

Outline of the Ph.D. Project

Title (provisional): The human rights framework in the context of cyberspace under European Union law

The research question and the objective of the project: What human rights are recognized in cyberspace? How are they protected under European Union law?

The main goal of this research is to define a complete human rights framework which could be relevant in the context of cyberspace, therefore to analyze the ways in which these kind of rights are enforced and protected under European Union law. Furthermore, my thesis would like to underline any deficit of the European legislation in this respect, thus proposing any improvements in order to guarantee an effective enforcement of the human rights framework in the context of cyberspace.

Overview

The first part of the thesis aims to address a preliminary issue, namely what really is cyberspace and how this new ‘environment’ can be defined. Furthermore, in order to evaluate the actual human rights enforcement in this context, it is necessary to answer a very important question: what rules should govern cyberspace?

In other words, the thesis intends to analyze the topic of cyber governance, with the purpose of individuate what entities are able to establish their rules over this new domain.

The second introduces the several human rights relevant into the cyberspace, proposing also a complete analysis of each one of them, in order to evaluate their effectiveness and enforcement.

Chapter 1 Cyberspace as a new domain

Chapter 1 provides a description of the development and evolution of the concept of cyberspace, pointing out the differences between the Internet and the World Wide Web. The first one can be briefly defined as the technological and instrumental basis on which a network of interlinked devices (computers, smartphones, etc.) is posed, while the Web is a sort of ‘net’ of websites and hypertexts made available using an internet connection. The preminent feature of the World Wide Web is its decentralized nature; there is not a ‘central computer’ which controls and rules over it. Considering so, the Web reveals to be extremely dynamic, and consequently it is not possible to have a complete idea of every topic and connection available because they change in a constant and continuous manner. Due to its nature, the Web is where every user can experience cyberspace, which literally means “navigable space” and it consists in every communicating space opened by an Internet connection.

As mentioned before, this project intends to analyze how the concept of governance could be applied in the cyberspace domain. From the internet's origins till now, the idea of cyber sovereignty has radically changed from the conception of cyberspace as an independent 'realm', outside the control of every States, to a domain where there are not political borders, but where normative power is now entitled also to the States and the international community. The issue of cyber governance raises several regulatory questions directly related to the growing possibilities of communications offered by the Internet evolution. In conclusion, the thesis will argue how a coordinated regulatory approach from the different stakeholders of the cyberspace would guarantee an effective enforcement of human rights in this new domain.

Chapter 2 Free Access to a neutral Internet: a new human right?

Nowadays, the Internet is an essential instrument for daily life purposes, and it is also necessary for the proper enjoyment of a series of rights, including the right to access knowledge and to share information and data. Stating so, every individual should have the possibility to get connected to the Internet at affordable conditions; consequently, every regulatory measure concerning the Web should be consistent with basic rights and liberties of human beings.

Chapter 2 introduces the concept of free access to Internet as a new human right, pointing out pros and cons of this idea. The thesis aims to analyze the several 'soft law' instruments released by different States and International Organizations addressing this right.

In addition to that, the right to have a free access to Internet is strictly related to the concept of net neutrality. Internet users, in order to freely enjoy their navigation through cyberspace, should not be blocked or disadvantaged due to the practices and actions by their Internet Services Providers. Considering this, chapter 2 provides also a brief study of net neutrality and its evolution, evaluating the most recent legislation which regulates this topic. The main goal of this study is to try and find a balance between the right to have an access to a neutral Web and the right of ISPs to operate on the market freely.

Chapter 3 Privacy in cyberspace: from "ius excludendi alios" to data autonomy

Chapter 3 presents the evolution of the concept of privacy from its origin, defined by Warren and Brandeis in their paper, till now; from a right to be let alone to the right of every individual to be adequately informed about the way in which their personal data and information are used and shared.

The right to privacy must therefore be understood as the right to 'information autonomy'; i.e. being aware how your personal data are shared and to influence their use. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access the data which has been collected concerning him or her, and the right to have it rectified.

The right to privacy is enshrined in artt.7 and 8 of the EU Charter for Fundamental Rights. Article 16 TFEU recognizes that everyone has the right to the protection of personal data concerning him or herself and prescribes the European Union to act in that way.

This chapter outlines how the protection of these fundamental rights should be based on the following notions: these rights are applicable in all situations, the Court of Justice's scrutiny of the European Union is strict, and the application in horizontal situations between private parties

acquires a new dimension on the Internet, including a duty for the European Union to ensure protection. Chapter 3 also provides a brief analysis of the European legal framework of privacy, including GDPR.

