4.

79 Vasak 1977 *The Unesco Courier* 29.

The potential right to Internet access does not fit into this categorisation of rights, not only because when first-generation rights were crystallised the Internet did not exist, but because it does not share similar characteristics to civil or political rights.

2 4 2 Second-generation rights

The International Covenant on Economic, Social, and Cultural Rights,[80] which was adopted by the United Nations General Assembly in 1966, is a central document in the establishment of second-generation rights.[81]

Second-generation rights are considered to be mainly economic and social rights.[82] These rights shifted the focus away from liberties and highlighted the outcomes of rights.[83] Second-generation rights endeavoured to achieve particular tangible outcomes that, at least in theory, attempted to advance living standards of individuals. They include the right to housing, the right to health care, the right to adequate working conditions, and the right to education.[84]

These rights characteristically impose a positive obligation on states or governments to promote the outcomes that these rights are aimed at, unlike first-generation rights, which are mostly negative rights.[85]

2 4 3 Third-generation rights

Third-generation rights are a new addition to the legal vocabulary. Third-generation rights aim to address modern societal issues and challenges that are deemed not to be addressed by first- and second-generation rights. Third-generation rights are often referred to as solidarity or collective rights.[86]

In contrast with first- and second-generation rights, third-generation rights can be seen as group rights. Clear examples include references to "women's rights" or "minority rights". These rights encompass a broad range of second- and third-generation rights that are deemed not to have been protected for these particular classes or groups.[87]

2 5 Liberty rights versus entitlement rights

With the development of rights into three distinct generations, there seems to have come about a clear distinction to be drawn between liberty rights and

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80 UNGA *International Covenant on Economic, Social and Cultural Rights* 993 UNTS 3 (1966).
81 Myers *From Natural Rights to Human Rights* 15.
82 Whelan and Donnelly "The West, Economic and Social Rights, and the Global Human Rights Regime: Setting the Record Straight" 2007 *Human Rights Quarterly* 908 909.
83 Myers *From Natural Rights to Human Rights* 12.
84 Myers *From Natural Rights to Human Rights* 14.
85 Whelan and Donnelly 2007 *Human Rights Quarterly* 919.
86 Engle "Universal Human Rights: A Generational History" 2006 12 *Ann Surv Int'l & Comp L* 219 254.
87 Engle 2006 *Ann Surv Int'l & Comp L* 260.

entitlement rights.[88] Liberty rights protect the right to act freely, whereas entitlement rights are claims to goods and services from others.[89] Broadly speaking, first-generation rights are liberty rights – that is, they place a negative obligation upon others, including the State, not to infringe upon them, whereas second- and third-generation rights are generally claims to goods and services such as housing and health care.

For rights to be of any effect, not to mention substantial benefit, they have to be able to be applied universally.[90] The right to adequate housing is of little benefit when it cannot be guaranteed. The South African Constitution famously states that the rights it guarantees should be achieved through the State, which "must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights".[91] These rights are therefore not universal because they are not guaranteed to all. In contrast, the right to freedom of expression or the right to life is universal.[92]

Natural or human rights cannot be justified as being universal if rights are not universal claims to services, goods or amenities.[93] Although these claims are noble and commendable ideals, they should not be included in the same category as natural rights, as this reduces the status of ideas and the universality of rights will suffer as a consequence.[94]

For any person, anywhere in the world, deprivation of natural or human rights, by very definition causes a severe injustice.[95] Should we consider access to the Internet to be a human right, then not only would 56,1 per cent of the world's population be facing a grave injustice by not having this right fulfilled, but the whole of mankind prior to the creation of the Internet in the 1960s would have been victim to a grave human-rights violation. Moreover, it is the author's opinion that there is no guarantee that the Internet will not sooner or later disappear as a relevant technology. The recognition of claims to entitlements as natural rights causes severe damage to such rights and their universality.[96]

The universal enactment of liberties as human rights is a practical possibility. Broadly speaking, liberties only require individuals to respect the freedoms of others.[97] No claims can be made that cannot physically be fulfilled. Similarly, the universality of rights is closely tied to the fact that these rights cannot be surrendered despite the fact that they can obviously be unjustly infringed.[98]

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88 Penney "Internet Access Rights: A Brief History and Intellectual Origins" 2011 38 *Wm Mitchell L Rev* 10 24.

89 Penney 2011 *Wm Mitchell L Rev* 16.

90 Myers *From Natural Rights to Human Rights* 28.

91 Ss 24(*b*), 25(5), 26(2) and 27(2) of the Constitution of the Republic of South Africa, 1996.

92 Engle 2006 *Ann Surv Int'l & Comp L* 230.

93 Ashford "Human Rights: What They Are and What They Are Not" Political Notes No. 100 3.

94 *Ibid*.

