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State – Regulation – Media

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1. Fresh Thinking and the Internet

Government actors in many countries attempted to react to the Internet using conventional means of the state apparatus, like passing laws in parliament or having courts judge over access to unlawful content. In most cases this proved to be fruitless; in fact it demonstrated the weakness of the traditional nation state in attempts to regulate the Internet. Just to give a few examples: since 1997 there has been a law on digital signature (the oldest in the world) in Germany, but after seven years there is still no practical way to sign a contract on the Net. In several countries, courts have attempted to punish Internet Service Providers (ISP), which allowed access to hate speech or child pornography for example, usually without any success. True, there are governments like Singapore or China that censor content on the Net, but the effect is limited as the fluidity of the Net often means that filtering programs can be circumvented.

This paper is about the obvious weakness of the traditional nation state and its instruments *vis-à-vis* the Internet and new ways of coping with the problem. It is often the State itself that encourages unconventional action as this releases it from the difficulties in fulfilling its obligations. A Council of Europe Recommendation of 5 September 2001 encourages self-regulatory organizations, especially in the field of media regulation. Innovative concepts of regulation and governance are being tested and decision-making procedures in a global environment are being addressed. This requires new ways of thinking:

- Firstly, it is necessary to assess existing concepts of regulation and governance (from pre-Internet times) and consider how they may be applied in the Internet age.
- Secondly, recent and encouraging developments can be observed that might lead to a new era of global Internet governance.

Finally, ten rules of Good Internet Governance will be proposed that define trends and values for the emerging structure of global Internet regulation.

2. State Regulation and Self-Regulation

Regulation in the original sense refers to an arbitrary process under the rule of the State, usually centred in a (more or less) independent regulatory body. This body makes decisions in situations where there are conflicting interests. The idea is that decision-making is so complex that a specialized body of independent experts is better equipped to do this than state bureaucrats. The term "regulation" is already mentioned in the US Constitution, dating back to the late eighteenth century. Regulatory bodies are also not new. The first "watchdog agencies" were established in the US in the second half of the nineteenth century for the private railroad industry.

One field that is regulated by the State is broadcasting. More precisely, this means that the State issues radio and television licences and supervises the industry. Again this first emerged in the US in the 1930s (FCC 1934) in the context of commercial broadcasting. Europe did not experiment with regulatory bodies until the 1980s. Today examples of these are Ofcom that was recently established in Britain, the Conseil Supérieur de l'Audiovisuel Français in France or equivalent bodies in the German Länder or States. Bodies of this type are usually constructed like a court, with collective decision-making somehow reflecting the work of a "jury". They have to handle applications from different interests and may also adjudicate between the interests of the broadcasting industry and the public. Their main task is to hammer out a lasting compromise, not to decide what is legal or unlawful. One obvious problem is that these authorities are potentially weak and vulnerable to being "taken over" by the industries that (mis)use them for their own interests, for example to keep newcomers away from the market or to increase tariffs (e.g. for cable fees).

As matters of broadcasting regulation tend to be very complex, these bodies are soon overloaded with work and usually encourage self-regulation of the industry. This means that the actors are urged to solve problems among themselves, before turning to the state regulator. As it usually reflects the interests of the industry to keep the State out of its affairs, it accepts this obligation. Therefore state regulation is usually accompanied by self-regulation. This type of self-regulation is done under the "shadow of the State", meaning that all sides act under the threat that the State may intervene if no compromise is found or public interests are seriously threatened.

If the State and the private regulators co-operate in joint institutions, this is called "co-regulation". If this type of self-regulation is structured by the State

but the State is not involved the appropriate term is "regulated self-regulation" (Hoffmann-Riem 2001). This type of regulation was first developed in Australia.

But self-regulation may also be found where there is no state regulation. Again this started in the US with industry associations that defined a code of conduct. And only those who adhered to these self-defined moral rules were entitled to become members. Whoever did not follow the rules voluntarily, could not be formally punished, but there were sanctions like being excluded from the association and/or making public the accusations. The first organizations that followed these procedures were associations of newspaper publishers and editors in the 1920s.

