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To what extent international law, designed to regulate relations between states, is hopeless at effectively regulating the Internet?

Introduction

The Internet was created to transcend national borders, bridge distances and create a borderless world, while international law is built on the concepts of sovereignty and non-intervention, which are both linked to idea of territoriality and national borders. The general approach to applying international law to online activity has been to implement it without any adaptation. This is part of the reason why current international regulation of online activity has so far failed to achieve any meaningful results. The rules designed to regulate day-to-day offline activity between states are not in the same way enforceable and do not bear the same consequences when applied to online activity. Nevertheless, as it will be argued in this short essay, if international law is appropriately adapted to the new environment, it will not be completely hopeless at regulating the Internet. To prove this, the essay will be divided into four parts. Part I will look at the aspects of the Internet that require international regulation. Part II will explain the reasons why online conduct regulation is challenging for international law. Part III will focus on the three contemporary approaches to international regulation of the Internet and explore their drawbacks and potential. Part IV will briefly look at the future of international regulation of online activity.

I. Aspects of the Internet that Require International Regulation

There are three aspects of the Internet that necessitate some form of regulation:
(1) Access – control of the opportunity for connecting and means to access the Internet, such as the machines using Internet technology (computers, smart phones, etc.) and Internet Service Providers (ISPs);
(2) Functionality – controlling the quality of Internet connection such as the physical infrastructure (its bandwidth and speed), the software used for communication (email clients, browsers, chat clients, cloud computing software, etc.);
(3) Activity – controlling how the Internet is used by various stakeholders, such as individual users, organisations and governments.

Out of the three aspects of the Internet that require regulation, the most difficult one to exercise control over is activity as control over activity has strong ethical and political considerations and includes a balance between competing values, e.g. privacy and security, which is a achieved in a different manner by different states.

II. Reasons why Internet Regulation is Problematic for International Law

Firstly, international law is designed to regulate relations between states. At the same time, the states do not have complete control over the three aspects of Internet regulation. Furthermore, the Internet blurs the traditional division in international law between public and private, e.g. Internet functionality is driven by private interests, but it is the states that regulate and monitor Internet infrastructure within their own territory.

Secondly, the system of Internet protocols that the Internet works through, promotes distributed control, i.e. decision-making over protocols is no longer closely linked to political units. Moreover, the Internet led to the creation of new standard-setting institutions such as the Internet Corporation for Assigned Names and Numbers (ICANN), Internet Engineering Task Force (IETF), regional internet address registries, etc. Thus, authority over international standards is outside of the state system.

Thirdly, there is a perception that international law is hopeless at regulating the Internet because of the prevailing interpretation of sovereignty, on which international law is founded, as bound to the concept of territoriality. This is not necessarily the case. There are different ways in which states exercise sovereignty and enforcing the law within their own territory is only one of them. Other ways include the exercise of extraterritorial jurisdiction or ceding sovereignty to international institutions. For example, the cession of sovereignty from states to ICANN is a way in which they practice sovereignty. The US Department of Commerce has a zero-dollar contract with ICANN, which manages the Domain Name System. Thus, the US government indirectly oversees the domain name system without greatly compromising its international legitimacy. However, states mainly practice their sovereignty in the context of Internet regulation through exercising extraterritorial jurisdiction.

III. The Reality of International Internet Regulation – Three Different Approaches

There has not been a single approach to Internet regulation in international law. Rather, there are three approaches which currently coexist.

The first one is the country of origin approach, according to which an activity is legal anywhere else if it is legal in the country from which it originates. This approach is effectively compliance with the least restrictive common denominator between states or in other words, the law of the country with the least restrictive laws. The country of origin approach is exemplified by Art. 3(2) EU E-Commerce Directive according to which a state may regulate e-commerce service providers on its own territory, but not the ones based in other states. It can easily be inferred that such an approach is strongly supported by online publishers as it guarantees certainty for them, but opposed by states as it deprives them of the ability to control activities taking place at their territory though originating by foreign providers.

The second approach – the country of destination approach, is the exact opposite of the first one. According to it, the mere accessibility of content or a service somewhere renders it subject to the law and its sanctions there. The country of destination approach has traditionally been applied to Australian defamation cases such as Gutnick v Dow Jones, as well as EU copyright cases such as Per Hejduk. More recently though, it was applied in the landmark Google ‘right to be forgotten’ ruling, in which the Court of Justice of the European Union forced Google to delist outdated results upon request from its EU users simply by virtue of its operation within the EU and despite the fact that Google is based in the US. The US also applies this approach to cybersquatting and online gambling cases. For example, in the CNN v CNNews, the Virginia District Court held the Chinese website cnnews.com liable for infringement of CNN’s trademark under the US Anticybersquatting Consumer Protection Act by virtue of its accessibility in the US, despite the fact that only 0.5 per cent of its users were in the country. Similarly, in US v American Sports Ltd, the American court used the country of destination approach to impose sanctions on online gambling activities by Caribbean service providers.

