

THE NATURE OF THE INTERNET: LAW AND ETHICS FOR THE INFORMATION SOCIETY

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ABSTRACT

This work is aimed to contribute to the definition of the most adequate public actions –policies and laws- that are required to achieve an inclusive Information Society. It seems that such policies should be meant to grant full use of ICTs, but, whereas in developed societies these regulations should be enough, in the underdeveloped ones, the Information Society can only be discussed after the spreading of the ICTs, and this depends on the accuracy of policies aimed at impelling their diffusion. Considering that the Internet is a public good, we evaluate how the universal access to the net should be granted. Then, we analyze the more adequate legal policies for ICT, the Internet and the Information Society. We sum up that, in order to achieve an inclusive Information Society, the universal rights of access to and benefit of Internet for developing countries should be established at an international level.

KEYWORDS

Legal policy, Public goods, Global goods, Universal access, Public service, Universal service

1. INTRODUCTION

Our present project¹ is devoted to the study of the legal frame of the Information Society and the impact of Information and Communication Technologies –ICT- in Small and Medium Enterprises –SME- in developing countries. The impact is measured using complex systems tools.

In the legal area the study is aimed to contribute to the definition of the most adequate public actions – policies and laws- that are required to achieve an inclusive Information Society. One of the key issues on this subject is how to guarantee a fair access to internet in developing countries. In order to answer this question we will focus on the ethical justification of ICT and Information Society Policies, taking into account the nature of internet as a global public good.

In the field of the ICTs, we restrict our work to the Internet since the existing different information infrastructures are all merging into it -‘network of networks’, driven by ICT-convergence [Hilbert–Katz].

2. ABOUT POLICIES AND THE NEED OF THEM

¹ “Las PyMES entre las TICs y el Derecho” (SME between ICT and Law) –SPU/PI 11 J 072-. Also “Marco jurídico, complejidad de la información y cuantificación del impacto en el uso de TICs” (Legal frame, information complexity and quantification of the impact of ICT in SME) -UNLP BID 1478/OC-AR – PICT N ° 2-13533- sponsored by the Inter-American Development Bank.-

Despite the romanticized descriptions given in the early days of the Internet, the cyberspace shows a feudal character that emerges from the hierarchical privatization of its government associated with the granting of Internet domains. The hierarchical distribution of cyberfiefs means that, as in feudal society, every interest in cyberland is held from a superior computer operator who functions as lord over vassal or serf. Cyberlords exercise, therefore, the power of states as an incident of private property. Additionally, the Internet's government, like that of a feudal society, is highly fragmented [Yen]. Whether this frightening scenario shall increase or improve is fully on law and policy makers' hands.

Most literature regarding the troublesome relationship between ICT and society points out that, in order to overcome the different problems it involves, certain policies are required. Being true, such a statement entirely lacks accuracy. Is it that the policies required are policies for ICT? Or should they rather be policies for the Information Society?

2.1. Policies for ICT and the Information Society: ethical justification

Which is the outcome of 'Policies for ICT' supposed to be? It seems that such policies should be meant to grant full use of these technologies by means of ruling their production, acquisition and use. Within developed societies, these regulations should be enough, and they certainly are. In the underdeveloped ones, on the other hand, the Information Society can only be discussed after the spreading of the ICTs, and this depends on the accuracy of policies aimed at impelling their diffusion.

In most countries, and since the early days of the Internet, the actions of policymakers in this area have been focused in granting the universal access to the net. This universal access has been described as "a basic necessity, if not a right", even though it seems to have been considered a low intensity right, since "Universal access can be further refined to mean that one member of every family anywhere has access to the Web for at least a short period every day or every week" [Ashfaq].

We do agree that the universal access must be considered as a universal basic need. But we do not agree with a weak definition of need and a low intensity right. At this point, it is important to analyze briefly what does 'basic needs' mean here. According to Doyal, the meaning of 'universal needs' is that the harm caused by the absence of certain goods is the same for every human being. Basic needs are universalizable preconditions that allow the active participation of individual in the life style that they would choose if they had the opportunity to do so. In order for people to act and be responsible, they must have a certain physical and mental capability to do so. Thus, personal autonomy is a precondition for individuals' action, independently of the culture to which they belong. To be autonomous in this minimal sense is to have the ability to make informed choices about what should be done and how to go about doing it. For critical autonomy to be a real possibility, individuals must have the opportunity to express both freedom of agency and political freedom [Doyal]. This is due to the fact that when we examine the notion of harm, we see that it commits us to the satisfaction of those goods that an individual needs so as not to be harmed, whether they are a primary product or not. It is also possible to consider harm as an obstacle to exercise a capacity and to its adequate function. But, what kind of good is the Internet?

