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The Internet and Constitutional Law

The protection of fundamental rights and constitutional adjudication in Europe

Edited by
Oreste Pollicino and Graziella Romeo

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The Internet and Constitutional Law

This book analyses emerging constitutional principles addressing the regulation of the internet at both the national and the supranational level. These principles have arisen from cases involving the protection of fundamental rights. This is the reason why the book explores the topic through the lens of constitutional adjudication, developing an analysis of courts' argumentation.

The volume examines the gradual consolidation of a 'constitutional core' of internet law at the supranational level. It addresses the European Court of Human Rights and the Court of Justice of the European Union case law, before going on to explore Constitutional or Supreme Courts' decisions in individual jurisdictions in Europe and the US. The contributions to the volume discuss the possibility of the 'constitutionalisation' of internet law, calling into question the thesis of the so-called anarchic nature of the internet.

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PART III
Models of constitutional adjudication on internet issues: a comparative perspective

Introduction

This volume collects contributions originally prepared and discussed in the international conference Internet Law, Fundamental Rights and Constitutional Adjudication, held in October 2014 at Bocconi University, Milan.

The basic statement behind this book project is that internet law needs a constitutional analysis; that is, using models of constitutional adjudication, in both their institutional and argumentative dimension, to explore the law of the Web significantly enhances the state of the art in internet studies.

To take up this challenge, internet-law scholars who are very familiar with the different models of constitutional adjudication have been put together to discuss the issues connected to the relationship between protection of fundamental rights in the digital era and constitutional review, in a comparative context that takes into consideration the domestic dimension and the supranational one.

The theories that have influenced the research carried out in this volume are those related to constitutional adjudication, which essentially aim at explaining how judges decide cases and how judges ought to decide cases.[1]

The first part of the volume addresses the theoretical framework surrounding Internet studies and the specific issues connected to the jurisdiction conundrum.

More precisely, with regard to the theoretical relevant landscape, András Sajó and Clare Ryan analyse the issues of judicial reasoning in cases involving new technologies, covering the framing activity, which consists in making sense of the internet in a way that enables judges to use traditional legal categories or to face the problem of translating old categories in a new language.

In connection to the jurisdiction conundrum, Catherine Van de Heyning's chapter explores the boundaries of jurisdiction in cybercrime cases from a European perspective, focusing on the problem of identifying potential harms in the Web and exercising jurisdiction in the anarchic world of bit. Finally, Molly K. Land adds the US perspective on both the problem of jurisdiction and the constitutional dimension of Internet issues across the Ocean.

The second part covers the European standards for protection of fundamental rights in the Internet. Joan Barata Mir and Marco Bassini address the European

1 Robert Justin Lipkin, 'Conventionalism, Constitutionalism, and Constitutional Revolutions', (1987–1988) 21 *U.C. Davis L. Rev.* 645.

Court of Human Rights case law underlining recent developments, especially in the area of freedom of expression. Filippo Fontanelli closes the second part of the volume focusing on the Court of Justice of the European Union case law, arguing for the need to reconsider the balancing test in internet-related issues as part of the broader problem of judging in cases in which new technologies are involved.

The third part of the volume is entirely dedicated to domestic constitutional and supreme courts case law, with specific regard to the relationship between the standard of protection of fundamental rights in the internet and the different models of constitutional adjudication. It aims at highlighting the reasoning of these courts in two complementary perspectives: the constitutional dimension of the case law, that is the balancing of rights and interests in the digital era; and more broadly the domestic judges' approach to the internet phenomenon: does it alter the application of existing laws and legal categories?

Jurisdictions, as already mentioned, have been selected on the basis of the model of constitutional adjudication that is performed. Consequently, Paolo Passaglia opens the third part by addressing the case law of courts operating in centralised systems of constitutional adjudication with no direct access to the constitutional courts (Italy and France). András Jori dedicates his chapter to the centralised system of constitutional adjudication with direct access to the constitutional courts (Germany and Central Europe). Krystyna Kowalik focuses on the Polish Constitutional Tribunal, which developed an original understanding of the relationship between law and the internet. Jacob Rowbottom provides an analysis of a 'weak' (that is not Kelsenian) model of constitutional adjudication addressing UK case law. Finally, Gert-Jan Leenknegt develops a study of the Dutch case, which falls under a peculiar constitutional model providing no system of constitutional review of legislation.

The institutional models of constitutional adjudication explain the distinguishing features of the structure of judicial review performed by constitutional and supreme courts. More importantly, they offer a wide overview of the different way in which the protection of fundamental rights can be addressed and ensured.

Ultimately, as it is pointed out in the concluding remarks, the volume challenges the idea that internet law is (only) a highly specialised area of legal studies; it underlines the constitutional dimension of the issues connected to the regulation of the Web and to the protection of rights in the digital era.