The best known field for this type of self-regulation in Europe are the press councils that may be found in a majority of EU member countries today (Leonardi 2004). The press council movement started in the 1950s in Britain and later in Germany. The first step was usually taken by the State, which planned to intervene in the matters of the industry with a law. The press industry retaliated by offering to build an autonomous structure for complaints that would be handled before independent bodies, constituted and financed by them. Decisions are made based on a Code of Ethics for Journalists that is then applied to individual complaints. In a similar way to a court, the case is considered by a jury. However, this jury consists of representatives from the industry, possibly of active journalists and media professionals and perhaps also laypeople. They consider the case together and issue a ruling that is made public. If a publication is being criticized, it is expected to publish the criticism, but it cannot be sanctioned if it does not.

The advantage of this type of self-regulation is that representatives from the profession and not regular judges pass judgement on complicated matters of journalistic reporting and decide what is acceptable and what crosses the borderlines. This adheres to the idea of a peer review. Most European countries have press councils although these differ very much in the way they work. Even though press councils usually date back to pre-Internet times, they have extended their activities and are today responsible for online publications as long as they are of a journalistic nature. There are other fields of pre-Internet self-regulation, the most prominent being the classification of films and movies, which is mandatory in most European States (Oxford University 2004a: 57–60).

Both variations of regulation – by the State and by the industry itself – are

highly relevant for the development of Internet regulations. Practically all European regulatory bodies in broadcasting started with a limited range of activities. But with the convergence of broadcasting, telecommunications and information technology, they have to widen their regulatory responsibilities or merge with institutions that regulate telecommunications. The American Federal Communications Commission (FCC), founded in 1934, was always responsible for all communication sectors. As a result it only had to co-ordinate and merge its internal handlings. In Britain, OfCom was established in 2004 incorporating the work of several agencies that had been performed independently before. In other countries, like Germany, the convergence of regulatory structures has not even started. It remains to be seen to what extent the logic of "old" regulatory action will be able to cope with the Internet.

A new field of industry self-regulation has emerged in relation to the Internet. This is based on codes of practice that regulate issues like respect for privacy, public decency, protection of minors, accuracy or the application of filtering software. An important part is played here by Internet Service Providers (ISP) and their respective industry associations. A recent study identified self-regulatory activities in most EU countries although there were considerable differences between them. The study comes to the general conclusion that the "most successful self-regulatory activity has taken place where there is a key legal basis; e.g. in relation to complaints about illegal content." (University of Oxford 2004: 2) Regulation was less successful when public policy objectives are not clear or consensus is difficult to build. Often the codes of practice are little known and insufficient transparency and accountability in the process of code production and application were mentioned. Other fields of self-regulation in the field of Internet and digital media include Internet content, the electronic game industry and mobile Internet services (Oxford University 2004a: 37–57,61–70).

The distinctive feature of these regulations is that they were removed from traditional state bureaucracy, which was unable to handle the details of Internet communication. Problems arise when bodies are taken over by private interests. Regulation and self-regulation in Europe reflect the thinking of a corporate age in which co-operation between industry and professional associations, rather than the State, is seen as a move away from "big government".

These "old" procedures of regulation were devised at a time when citizens and the civil society were not yet seen as autonomous actors with

independent competence and expertise. Therefore there are no representatives of non-governmental organizations (NGOs) or citizen action groups. As a consequence, regulation was left to the experts, mostly in the industry but sometimes in co-operation with professional organizations. Laypeople are rarely involved. The one exception is the traditional idea of the “ombudsman”, a well-accepted person who represents the interests of “ordinary” people. The lack of citizens’ representation certainly has to do with the fact that the civil society was not involved in the “old” media, so no need was felt to include citizens in the regulatory process.

The concept of governance is more recent and reflects the fact that over the past decades civil society organizations were increasingly voicing their concerns about many issues (including environment, gender, unemployment etc.). This certainly affects new forms of communication and the Internet.

3. Governance

Governance was first developed in the 1980s as a concept to introduce good behaviour in companies, with the intention to improve relations with the public and make decisions more transparent (Benz 2004). The term was then introduced in the analysis of international relations, reflecting the fact that in the absence of global government, successful decision-making becomes a highly complex procedure between national governments, global organizations like the UN, economic actors and NGOs (Behrens 2004). Civil society representatives were closely involved in global UN Conferences on Environment, Women, Health etc., which started in the early 1990s. These conferences can therefore be seen as good examples of emerging governance. Certainly the two-stage World Summit on the Information Society (WSIS), with its first meeting in Geneva (2003) and the final conference in Tunis (2005), follows this tradition and serves as a good example of Internet governance.

