

*NET NEUTRALITY
AND THE DEMOCRATIC HEALTH*

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AND THE DEMOCRATIC HEALTH

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FIRSTLY I would like to give my compliments to the organizers and also thank for inviting me to speak.

With my words I seek to outline certain basic legal problems facing the development of democratic society owing to the spread of the Internet.

In the early days of communication between computers, nobody imagined how much social relationships would change, and would continue to change. Internet access, a simple fact of daily life, has reminded us of the bite of the fruit of the Tree of Knowledge, for it has made it possible for anyone curious to access more and more knowledge and information, a huge universe which we are able to appreciate thanks to technological advances, to the intuition of original explorers and to commercial investment. This is an area for Law to make its own, just as it has done on so many occasions throughout Human History as, after the arrival of explorers, the need has always arisen to fix rules and avoid the abuse of force in order to facilitate the coexistence of free people.

If the fall of the Roman Empire or the discovery of America, according to common historiography, opened up new periods in Human history, in my humble opinion, the spread of the Internet has also opened up a new era. It is forcing us to rethink social relationships and legal institutions, from the most elementary aspects of the political system to the most refined judicial constructions. It is not that I believe that the Internet will bring about a utopia in social organization – not at all. Nevertheless, I do not think that we should lose sight of its development, lest the public freedoms and basic rights that have been conquered should suffer in the network of networks that make it up.

This is why I'd like to focus attention on certain points. We have our gaze fixed on the horizon of the future, of innovation, a gaze overwhelmed by novelty. Nevertheless we should not forget the long road of legal conquests that we have already travelled, using the techniques and legal instruments already known to us. And this is what I'm going to try to piece together: highlights of one or two points of the development of the Internet and the techniques offered by the rear-view mirror of History with a view to suggesting some solutions.

Now, for example, in the twenty-first century, we find that we have to struggle to guarantee a minimum of security on the networks, infrastructures and systems, just as over a thousand years ago, we sought to ensure safety on the highways; and we must protect the freedom of surfing the Internet, just as Fernando Vázquez de Menchaca and Hugo Grotius defended the freedom of the seas centuries ago; we must guarantee social communication and information but above all the free development of the personality, just as, over two hundred years ago, American

and French revolutionaries defended it and saw it mature into the legal status of the “citizen”.

These are the points I would briefly like to touch on. I shall repeat my thesis: although our outlook is fixed on the future and its exciting innovations, we should remember the past and the classic legal institutions that in past centuries served as levers to overcome conflicts.

I

So, in the first place, the networks and surfing the net are fraught with risks and “highwaymen”: viruses, Trojan horses, wormholes, data theft, usurping of identity, cyber harassment, etc., while we must also protect “strategic” infrastructures, which ensure supplies and the performance of essential services. For this reason, a major function of public power today is the guaranteeing of security in relationships if we want to keep society open and free.

This concern made me remember the situation of the lands of Europe when it was noticed at the end of the first millennium that the sky had not fallen, as many soothsayers had predicted. There has been much conjecture about the Dark Ages, of fear and religious repression, of the threat of the End of the World. It is also true that there are myths and legends like those so often used elsewhere to decorate the advance of the History of Hu-

manity. In any event, it is easy to imagine insecure populations, those who returned from the Crusades, highway robbers and the like. The studies of thorough historians offer illustrative data on insecurity and the consequent feudal revolution.

Because use was made of the collapse of the Carolingian Empire in many areas of the marches by bickering lords who broke their allegiance to the king and sought to consolidate their domains, in practice, those shows of power also brought about the occupation of farmers' land, the harvesting of their crops, the claiming of rights to the harvests and, naturally enough, constant struggles between feudal lords trying to impose their will. This was a period of great violence and of vengeance, of many upheavals caused by abuses of power in the frontier areas between the Carolingian Empire and Moslem territories.

In this violent environment, in 1027 the peace of a monastery housed the Synod of Toulouges, where the Benedictine abbot Oliba, who was on a pilgrimage, is credited with the proclamation of the first "Peace and Truce of God", whereby there should be no aggression, violence or belligerence of any kind against persons or property, first from Saturday to Monday, and later from Wednesday to Monday. The declaration of "Peace and Truce" was also proclaimed in the diocese of Vich by this abbot when he was Bishop there in 1033, and was repeated in neighbouring territories, spreading to many areas of the Catalan Marches. "Peace and Truce" was imposed to protect clergy and monks. Declarations of "special" peace spread rapidly and those breaching it were threatened with excommunication.

This peace was, in principle, respected, owing to the fear of being set apart and repudiated.

There was peace for monasteries, for churches and their surroundings, the *sacraria*, peace for anyone approaching places of worship, peace for pilgrims and also peace for fairs and markets. And in order for people to arrive in peace, for trade to prosper and for the feudal coffers to be filled, there arose the peace of the highway, for it is there that calm, safety and peace were needed most.