1 Judicial reasoning and new technologies

Framing, newness, fundamental rights and the internet

András Sajó and Clare Ryan*

1.1 Introduction

For centuries, judges have struggled to adapt existing law in the face of technological advancement. Both civil law and common law judges confront situations in which technological developments contribute to new social and economic contexts; contexts for which the current legal regime is ill-equipped. When this arises, the judge must first determine whether the technology is indeed new. Does the present case truly fall outside the scope of previous precedent and statute? If so, judges apply metaphors and analogies to the new context so as to make sense of the novel by using the frames of the past.

The act of pouring new wine into old bottles has always been a part of the judicial task – not only for common law development, but also as civil law judges interpret and apply code. There is nothing new in this act of judicial framing. The real challenge comes when judges (or legislators) are confronted with unexpected, unpleasant or ambiguous social and economic consequences of technology. The challenge may be particularly acute when these consequences arise from earlier judicial choices about framing.

The focus of this chapter will be on the complex challenges posed by the internet. Specifically, this chapter will address the interaction between the harms and opportunities of the emerging online world and individual constitutional or human rights. We ask first how judges develop analogies and metaphors to make sense of new technology. We then question whether those frames provide an adequate response to the modern world. We argue that, with regard to individual rights and the internet, a process of reframing is occurring. This reframing has begun to reject traditional rights frames – like freedom of expression.

It is important to note that we are not talking about technological change as such, but rather the interaction between technological change and the relevant social and market reactions to the implications of this change. It is regularly argued that when the current law, or the lack thereof, is insufficient to address

* This chapter is derived in part from a speech given by András Sajó entitled 'Is freedom of expression sustainable in a world of sensitivities?' delivered on 6 December 2014 at the Palais des Académies in Brussels.

present conditions, then it is for the legislature to take appropriate action. This principle surely applies to uncertainties resulting from technological change. But what happens if the legislature is not responding? The judge will decide the case on the basis of laws that are arguably inadequate to handle the new situation. The matter is then further complicated by the application of constitutional or human rights to contexts in which the legal rule governing a technological advancement predates the recognition of the right in question.

When it comes to judicial handling, the subject-matter of litigation is relevant, but of equal importance is the type of court that is supposed to adjudicate. Here we concentrate on apex courts (i.e. constitutional and supreme courts), and also international courts, primarily the European Court of Human Rights. Even at these apex courts, it should be mentioned that rights and fundamental rights-related concerns are only part of the consideration. Risk and economic development are additional considerations, which do play a role in the acceptance of rights restrictions. In other words, the social interest related to the consequences of the technology might give weight to the conventionally recognised grounds for interference.

We have arrived at a point of great tension between existing rights frames and the social reality which creates, and is created by, the internet of the twenty-first century. The first part of this chapter explores judicial framing as a technique for confronting new technology. Next, we examine the ways in which social consequences challenge existing frames. Finally, we demonstrate the ways in which old metaphors are losing their power – including past justifications for values such as freedom of expression.

1.2 Old framing for novel technology

The dilemma of how to balance old norms in new contexts is hardly new, although the scope of its implications may be broader now than in the past. For the continental lawyer the paradigm cases remain, most probably, the French judicial reaction to photography and to the phenomena of industrial accidents. Similarly, the development of liability regimes during the English and American industrial revolutions highlight how integral judicial framing is to the legal reception of technological advancements. Additionally, a classic American case for reframing rights and technology in a socially changing environment came from Justice Brandeis's dissent in the first US Supreme Court case to address wiretapping.

In 1858 it had been five years since Nadar opened his portrait studio in Paris and photography had become commercially available. In that year, a French judge was asked to decide the fate of legally taken photographs of the French actress Rachel on her deathbed. The pictures were taken upon request of her sister for family purposes, but the photographers were forbidden from communicating a copy of them to anyone. Twenty-five copies were put up for sale. The French court ruled that: 'No one may, without the express consent of the family, copy and publish the face of a person on his deathbed, irrespective of the celebrity

of the person and the degree of publicity that was attached to the acts of his life. The right to forbid such reproduction in an absolute one.'[1]

Although it was nearly half a century after this case before France codified a general right to personal images, the *Rachel* case is considered to be the beginning of modern personality rights and the right to one's own image. Certainly, it did have an impact on the use of photography (although not on the technology). This case demonstrates that, even in the absence of a civil code rule, the civil law judge was able to determine that the new technology had facilitated the infringement of a heretofore unarticulated individual right.

The second French example is that of no-fault liability. The French Civil Code and French legal doctrine were based on the assumption that fault is the moral base of negligence and legal liability. Therefore, plaintiffs had the burden of proving fault as an element of their claim. In an age of increasingly dangerous industrial equipment, this strict requirement to prove fault wrought evident injustice for victims of industrial accidents (evident, importantly, to judges).