Modern governance has different meanings. A rather general definition describes it as government that interacts with society, applying interactions "with a ‘co’-public-private character, offset against a ‘do-it-alone’ government perspective" (Koosman 2003: 3). According to the Dutch scholar Jan Koosman, governance describes a mix of all kinds of social responses to changing government demands, based on the idea that governance is made up of both public and private ‘governors’. In contrast to concepts of self-regulation, which were primarily developed in law and

reflect legal thinking, governance is a "socio-political" term and is based predominantly on social and political science analysis. A crucial aspect is the idea that political decision-making should go beyond the strict boundaries of state apparatus and should seek to involve interested and competent partners in the economy and civil society. It is especially the inclusion of the civil society and its representatives, old associations and new non-governmental groups, allowing new forms of public interest advocacy, that is typical for concepts of governance.

The logic of governance existed before the Internet and has been successfully practised in various situations. One might recall the "round tables" at the time of the transformation of politics in many former communist countries. Including representatives of "socially relevant groups" on the broadcasting boards of public service radio and television stations in Germany from the late 1940s also pointed in this direction.

Whereas self-regulation works best under the "shadow of the State", which provides a "safety net" if self-regulation fails, governance calls for collaboration with the State. Governance makes the decisions instead of the State and expects the State to respect these. Of course, governance is a concept that is in an experimental phase and still has to prove its usefulness in a global context.

4. Beginnings of Global Internet Governance

In order to cope with global issues relating to the Internet, including the future of the Internet Corporation of Assigned Names and Numbers (ICANN), the World Summit on the Information Society (WSIS) in Geneva in December 2003 called for action. As a result, a Working Group on Internet Governance (WGIG) is in the process of being established. The members are to be appointed by UN Secretary-General Kofi Annan and he promised a "multi-stakeholder approach", meaning that he promises to include representatives from different geographical, gender and interest backgrounds. An open-ended and transparent process for the selection of the 15 to 20 members of the WGIG has been announced. A secretariat has already been established, located in Geneva and headed by the Swiss diplomat Markus Kummer as Executive Coordinator. Before this position he was eEnvoy of the Swiss Foreign Ministry and he chaired the negotiation group that developed the compromise over Internet governance for the WSIS Declaration of Principles and Plan of Action.

The WGIG is expected to report to the final meeting of the WSIS in 2005 in Tunis. According to Kummer the main duties of the WGIG will be:

- to define Internet governance;
- to identify public policy issues that are relevant to Internet governance;
- to develop a common understanding of the respective roles and responsibilities of governments, international organizations and other forums, as well as the private sector and civil society from both developing and developed countries (Kummer 2004).

At the current time (August 2004) it is not clear which topics the WGIG will start working on. A narrow definition could have a strong emphasis on nation states and their governments, which claim to have functioning structures for the dialogue with stakeholders and want to extend this in a global, multilateral rule-based framework with the legitimacy of the UN (which again is heavily controlled by the nation states). This of course would not be governance. A broader definition would encompass full involvement of the private sector that includes industry representatives and NGOs representing civil society. This sounds like governance. Topics could include network security, interconnection, intellectual property rights, consumer and data protection and multilingualism on the Net.

Another controversial topic will be the future of ICANN, at present a company that cannot act independently from the Commerce Department of the US Government (Ermert 2004). Network administration by ICANN could very well follow the self-regulatory logic of global governance, i.e. as an international corporation under UN authority with a board of globally selected governors. These governors could be elected in different world regions in Internet-based elections of a kind that have already been practised by ICANN (Hamm/Machill 2001). So ICANN could be a very good starting point for establishing a role model for an international Internet regime that follows the logic of governance.

5. The Emergence of Good Internet Governance: 10 Rules

1. Coping with the Internet requires innovative and new ways of thinking. The conventional law-making process centred around a nation state, its law-maker, bureaucracy and court system proved unsuccessful in most cases. There are two reasons for this: firstly laws cannot regulate the Internet in many cases, and secondly the Internet as a global medium cannot be caged in by nation states. Instead new concepts are required and, as Lawrence Lessig demands, "code instead of laws" are needed.

2. Regulation of the Internet is complicated and should be limited to fields where it is inevitable. Preferably the Web should be seen as a space that works best autonomously and without any intervention. If regulation appears unavoidable though, it should be applied according to the principle of subsidiarity, meaning that regulation should be as close to the source of trouble as possible – close both in terms of geography and competence. Regulated self-regulation is here a preferable option to a regulatory authority.