Rightly have legal historians stressed that that peace on the highway was a major novelty. Until then, declarations served to protect certain people, normally clergy, or places where they met, such as monasteries or markets. Likewise, a *conductus* (safe-conduct) was given to anyone going to Court, to pilgrims, foreigners, merchants and others. As opposed to those personal declarations, the “peace of the highway” meant objective protection. The highways and paths themselves, those long and winding roads, now received attention, a singular advance in Medieval legal thinking.

And some of the first Medieval *fueros* (territorial law codes) made provision for this. For example, any highway robber was declared to lose “the king’s love”, and all citizens shared the obligation to help the monarch to look after the highways. These texts also included the punishments with their traditional names that would be meted out to anyone breaching the peace, such as highwaymen. Similar provisions were made and became widespread in many other European kingdoms.

And traffic requires safety. It may be said that it was around that peace of the highway that communication grew, and with it Law, because the highways had to be maintained and cared for, because privileges of tolls arose, because something had to be

done with things lost on the roads, because the roads made it possible to reach villages and towns, which grew and multiplied their relationships and businesses, which contributed to the spread of a new way of thinking that did away with prejudices and changed peoples' attitudes to one another.

Such is the importance of the peace of the highway that today, a thousand years later, it has to be reconquered for the virtual highways, for the networks, communications and services of the Internet.

Some landmarks must be recognized that guarantee the security of strategic facilities and infrastructures, together with the encrypting of the message traffic. Nevertheless greater support must be given to research, as there are still many risks to combat, such as darknets or the deep web.

It is above all important to educate citizens in the correct use of the Internet. If in the year 1000, their collaboration and "the king's love" were insisted on, today, their action must be directed towards respect for and the defence of the democratic and social order, to the recognition of public rights and freedoms. This recognition is the basis of the stars on the flag of the European Union.

II

ONCE the citizens' trust and security are assured, the next step is to guarantee their equality and the equality of opportunities. In this regard, there are two risks that could split or fracture European democratic society, which public Law must face.

On the one hand there is a need to ensure every citizen's right to Internet access. It is well known that some years ago, European legislation established such access as a "universal service", that is, a service to which every citizen must be guaranteed access. However, its basic content and its minimal substance are still very poor and, although there are major European plans and programmes, like Connecting Europe within Horizon 2020, announcing minimal service thresholds more appropriate for a modern society, day-to-day reality is that there is a vast gap between European cities and rural areas. Will you believe me when I say that in Spain there are many homes without broadband access and even without any Internet access? Believe me, it is the truth.

To assign the responsibility for relieving this digital poverty preferably to private companies has made it difficult, for example, for local councils to offer citizens decent access. Nearly ten years ago, in a book I defended the virtues of allowing councils to offer residents access to a municipal wifi network¹. Use could be made of existing municipal telecommunications services for

1 *Redes inalámbricas municipales. Nuevo serviciopúblico*, Ed. Marcial Pons, Madrid, 2005, ISBN 9788497682374

internal services such as communicating with the police, public transport management and many others in order for residents and tourists to access the Internet. I defended that access as a new municipal public service. However, the “relevant authorities” came up with all kinds of obstacles to limit the development of such a service. Today, fortunately, Internet access is becoming available in parks and squares and on public transport, but its development was put back several years, causing obvious problems.

We must increase a solid connection throughout Europe, an extensive connection to benefit all European citizens regardless of where they are, a Network sewing together all the parts of Europe to avoid the split seams of the Eurosceptics and any others wanting to break up Europe.

Now another question is complicating the recognition of citizens’ equality, that is Net neutrality.

In this forum of specialists it will not be necessary to recall how this cause was taken up in the United States in order to recognize the different basic freedoms in electronic communication: a) the freedom of access to contents chosen by each consumer; b) the consumer’s freedom to use the applications they choose, with the corollary that companies producing applications must trust that their products work without discrimination; c) the freedom to connect personal devices; and d) the freedom to ascertain the terms and conditions of the services taken on, and the different service options.

We know that in the European Union, much energy was first focused on the liberalization of telecommunication services and

guaranteeing the correct application of competition law. In the first provisions there was no regulation of the possibility that the so-called Internet suppliers could filter content, block it or charge different prices for traffic. These practices were neither regulated nor prohibited so there arose a sort of limbo of legal uncertainty in Web communications. Yet this management of Internet traffic could affect citizens' basic rights, by which I mean public rights and liberties so important for maintaining an open and free democratic society such as freedom of expression, the right to information, the right to communicate, and so on.

Hundreds of studies, reports and other documents have come out of the European institutions in recent years in order to set up a legal framework to consolidate an "open and neutral Internet" in Europe. So now we have a basic text, Regulation 2120 passed, on the 25th November 2015, to establish common rules in order to guarantee a fair and non-discriminatory treatment of traffic in the provision of Internet access services and the rights of the end users.

This European Regulation recognizes that citizens and the users of telecommunication services have rights of access to information, to its distribution, to supply applications and services and to use the terminals of their choice. There is recognition of free choice for surfing the Internet, just as centuries ago there was a defence of the freedom to sail the seas.

In my opinion, it would be appropriate to remember the works of the jurists of the Salamanca school in Spain, especially Fernando Vázquez de Menchaca, who argued so well on common property and inspired Hugo Grotius's work on the freedom of the seas.