In 1896, the Court of Cassation, invoking Article 1384 of the French Code Civil, held the owners liable for injuries caused by the explosion of a steam engine. The relevant Article had hardly ever been invoked previously; it simply held that a person was responsible for harm caused by objects within their control, but it otherwise appeared to fit within the general negligence regime. However, the French court stated that Article 1384 raises a presumption of fault (*presomption de faute*), which results in shifting the burden of proof (*renversement de la charge de la preuve*) onto the defendant to show that the accident was the result of an uncontrollable event.[2]

This was sheer legal interpretation; applying a new reading to pre-existing statute. The court did not make explicit reference to socio-economic or technological change, although the power of new industrial machinery certainly drove this legal innovation. Rather, the court relied on a relatively open text within the civil code. As Saleilles mentioned in regard to a similar shift in interpretation regarding railway passengers: '*au dela du code civil, mais par le Code civil*'.[3]

The French courts, however, did not apply this innovative legal interpretation to automobile accidents until many decades later. Why? Perhaps out of fear of stifling a nascent industry. More importantly, in the early days, only the wealthy drove automobiles. The courts, despite increasing public frustration with the costs of these dangerous vehicles, refrained from imposing stricter liability on

1 Elizabeth Logeais and Jean-Baptise Schroeder, 'The French right of image: an ambiguous concept protecting the human persona' (1998) 18 *Loyola of Los Angeles Entertainment Law Review* 511, 514 citing T. P. I. Seine (16 June 1858), DPI II 1858, 52.

2 Francis Deak, 'Automobile accidents: a comparative study of the law of liability in Europe' (1931) *University of Pennsylvania Law Review* 271, 274–78.

3 John H. Tucker, Jr, 'Au-Dela du Code Civil, mais par le Code Civil' (1974) 34 *Louisiana Law Review* 957, 957 citing R. Saleilles, *Preface to Gény: Méthode d'Interprétation et Sources en Droit Privé Positive* (1st edn, Paris 1899).

accidents caused by this privileged social class. This stance did not shift until after the First World War.[4]

In the Anglo-American context, the strict liability regime also developed through judicial response to changing technology during the industrial revolution. The United States applied traditionally stringent fault requirements in industrial accidents, justified perhaps by a need to foster growth and encourage entrepreneurial industry. In some cases, however, this default began to erode during the latter part of the nineteenth century. Although there was a pro-industry presumption in legislation and traditional tort rules, as judges perceived the increased dangers of (then) modern technology, and the subsequent injustices created by outdated law in individual cases, they expanded the concept of strict liability into areas that had previously been governed exclusively by a negligence regime.[5] As Lawrence Friedman wrote in reference to this time of legal and industrial change:

> A general pattern may be discerned which is common to the judicial history of many rules of law. The courts enunciate a rule, intending to 'solve' a social problem—that is, they seek to lay down a stable and clear-cut principle by which men can govern their conduct or, alternatively, by which the legal system can govern men. If the rule comports with some kind of social consensus, it will in fact work a solution—that is, it will go unchallenged, or, if challenged, will prevail. Challenges will not usually continue, since the small chance of overturning the rule is not worth the cost of litigation. If, however, the rule is weakened—if courts engraft exceptions to it, for example—then fresh challenges probing new weaknesses will be encouraged.[6]

In the era that Friedman describes, judges increasingly carved out exceptions to the fault rule – conforming to social fairness, rather than strict legal requirement – and, over time, these exceptions eroded the overarching legal frame.

In 1928, Justice Brandeis provided the classic American case for judicial framing in the face of new uses of technology. His dissent in *United States v Olmstead* argued for expanding Fourth Amendment search and seizure protections to telephone wiretapping. The majority held that because listening to a private telephone conversation did not require a physical search or entry into a person's private space, the Fourth Amendment warrant requirements did not apply. Brandeis argued that extending the meaning of the search and seizure protection was warranted, given the changing technology:

4 Francis Deak, 'Automobile accidents: a comparative study of the law of liability in Europe' (n 2) 271, 281–82.

5 See Gary T. Schwartz, 'Tort law and the economy in nineteenth-century America: a reinterpretation' (1981) 90 *Yale Law Journal* 1717.

6 Lawrence M. Friedman and Jack Ladinsky, 'Social change and the law of industrial accidents' (1967) 67 *Columbia Law Review* 50, 59.

