THE NET AS A PUBLIC SPACE: IS NET-NEUTRALITY NECESSARY TO PRESERVE ON-LINE FREEDOM OF EXPRESSION?

Clara Marsan Raventós

Abstract

The aim of this paper is to analyze from a constitutional theory perspective the so-called Net-neutrality. In particular, it will treat two sets of questions. The first one wishes to engage with the nature of the Net (public or private?) and tackle the issue of the breach of constitutional rights and freedoms through the Net. The focus will be placed on the freedom of expression and censorship. The second, instead, offers an overview of the actors that can influence the nature and content of internet.

Telecommunication Technologies have brought new spaces in which people interact. The most prominent of these new spaces is the Net, where individuals communicate in manners that fall as much into a private-space interaction pattern (e.g. e-mailing), as into a public-space one (e.g. forums, blogs, etc).

The first element that this paper explores is how the so-called neutrality of the Net relates to the nature of this space and, in particular, to on-line freedom of expression.

When considering the latter we will see how public and private entities have a direct influence in determining the future of on-line freedom of expression. Traditionally, fundamental rights have been a tool to protect individuals from abuses of power by public authorities (the State); yet, the State is no longer autonomous to perform this balancing between goods when the latter clash in this hybrid space of the Net. Moreover, when public authorities succeed in regulating the Net to protect private rights (e.g. the freedom of expression or the protection of one’s private life) and other public goods (e.g. security), is the State carrying out its role as ultimate guarantor of fundamental rights? Or is it trying to censor Net-content and control this space? And, finally, does the fact that private entities have a clear role in the possibilities of freedom of expression change how the Net should be regulated to protect this liberty?

Ultimately, these questions oblige us to look at who is deciding on the neutrality of the Net. Who participates from this neutrality? Who designs its contours and ensures that it is respected? Do private companies have a share on the public monopole for the protection of the public good? Or, finally, is this neutrality completely alien to public authorities and, hence, any direct or indirect intervention by them should be labeled as a breach of neutrality (e.g. as a mechanism of censorship vis-à-vis the freedom of expression)?

Author’s bio

Clara Marsan is currently a Public Law Professor at Universitat Oberta de Catalunya. She holds a Masters Degree (DEA) from the universities of Lausanne and Genève in European Law and International Economic Law. She has written her PhD dissertation at the European University Institute in the field of constitutional theory (with the title “Recovering constituent power. The constituent role of judges in globalised states”). She is currently researching on the impact that new technologies have on human rights, particularly on privacy and freedom of expression.