Chapter 4 Freedom of expression in cyberspace: a free speech in a free land?

Article 10 of the European Convention on Human Rights (ECHR) establishes the fundamental right to freedom of expression. Generally inspired by Article 19 of the International Covenant on Civil and Political Rights, the formulation of the rule contained in the ECHR establishes a common general protection which is essentially in line with the different constitutional traditions within Europe. The communication environment in which this right should be enforced radically changed over the last few years; the increasing emergence and abundance of a diverse number and variety of media, beyond the press, led to a sort of ‘massification’ of communication, namely a small number of powerful message issuers had the privileged capacity of shaping the conditions of formation of public opinion. Although this system is still prevailing, chapter 4 analyzes how the paradigm of ‘vertical information’ is gradually disappearing. Cyberspace is characterized by horizontal communication nodes, which engage in the global exchange of content without the intervention of traditional media intermediaries. This chapter, in order to provide a complete analysis of the right of freedom of expression in the context of cyberspace, studies the most relevant ECJ and European Court of Human Rights rulings in this regard.

Chapter 5 Cyberspace Jurisdiction: personality rights infringement and Bruxelles I bis

Under European law, the international jurisdiction of the courts to hear disputes arising from any infringement of the rights relating to personality, including, of course, those occurred on the Internet, is set by the so called Brussels I bis regulation of 12 December 2012. In judicial proceedings derived from the infringement of the personality rights on the Internet the courts of the Member State in which the defendant is domiciled (Art. 4 and recital [16] Bruxelles I bis) will have jurisdiction to hear the case. The courts of the Member State in which the defendant is domiciled have international jurisdiction to settle any disputes with regard to the “whole tort” that has been suffered by the alleged victim, i.e., all legal claims for damage worldwide (ECJ, 7 March 1995, Shevill). This ground of international jurisdiction appears to be not fully adapted/adequate in the case of damage to the rights relating to personality on the Internet, for several reasons. Firstly, the victim is not aware of the place from which the person who is allegedly liable may have acted. In such cases, this ground of jurisdiction cannot be activated. Secondly, in the cases of libel on the Internet, the supposed tortfeasor may use a pseudonym, a false name, or simply it can be impossible to identify him. In this event too, this ground of jurisdiction cannot operate. Thirdly, this ground of international jurisdiction is hardly suitable for the exercise of the right of reply when the Internet server where the website containing the allegedly defamatory information is located is in a country other than the State of the defendant’s domicile. Fourthly, for the plaintiff, i.e. the alleged victim of a violation of rights relating to personality, litigation in the Member State where the defendant is domiciled turns out to be a very expensive jurisdictional option. The plaintiff should make a ‘jurisdictional trip’ to the country of the defendant’s domicile and file a suit there. Litigating in that country implies lower jurisdictional costs for the defendant than for the plaintiff. In terms of judicial efficiency, this ground of international jurisdiction is inefficient, as it implies higher costs to the

victim than to the alleged wrongdoer. Considering so, chapter 5 evaluates if the place of the harmful event as a ground of international jurisdiction could be the right solution in order to avoid the abovementioned problems.

Chapter 6 Applicable law in cyberspace: conflict of laws and obligations derived from the violations of rights relating to personality on the internet

In the European Union, the applicable law to non-contractual obligations is determined in accordance with the conflict rules codified by Regulation Rome II. Nevertheless, although the violation of the rights relating to personality gives rise to non-contractual obligations, Regulation Rome II is not applicable to these cases. Such exclusion is due to the fact that the Member States did not reach a satisfactory agreement on the law that should be applied to the civil liability derived from damage to personality rights. Due to the lack of a uniform European conflict rule in the Rome II Regulation, at present, the law applicable to the liability derived from the violation of personality rights on the Internet as well as on other media must be determined in accordance with the national conflict rules of each Member State. Considering that, the need of a uniform framework is undoubtable. The design of a new conflict rule that determines the law applicable to rights relating to personality and their violation requires bearing in mind the superior legal values of private international law, and, at the same time, the specific details of the particular case. Thus, a future European conflict rule must fit perfectly well with such superior European legal values. Such values are, fundamentally, the following: (a) the preference for a conflict rule and not a material rule; (b) the fight against Forum Shopping through a uniform conflict rule; (c) the enhancement of free movement of people, companies and productive factors in the European Union. Chapter 6 addresses this issue with the purpose of analyzing the different theoretical possibilities in order to individuate a uniform legal framework. This chapter also provides a study of the relevant issues of conflict of laws in contractual obligations, paying particular attention to the protection given to the weaker party.