> [T]his court has repeatedly sustained the exercise of power by Congress, under various clauses of that instrument, over objects of which the fathers could not have dreamed . . . We have likewise held that general limitations on the powers of government, like those embodied in the due process clauses of the Fifth and Fourteenth Amendments, do not forbid the United States or the states from meeting modern conditions by regulations which 'a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. . . . *Clauses guaranteeing to the individual protection against specific abuses of power, must have a similar capacity of adaptation to a changing world.*[7]

1.3 Framing and the power of metaphors

So what do courts do when they are confronted with a new technology that generates socially contested situations, in particular alleged fundamental rights violations? Compared to the strict liability example, here the stakes are raised. The arguments are elevated to the realm of fundamental and human rights on both sides (users of the technology and its victims). In the fundamental rights context, courts have recourse to constitutional, open text. All things considered, the technology-generated problem will be translated into the traditional legal dilemma of right and non-right: the way it is translated will to some extent determine the answer. For example, if the resulting rights restriction is disproportionate in view of the interest served, it will not be constitutional.

Translation of a technology and its consequences into the legal frame is not automatic. This is particularly evident when the social and normative consequences of the technology are successfully presented as new. Newness in this context means dissatisfaction with the outcomes attributed to existing rules. The mechanism of reframing has two parts: first, one must challenge the existing model by showing the newness of the phenomenon and, second, the phenomena must be fitted into a new frame, which solves the novel problem.

Recognition both of the technology's newness and of the applicable law rely on the same set of techniques for framing. A 'frame' is a cognitive structure designed to facilitate understanding. Reasoning through metaphor enables us to move from a familiar prototype to a new context. When a frame is successful, it allows individuals to use certain words and concepts to evoke other values or concepts: for example, certain ways of describing the internet may evoke a 'privacy' frame, or in others a 'liberty' frame. To refer to George Lakoff's famous study, prototypes and conceptual metaphors are decisive. The metaphor allows for a specific legal move: analogy to existing law. As Lakoff described: 'Abstract thought requires metaphor; almost all abstract thought is metaphorically based on concrete, sensory-motor concepts.'[8] Cognitive scientists over the last several

7 *Olmstead v United States* 277 US 438, 472 (1928) (Brandeis J dissenting, emphasis added).

8 George Lakoff, 'A cognitive scientist looks at *Daubert*' (2005) 95 *American Journal of Public Health* S114, S115.

decades have developed increasingly rich understandings of how 'mostly unconscious correlations in our experience could be the basis for primary conceptual metaphors, which are then combined into complex metaphors'.[9] These studies employ the 'influential approach [of interaction theory, which] has a number of distinguishing features . . . most notable for its assertion that our everyday concepts are structured and molded by a series of cognitive metaphors that all human beings share'.[10]

This is certainly a crucial element in the judicial process of translating something new into the language of past legal models. Judicial framing, as such, is nothing special. It presents the socially constructed shape of judicial reasoning. The new technology may generate decisional uncertainty, in which case framing is uncertain. The applicable constitutional rights and norms are often deliberately vague. So, too, the meaning and implications of a new technology may not be transparent to the judge. As Richard Posner observed: 'The application of a rule to facts is problematic when the facts are incurably uncertain.'[11]

Similarly, with regard to relevant values, one computer scientist-turned-lawyer observed:

> In technology law, the statutes and the technologies are brand new and filled with ambiguity . . . Statutes regulating these ambiguously-specified technologies are passed by technically inexperienced lawmakers, with technical guidance drawn from biased industry representatives, on the one side, and equally biased public interest groups, on the other . . . [Judges] apply the (still largely unlitigated) legal doctrine to the (brand new) facts of a case at hand. This increased judicial flexibility does not necessarily create room for framing . . . however, no one can [be] fully objective and neutral.[12]

In the case of emerging technology, not only is the meaning (and applicability) of a constitutional right uncertain, but even the argument of newness is contested. As Monroe Price so eloquently pointed out, the battle concerning framing starts, or may start, with a battle concerning the newness of technology.[13] If the technology is not so new, or if the consequences are not so new, there is little reason to change existing frames, although there may still be choice among existing frames. For example, even when the technology itself is not new, there may be diverse perspectives on its social consequences. If the technology is new in some important way, then judges may seek new metaphors and analogies to make sense of the change.

9 Mark L. Johnson, 'Mind, metaphor, law' (2007) 58 *Mercer Law Review* 845, 861.

10 Dan Hunter, 'Cyberspace as place and the tragedy of the digital anticommons' (2003) 91 *California Law Review* 439, 469.

11 Richard Posner, *How Judges Think* (Harvard University Press 2008) 176.

12 Chris Riley, 'The rite of rhetoric: cognitive framing in technology law' (2009) 9 *Nevada Law Journal* 495, 504.

13 Monroe E. Price, 'The newness of new technology' (2001) 22 *Cardozo Law Review* 1885, 1889.