95 Engle 2006 *Ann Surv Int'l & Comp L* 258.

96 Myers *From Natural Rights to Human Rights* 28.

97 Ashford "Human Rights: What They Are and What They Are Not" Political Notes No. 100 2.

98 Van Staden "Spontaneous Order or Central Planning? A Brief Overview of the Libertarian Approach to Law" 2021 84 *THRHR* 54.

It is, however, important to mention that although entitlement rights should not be seen as natural or human rights, they could be considered as rights of a different kind, namely legal rights. Legal and natural rights are different sets of philosophical entities and equating the two should be avoided.

3 WHAT ARE LEGAL RIGHTS?

A common definition of legal rights is an interest that is recognised by law and protected by the rule of justice. The two main elements, therefore, are legal recognition as well as legal protection.[99] Although natural rights may also be considered legal rights (in that they are legally recognised as well as legally protected), not all legal rights are natural rights.[100]

Every natural right forms part of the innate existence of every human being, and natural rights held by one individual (a natural person) are the same as those held by all other natural persons. That is why these rights are said to be universal rights. A so-called legal right, on the other hand, is created or received by or bestowed upon an individual person through operation of law. The number, nature and content of legal rights held by any one individual person may vary significantly from those held by other individuals. Legal rights are subject to change as may be deemed necessary from time to time. Natural rights, in contrast, cannot be changed or amended because of their universal nature.[101]

It is worth pointing out that legal rights are social constructs and that the content of legal rights is open to determination. Moreover, legal rights are connected to a particular time, place and context. To illustrate this point, it is trite that various countries guarantee the legal right to a nationality. This right is not rooted in the inherent necessity of a human being to have a nationality in order to exist, but rather came about with the emergence of nation states during the past three centuries. The legal right to nationality exists because it enables the fulfilment of other rights that are guaranteed by nation states.

Legal rights, which go beyond the scope of natural rights, are used as instruments to attempt to achieve certain material outcomes. Many second- and third-generation human rights (as discussed earlier in this article) go beyond the scope of natural rights; through legal recognition and protection of such rights, nation states attempt to solve societal challenges.[102]

However, the mere fact that a legal right exists does not guarantee that the individual will necessarily enjoy the fulfilment of that right. The debate regarding legal rights versus natural rights and how they should be viewed and differentiated (if they should be differentiated at all) boils down to the age-old academic discussion and debate on the significance of natural law

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99 Campbell "Legal Rights" (2017) https://plato.stanford.edu/archives/win2017/entries/legal-rights/ (accessed 2019-06-17).

100 Engle 2006 *Ann Surv Int'l & Comp L* 222.

101 Engle 2006 *Ann Surv Int'l & Comp L* 239.

102 Vasak 1977 *The Unesco Courier* 29.

and legal positivism, respectively. The question of whether rights exist and belong to all human beings by virtue of our humanity, or whether rights exist because of governments or societies that create these rights, remains the central point of legal philosophical controversy and will likely remain so for many years to come.

4 INTERNET ACCESS AS A RIGHT

Despite the lofty ideals of some authors, it should be noted that the Internet remains a communication method – like television, postal services, and the radio.

Owing to the Internet's enormous influence on and societal benefit for humanity, the question of whether or not access to the Internet should be considered a right has naturally gained prominence throughout the media and academia.[103] The question often centres around whether it "should" be a right and not whether it "could" be a right. Although some proponents of this suggestion might hold lofty and praiseworthy ideals, something does not become a right simply through being proclaimed as a right. That would be a superficial and empty concept of rights.

In order to determine whether access to the Internet should be considered a right, three main questions have to be answered, namely:

1. Can the right of access to the Internet exist as a *natural* right?
2. Can the right of access to the Internet exist as a *legal* right?
3. If the right of access to the Internet *can* exist as a legal right, *should* it exist as a legal right?

4 1 Can the right of access to the Internet exist as a natural right?

To address the research topic of this article, it is important to define properly what rights entail and whether access to the Internet could be considered a right. If the definition of natural rights, as discussed above, is applied to accessing the Internet, it is clear that it is difficult to consider access to the Internet to be a natural, inalienable right that all human beings intrinsically possess by virtue of their humanity.

The author submits that the existence of a right to something depends on whether it fulfils the common characteristics of a right. As is clear from the development of natural rights, the core characteristic of natural rights is their universality. A right must be susceptible to universal application in order for it to be considered a natural right.[104] The question therefore is whether a right of access to the Internet has universal and intemporal application.

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[103] Skepys "Is There a Human Right to the Internet?" 2012 5 *Journal of Politics and Law* 15.

[104] Engle 2006 *Ann Surv Int'l & Comp L* 258.