2.2. The nature of the Internet: a public good

Internet is a public good, and the specification of this kind of good will not depend on the relative needs, individual preferences or market. If we accept a relative concept of needs we would allow them to be determined by market preferences, as well as by asymmetric relationships between private companies and the subject-object of the agreements. If we support an impartial allocation criterion of universal justice, we guarantee universal access to this benefit in order to satisfy basic needs –absolute needs-. This does not imply restricting priorities allocation criteria for communities, "While the basic individual needs and autonomy are universal, many goods and services required to satisfy these needs are culturally variable" [Doyal]

How could universal access to the net be granted? Such a guarantee can only lay on a strong and courageous definition. As we have mentioned before, the Internet is a public and not a private good. If information and knowledge are considered public goods –this is, the kind of goods that are available to everybody to benefit from them-, then the Internet is a public good.

Now, if we analyze the problem in terms of the Information Society, particularly in an inclusive Information Society, then the Internet should be considered a global public good. Global public goods are goods that exhibit a significant degree of public character (non-excludability and non-rivalry) across natural boundaries. Knowledge is commonly regarded as the archetypical public good. It is available to everyone to benefit from it and one person benefiting from it does not prevent another one from benefiting too. (Note that there is a wide range of "impure public goods", for example where technology can introduce excludability such as encryption of two broadcast signals). A more technical definition of global public goods is, therefore, that they are the kind of goods "which it is rational, from the perspective of a group of nations collectively, to produce for universal consumption, and for which it is irrational to exclude an individual nation from its consumption, irrespective of whether that nation contributes to its financing" [Woodward-Smith]

2.2.1. The access to the Internet

Coming back to the problem of the equal access to the Internet, at the present moment there is a great inequality between rich and poor countries as regards the direction and priorities of the distribution and access to the Internet services. Justice considerations commit us to allocate benefit according to needs. People in a given society have a basic right to equal opportunity, and access to knowledge and services plays an important role in sustaining that equality [Rawls]. Scientific and educative services are different from other commodities. Future societies will be based on knowledge; therefore, research efforts should promote universal access to it -including developing countries-. All citizens share a common interest for a prudent use of patents and the commercialization of products; in view of the high cost of technology and the difficulty to allocate all benefits on an equal basis, our duty is to use an allocation criterion that will not discriminate in terms of irrelevant moral reasons -such as gender, race, social conditions, etc- , i.e., a criterion that allows us to distribute the benefit in an impartial way, aiming at "equality of opportunities".

One suggested distributive criterion is the difference principle of Rawls, but it proves to have several problems; likewise, considering the access to Internet and computers in developing countries a low intensity right is not enough. In order to understand this ideal criterion introduced by Rawls, we must accept that inequalities will only be tolerated to the extent that they benefit the least well-off through leading to the provision of those goods and services that are necessary for the optimization of basic needs satisfaction. In other words, it implies compensating in favor of the "worst off group" because there are moral obligations to compensate for natural and social disadvantages. Now the problem is how should "worst off group" (natural, social) be defined, and of course, how to balance between efficiency and equality if we only benefit the "worst off group". We do not have a real criterion for distribution in an underdeveloped country, since this criterion supposed a democratic and moderate scarce society.

In our opinion, the criterion of justice must be based on the universal obligation to satisfy basic and absolute needs for the development of basic capabilities. In order to balance inequalities and allow a fair equality of opportunities, the mere guarantee of the equal access to the computers and bonus for Internet is not enough. To have access both to the computer, to the know-how and to the knowledge as well as to be able to develop equal capabilities to contribute to a balance in an integral context (access to education, health care, etc) is a requirement. Therefore, moral obligations are not only applied to individuals, but also to Institutions and/or Organizations. "The right is not effectual by itself but only in relation to the obligation" [O'Neill] According to Onora O'Neill, the moral imperative is applied to Institutions because these have moral obligations and duties towards individuals whose moral and legal rights are infringed by denying them access to service or not satisfying their universal basic needs.

2.3. Legal policies for ICT, the Internet and the Information Society

The discussion about legal policies must be carried along different channels, depending on the level of development of a given country or organization. In most developed countries and among the mayor corporations it takes place in the field of Intellectual Property. They argue about patents and licenses, if software patents are a useful way to protect software or copyright protection is sufficient, if government should use proprietary software or open source software, and so on. They are talking about how to manage, administer and appropriate the benefits of their technological knowledge.

In most underdeveloped countries, on the other hand, law's concern seems to be restricted to the regulation of communications –an area where many of those mayor corporations are much concerned- and, in some of them, the legal tools e-business demands, like e-signature. Whether to use open source software in the public sector or not, for instance, seems to be a problem for scarce civil servants and scientists in a few of these countries –i.e. Brazil [ALADI]-. No firm, especially small and medium-sized enterprises, is likely to be found developing open source software; they cannot afford the costs involved in it, not only in the software itself, but also in the employees training.

Everybody is concerned about privacy and security in the net but, once more, the extension and depth of those rights is different for developed and developing societies.