Netneutrality is very similar to that freedom of the seas. And like that freedom, it may see limitations, as numerous risks exist.

Why? Because just as the states bordering the seas and the great companies that consolidate and arbitrate the traffic on them have much to say about their freedom, so some states seek to block and control Internet traffic. The great telecommunication companies especially are seeking to influence access to certain contents and services. These are new and powerful feudal lords, who wish to make the rules and channel the traffic.

We must insist that the freedom to surf the Internet should be intrinsically linked to the guarantee of the recognition that citizens must be able to rely on equal opportunities in the Networks.

This idea that some of us have been formulating from many forums for a number of years has also entered the text of the Regulation mentioned earlier². In principle, and in general, companies must treat all traffic fairly, without discrimination, restrictions or interference, regardless of the identity of the sender and the receiver of the communication, and regardless of the contents, applications or services used, or equipment. Companies may not block, slow down, alter, limit, interfere with or degrade given contents, applications or services, subject to the logical exceptions of any state where the rule of law applies. It is therefore necessary: a) to comply with laws and court sentences; b) to defend the integrity of the Networks and c) avoid congestion.

² *Neutralidad de la Red ¿realidad o utopía?*, Ed. Marcial Pons, Madrid, 2014, ISBN 9788416212491

Nevertheless, in this last exception there may be risks of seeds of inequality among citizens growing into plants forming a dense jungle where the social and democratic Rule of Law will perish.

Companies can and must manage traffic; it is their mission. Nevertheless, that management must be carried out fairly, and the criteria and measures used must be, as in so many other areas of public services, reasonable, non-discriminatory, proportional and transparent.

Here again we call to mind the traditional legal institutions that have given so much to the Law of European countries, firstly French law with the establishment of the public service. The Internet, rather than a public service is a means for the proper development of many public services. For this reason, public authorities must establish “minimal service obligations” for companies at least to guarantee the equality of opportunities for all citizens.

In recent months, the European organization uniting all the national authorities responsible for telecommunications, the Body of European Regulators for Electronic Communications (BEREC), has sought to establish criteria for use in resolving conflicts concerning neutrality.

We have available to us then, legal techniques and fine tuning to establish these minimal obligations, together with legal principles to make such management neutral and objective, especially regarding principles of proportionality, reasonableness and non-discrimination.

In this regard, let us not forget that jurisprudence has given us criteria suitable for analysing the admissibility of company

practices. For this, three conditions had to be met: a) several measures had to be considered and the one considered most efficient for the end in view chosen; b) it had to be seen to be the least expensive option, the one with the least effect on the rights or interests of individuals affected and c) it should not bring about disadvantages that cannot be offset by any benefits deriving from such discrimination.

There are therefore beginning to appear instruments and criteria for assuring equality of opportunities for European citizens. But to go forward in this direction, it is absolutely necessary to do away with fragmented telecommunications markets, to encourage investments in telecommunications and to be firm in ensuring an open development of the Internet and netneutrality. The freedom and equality of citizens and companies is at stake. One only needs to reread Rousseau's *Discourse on the Origin and Basis of Equality among Men* to see this.

III

AND now a few words on a third point, one arising from the vast amount of existing information, from which I should like to take two matters that might prove to be of interest.

One praiseworthy aim is the provision of a body of information by the public institutions to improve citizens' knowledge and aid both their participation in channelling public policy, in

monitoring administrative management and in demanding accountability³.

The case of the European Union is a good example. A wealth of information is available through its Open Data portal. What concerns us at this moment? What should be done so that the effort of supplying so much information will consolidate European democratic society?

My proposals are on the borderline of the field dealing strictly with rules, of provisions, for they take into account the need for that great effort of information supply to bear fruit and not have negative effects.

On the one hand, we need to make sure that so much information does not scare the citizen or is deliberately overlooked. As we all know, with search engines, we must avoid the citizen who wants a glass of water being overwhelmed by a tidal wave.

In this regard, information should be graded into levels, just as basic education is progressive in schools. So we should at least offer successive examples of one-off specific actions, such as highlighting monthly gains; informing citizens of a European achievement, the co-financing of a public venture, a cultural activity, a research project, etc. Together with this, information must be drawn up for those with wider interests and for specialists.

The other risk I foresee is that the processing of so much information, of that new paradigm formulated with the name “big data” that encourages automation in the choice of guidelines for

³ *Videre* Giancarlo Vilella, *Innovazione tecnologica e democrazia*, Ed. Pendragon, Bologna, 2015

public policy, and shortcuts in decision making, might lead to a single path for citizens to channel their wants and demands, as in Aldous Huxley's "Brave New World". Life has to be open.

Techniques for enhanced public participation in administrative procedures are also relevant, a subject that Professor Galetta will talk about. I will hand you over to her in a moment.

That is all I have to say. It must be recognized that thanks to innovation, much has been achieved, but we must keep fighting to raise the flags of freedom and equality over the vast sea of the Internet, to make it open and neutral.



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