It seems quite impossible to consider access to the Internet as a natural right when measuring it against the universal nature of natural rights.[105] The Internet has only existed for the past 70 years, and it has only been extensively used for the past 30 years.[106] Moreover, it is uncertain how long the Internet will retain its current powerful technological role since further technological developments and improved communication methods are bound to take place.

Prior to the advent of the Internet, the right of access to the Internet was non-existent and therefore beyond the reach of any human being. Some writers, however, have argued that new rights can "come into existence".[107] This view, however, is philosophically problematic because of the universal nature of rights. If certain things are capable of becoming rights at any given time, they are similarly capable of ceasing to be rights.[108]

Without giving recognition to the universal nature of natural rights, natural rights lose their influence and *raison d'etre*.[109] Rights are both important and influential if they are considered universal. If rights are not universally applicable, they cannot be considered inalienable, and if rights are not inalienable, they do not have the desired protection that we seek through their application – that is, the protection afforded by any universal right.[110]

There exists a profound danger in declaring that a right to Internet access exists. The author similarly argues that an alleged right to housing or health care sets a dangerous precedent both socio-economically and philosophically. As Eric Sterner correctly points out, a right to Internet access cannot logically exist as it is "a right based on the nature of the technology rather than that of the claimant".[111]

Claiming that there exists a right to access the Internet is a material claim and not a universal claim of entitlement.[112] The claim that Internet access is a right is therefore a claim for the Internet as a technology and a physical tool. Recognising a claim to a technology and physical tool would seriously degrade and weaken the nature of rights because the fulfilment of this particular right would only materialise and exist sporadically, as and when access is achieved.

In 2017, the United Nations passed a resolution that emphasised the importance of Internet access for the fulfilment of various human rights.[113] It

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105 Ashford "Human Rights: What They Are and What They Are Not" Political Notes No. 100 3; Sterner "The Folly of Internet Freedom: The Mistake of Talking About the Internet as a Human Right" 2011 *The New Atlantis* 134–139.

106 Greenstein *How the Internet Became Commercial: Innovation, Privatization, and the Birth of a New Network* (2015) 159; *Ashford* "Human Rights: What They Are and What They Are Not" Political Notes No. 100 3.

107 Shestack "The Philosophic Foundations of Human Rights" 2017 *Human Rights Quarterly* 215.

108 Myers *From Natural Rights to Human Rights* 28.

109 Sterner 2011 *The New Atlantis* 134–139.

110 Hart *Essays on Bentham: Jurisprudence and Political Philosophy* (1982) 162.

111 Sterner 2011 *The New Atlantis* 134–139.

112 *Ibid*.

113 United Nations Human Rights Council *The Promotion, Protection and Enjoyment of Human Rights on the Internet* (2016).

is argued that access to the Internet is not a right in itself, but rather an enabler of rights.[114] Access to the Internet facilitates the exercise of various rights such as the right to freedom of expression, the right of equality and various legal rights aiming at the material benefit of individuals.[115] However, these rights do not stand and fall on the strength of access to the Internet alone. They are, and always have been, available – with or without access to the Internet – and certainly will still be so should the Internet ever disappear.

4 2 Can a right to access the Internet exist as a legal right?

Legal rights create legal obligations.[116] Legal rights are, therefore, rights that are deemed sufficiently valuable to protect through legislation.[117] Many natural rights are codified into legal rights through constitutions or statutes, but not all legal rights are natural rights.

Societies and states around the world classify various differing things as legal rights. Various rights in South Africa are granted protection through "ordinary" legislation rather than particular constitutional protection. Many rights are protected through legislation, and effectively so. An example is the statutory cooling-off period that is applied to various transactions in different jurisdictions. South Africa grants a cooling-off period when credit agreements are entered into, but not all foreign jurisdictions grant this protection.[118] In South Africa, this cooling-off period is considered a right as it is determined to be beneficial to society, valuable and consequently worth legal protection.

The right to Internet access could, therefore, be promulgated to be protected as a legal right, but the author submits that it should not be. In making this legislative decision, the question remains to be discussed whether the right to Internet access should be protected as a legal right. This discussion follows below.

4 3 Should the right of access to the Internet exist as a legal right?

The question of whether access to the Internet *should* be a guaranteed right is a policy decision facing countries around the world. Policy decisions are subject to various factors – including, but not limited to, resource considerations.

In South Africa, we already see enshrined in the Constitution various rights that cannot be considered natural rights, but which are legal rights, and more specifically entitlement rights, recognised through the Bill of

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114 Cerf "Internet Access Is Not a Human Right" (2012-01-04) *New York Times*.