Therefore, there is not 'a' legal policy for ICT, the Internet and the Information Society, but as many different policies as diverse socio-economic scenarios; moreover being the socio-economic scenarios equal, the different legal systems in one and the other might drive to different policies.

2.3.1. Where to?

Actors within the legal system should be thinking in a revolution. In fact, it has been stated that the Information Society shall only be possible after a juridical revolution [Olivera-Proto]. But, in the meantime something must be done. Electronic invoice, e signature, e document, e copy are tools used by those that are already 'in' the Information Society. Likewise Intellectual Property, it is mainly a problem for people that are, not only 'in', but impelling the technological development in the Information Society.

When the time of decisions about these legal policies comes –and it is now-, policy and law makers shall have to decide if they are going either to protect the rights of those that are already in the Information Society and, on doing so, deepen the digital divide or to work for an inclusive Information Society, shaping a legal frame that allows easy and legally useful interaction among social actors.

Action demands the implementation of specific requirements. "Transitions from more abstract to more determinate act descriptions are crucial for any process of practical deliberation" [O'Neill]. Bridging the technology gap and the digital divide claims for a change in the rules of the game -rules imposed by the market model by means of deception and coercion-. The theory of obligation focuses on action, and this action is the moral obligation of agents and Institutions [O'Neill]. If we intend to claim for a Multidisciplinary Agenda, with priorities of action, we need to perform them as positive actions, controlling their fulfillment and impact on equal opportunities. Summing up, "the only way of integrating positive and negative freedom will be through the optimal satisfaction of basic needs. This is why moral right must be translated into constitutional rights guaranteed by public authority [Doyal]".

2.3.2. In the field of Public Law

By now, the time when the Western Frontier metaphor operated as propaganda supporting minimal regulation of the Internet [Yen] looks too far away and long ago. The very few documents that face the legal aspects involved in the relationship between ICTs and firms are likely to analyze the regulatory frameworks. This is, from the field of public law, it is neither the general interest, nor the interest of the "worst off group", but the rights of the Internet Services Providers (ISP) that are being protected. The Feudal Society metaphor, on the other hand, forecasts a very complicated future for the denizens of a cyberspace dominated by unregulated private ordering. The Feudal Society metaphor shows that ISPs will try to create, maintain, and exploit barriers to user exit because those barriers increase the value of cyberfiefs [Yen].

In order to shape a coherent legal policy for the Information Society, it should be decided if the Internet might be included among either the 'public services' or the services 'in the public interest', or if it is a "universal service". If it cannot be included in any of these categories, then it is a private service; therefore the Internet should not be regulated at all.

As a result of the precedent theoretical and conceptual analysis, we consider that the universal rights of access to and benefit of Internet for developing countries should be established at an international level. An international treaty, resulting from a deliberative and democratic process -that would, for instance, take place at the World Summit for the Information Society (WSIS)-, would guarantee fair access and transfer of technology, as well as preventing ethical and legal consequences of information's misuse. If the access to knowledge is in danger because of the private sector's lack of responsibility, an international organization -through treaties and agreements signed by the states- should apply universal and effective rules for the control and balance between the growing commercial interest, and the shared human interest of environment,

as well as the social and economic concern of developing countries. Such a treaty should not imply interference with sovereignty or with the right of each and all countries to establish their own law and their own development priorities, as it is currently the case; it will contribute to harmonize the access to a common and public good on the basis of universal principles that have been historically accepted by all countries (such as they were in TRIPS, OMC, TLC, Cartagena Protocol).

3. CONCLUSION

As it regards the Internet and the Information Society, we are presenting the conflict between the market model (Internet as a private good) and a universal and equality model (Internet as a public good), making it clear that there are moral obligations to change the rules of the game in favor of an equal model for the humanity.

Therefore, we are all in a pivotal moment. We have the moral universal obligation to exclude the slavery of the new world; to recognize the right of each human being to be recognized as a 'goal in himself', to satisfy universal basic needs, to participate in and give consent to the creation of social and universal laws. All of these are human rights that are being infringed by denying the persons' autonomy for the benefit of the market. The growing vulnerability of human beings is a consequence of allowing market interest to invade areas that do not belong to the market model, i.e. moral, social, public policy, law and, above all, human life.

The impartial allocation criterion commits us to focus on universal needs because the non satisfaction of basic needs implies a harm due to not having access to the common goods. In that sense, developing countries have the right to be active members of an inclusive Information Society, to have access to the knowledge, technology and products obtained from the use of Internet. If we do not allow them access to such benefits, we are causing serious damage to people in developing countries, deepening the inequalities by the creation of new inequalities.

At this point it is important to understand that to guarantee access to knowledge and technology is an obligation, and that an inclusive and integrated Information Society demands its legal frame to be shaped by general rules –laws- based on ethics.

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