3. Procedures and patterns of behaviour have evolved among users of the Internet that could be best described as self-regulation. “Netiquette” was the first informal code of conduct that was not developed by industry representatives but users who wanted to utilize the Net for themselves in a civilized way. This logic should be extended and made popular among all Net users. It should also serve as a blueprint for other forms of regulation.

4. Successful regulation of the Internet requires a high level of competence and expertise. The knowledge of how it can best be achieved is distributed across different segments of society and includes representatives of governments, industries, the users themselves and citizen action groups. Without their joint involvement, no regulation of the Internet will ever be successful.

5. When structures or institutions for Internet-regulation are being designed they should follow the multi-stakeholder approach of governance that includes ‘governors’ from different segments of society, geographical regions and gender etc. No sector should be allowed to dominate and the overall strategy should be based on compromise.

6. A crucial element of governance procedures is transparency, both in the selection of ‘governors’ and in conducting its day-to-day work. A perfect means for achieving this transparency is the Net itself. For example, meetings of the regulators should be held in public and be made available worldwide via video stream. The Net should be utilized to collect proposals and statements from interested users. Negotiations should be accompanied by Net-based mediation and presentation. The results of regulatory work should be made available on the Net.

7. An important element of governance is trust and legitimacy. Governments receive legitimacy through general elections and

parliamentary action. Participants in governance processes have to bridge a trust gap here. One way is to base their work on new Net-based votes, including Net-based elections of representatives and referenda or opinion polls about options proposed by the regulators. The ICANN elections of 2000 demonstrated that votes are possible outside the structure of the nation state and should be used as a role model.

8. Freedom, diversity and pluralism must be predominant values in the work of governance bodies. Freedom primarily refers to the rules of freedom of expression and information as stated in democratic constitutions and international conventions on human rights. But it also applies to the interaction between the States and their citizens. Government bodies should only intervene in matters of the Internet if this is unavoidable and there is no other possible solution. Censorship, filtering and other repressive measures should not be tolerated.

9. The Internet is not just threatened by state activities, it also faces the danger of “privatized governance”. This occurs when a few industrial actors become so powerful that they are able to take over the regulatory process and define the rules. Diversity and pluralism as values do not just refer to the content of the Internet, they are also values of utmost importance in the selection of regulators.

10. Global public policy should become a champion defending these values. The Internet is based on technical designs that are mostly decided upon by hardware and software companies, not bodies of government or governance. The technical architecture of the Web must reflect values like openness, competition and easy access. It must be a central task of regulatory action to protect these features and to develop the courage to counteract any trends that could lead to the monopolization of Internet activities.

Bibliography:

Behrens, Maria (2004), “Global Governance”, in Benz (ed.), 104–24.

Benz, Arthur (2004) (ed.), *Governance - Regieren in komplexen Regelsystemen. Eine Einführung* (Wiesbaden: Westdeutscher Verlag).

Benz, Arthur (2004), “Governance- Modebegriff oder nützliches sozialwissenschaftliches Konzept?”, in Benz (ed.), 12–28.

Ermert, Monika (2004), "ICANN, WSIS und die Selbständigkeit der Internet-Verwaltung", *Heise-Online-Newsticker*, 20 July, <www.heise.de/newsticker/meldung/49236>.

Hamm, Ingrid and Machill, Marcel (eds.) (2001), *Wer regiert das Internet? ICANN als Fallbeispiel für Global Internet Governance* (Gütersloh: Verlag Bertelsmann Stiftung).

Hoffmann-Riem (2001), *Modernisierung in Recht und Kultur* (Frankfurt: Suhrkamp).

Koosman, Jan (2003), *Governing as Governance* (London: Sage).

Kummer, Markus (2004), *Interview with UN Head Secretariat of WGIG*, July 30, <www.circleid.com/article/708_0_1_0_C>.

Leonardi, Danilo A. (2004), *Self-Regulation and the Print Media: Codes and Analysis of Codes in Use by Press Councils in Countries of the EU*.

Oxford University, Programme in Comparative Media Law and Policy (2004), *Internet Self-Regulation: An Overview*, <www.selfregulation.info/iapcoda/03029-selfreg-global-report.htm>.

Oxford University, Programme in Comparative Media Law and Policy (2004a), *Self-Regulation of Digital Media Converging on the Internet: Industry Codes of Conduct in Sectoral Analysis* (Oxford, 30 April).