115 *Ibid*; Papadopoulos and Snail *Cyberlaw@ SA III: The Law of the Internet in South Africa* 251.

116 Hart *Essays on Bentham: Jurisprudence and Political Philosophy* Ch 5.

117 Campbell https://plato.stanford.edu/archives/win2017/entries/legal-rights/.

118 S 16(3) of the Consumer Protection Act 68 of 2008.

Rights.[119] These include housing, environmental, health care, food, water and social security and educational rights.[120] These rights are not universal natural rights but are rights that are enshrined and elevated in our Constitution.

On a practical level, therefore, it is possible to elevate the right to Internet access to the same level through a constitutional amendment. Alternatively, the right could be guaranteed through the promulgation of legislation, which would, however, not grant the same protection against amendments as a right enshrined in the Constitution would.

A further challenge to guaranteeing a right of access to the Internet arises from serious resource limitations in South Africa. Just as the right to housing, although protected, cannot completely and universally be guaranteed by the Constitution owing to practical restrictions, similarly, a right of access to the Internet will not easily be guaranteed owing to similar resource limitations. The Constitutional Court has on various occasions held that constitutional rights such as adequate housing (a second-generation right) continues to exist despite the South African government's failure to fulfil its obligations to ensure the right.[121] The author, however, submits that these decisions by the Constitutional Court have watered down the inherent value of these rights. As discussed earlier in this article, the value of a right is determined by its universality; that a right cannot be universally ensured hollows out the right.

Moreover, the right of access to the Internet may already be sufficiently protected by other rights. The right to privacy, the right to freedom of expression, and the right of access to information all indirectly touch on access to the Internet.[122] These rights, particularly those in relation to Internet access, also bear reference to the right or freedom to seek, receive and impart information.[123] That being said, as much as the right to Internet access may be protected through various other existing constitutional rights, the right to access the Internet is as protected by these rights as the right to access postal services is.

The legal and political philosophy of cyber libertarianism strongly contends that as a broad principle, the Internet should be a space that maximises individual liberty and usage freedom.[124] Overregulation and governmental involvement limits the individual freedom of Internet users.[125] Therefore cyber libertarianism militates against overregulation and rather supports the foundational characteristics of the Internet for the maximisation of individual freedom.[126]

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119 As discussed previously in this article.

120 Ss 24, 26, 27 and 29 of the Constitution of the Republic of South Africa,1996.

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

122 Penney 2011 38 *Wm Mitchell L Rev* 18; Papadopoulos and Snail *Cyberlaw@ SA III: The Law of the Internet in South Africa* 276.

123 Papadopoulos and Snail *Cyberlaw@ SA III: The Law of the Internet in South Africa* 276.

124 Dahlberg "Cyber-Libertarianism 2.0: A Discourse Theory/Critical Political Economy Examination" 2010 6 *Cultural Politics* 331 336.

125 Penney 2011 38 *Wm Mitchell L Rev* 18.

126 Penney 2011 38 *Wm Mitchell L Rev* 17.

As Sterner argues, rights are seriously cheapened when they are based on the existence of the technology rather than on our intrinsic humanity.[127] Elevating access to the Internet to the level of a right therefore risks weakening the concept of rights in South Africa, which can hardly be afforded given our history of gross rights violations. The attainment and fulfilment of hard-won rights in our country's constitutional rights-based dispensation cannot afford further degradation.

The South African Constitution famously proclaims a variety of rights, subject to what is referred to as "progressive realisation". Progressive realisation as argued for in the Constitution is a misnomer. The gist of this constitutional caveat is that the rights that our Constitution enshrines are viewed as goals and not fundamental realities inherent to each person. Those rights in the Constitution (the achievement of which are qualified behind the wall of progressive realisation) merely boil down to lofty ambitions to achieve material goals. They are therefore not rights. They are promises, and promises are not universal; nor are they intrinsic to being human.

5 CONCLUSION

It is clear that the term "right" has developed considerably since the dawn of human philosophy. Three distinct generations of right have appeared, which led to different theories of rights. Addressing the heart of the debate of whether anything could be considered a right, the author submits that a right could and should only exist if it can be universally applied and granted. Only by adopting this approach do rights retain the societal value that renders them worthy of protection.

Although the Internet has arguably been the most efficient and effectual enabler of human rights the world has ever seen and has undoubtedly strengthened the ability to preserve a variety of rights, access to the Internet cannot and should not be considered a fundamental right. The admirable desire to grant Internet access the status of a right is as seductive as it is problematic. The Internet is a medium that enables other rights and is not the object of a right in itself. Moreover, the Internet as a medium is not intrinsic to being human. To proclaim access to the Internet as a right therefore gravely diminishes the very nature of rights.

[127] Sterner 2011 *The New Atlantis* 134.