The third approach – targeting is the middle ground between the two approaches. Its main idea is that certain online conduct can be subjected to the laws in a particular country if it is directed towards it. If this approach had been applied in the CNN v CNNews case, the outcome of the case would have been completely different as cnnews.com was not directed at the US. Apart from this hypothetical interpretation, in reality targeting has been applied in US defamation cases in which the tort originates in one US state but is directed at another. Such a case is Young v New Heaven Advocate, in which two Connecticut newspapers were subjected to the defamation laws of Virginia on the basis with their contacts with Virginia, following the logic of the landmark 1945 case on minimum contacts - International Shoe Company v Washington. Also, the targeting approach has been used in the UK in cases where UK trademarks are used by foreign websites – e.g. 1-800 FLOWERS.

The existence of three approaches to regulating international online activity shows that international law has not completely given up on regulating international online activity. Nevertheless, the effectiveness of the three approaches varies significantly. The underlying philosophy of the country of origin and country of destination approaches is the idea of the common denominator – in the first case, the law of the least restrictive country is applied and in the second case – the law of the most restrictive country. The common denominator idea in both cases leads to an unfair balance between online publishers and states – the country of origin approach favours online publishers to the detriment of the ability of the state to control activity on its territory, while the country of destination does exactly the opposite – it favours state control to the detriment of online publishers. The only reasonable option then remains the targeting approach as it allows porous national borders – upholding national borders where necessary while reducing the incentives for Internet fragmentation, thus impeding the free flow of information across borders.

The three approaches differ in their level of jurisdictional self-restraint: the extent to which states refrain from exercising jurisdiction when they can legitimately do so under international law. The country of destination approach promotes a total lack of jurisdictional self-restraint, which is dangerous as it may lead to incentivising geo-blocking and result in complete fragmentation of the Internet, while the country of origin approach makes the countries with restrictive laws on online activity hapless when faced with an activity which affects their territory, but comes from elsewhere. On this account, targeting also proves the most viable approach as it implies a modest jurisdictional self-restraint in which countries govern activity within there own borders as well as activity with strong connections with the country

itself.

IV. The Future of International Regulation of the Internet

The future of regulation of the Internet lies in defining the extent to which regulation ought to be national or international and defining whether it should be organised in a hierarchical manner or through network of stakeholders (networking). This produces four competing theories of how the Internet should be regulated in the future:
(1) Cyberconservatism (cyber reactionism) - a theory that promotes national regulation of the Internet together with hierarchy. In practice, this means subordinating global communications to the institutions of political authority and realigning them with the jurisdiction of the state. While such an approach creates legal certainty, this is to the detriment of the user. The Chinese approach to Internet regulation exemplifies this approach. However, its imposition led to Google's withdrawal from the country, which is not a desirable outcome to the consumer.
(2) Networked nationalism – a theory that promotes national regulation combined with networking. According to this approach, the state remains the leading institution in Internet regulation, but it is reluctant to impose territorial hierarchy and thus, is more open to networking. It is willing to cede its sovereignty to international institutions such as ICANN and is involved in transnational networks.
(3) Global governmentality – a theory that promotes hierarchical control of the internet through international institutions that transcend national borders. The new institutions should be private with their own business interests to include the private aspect of internet governance. This idea is often phrased as the multi-stakeholder approach or public-private partnership.
(4) Denationalised liberalism – a theory that argues for transnational institutional regulation of the Internet, combined with networking. According to this theory, Internet regulation should be entirely outside of the state system and what matters are not states, but individual network participants.

The best solution in terms of international law is networked nationalism because firstly, there is no proof that states are willing to permanently let sovereignty slip out of their hands. Hence, a solution needs to be found within the state system. Secondly, physical location of activity cannot be ignored as a factor in Internet regulation. The networked nationalism approach factors in physical location, while at the same time allows for transport of data between states and permits participation in international institutions when this benefits the state interest.

Conclusion

To summarise the main points, firstly, there are three aspects of the Internet that require regulation – access, functionality and activity, out of which the most difficult to regulate is activity. Secondly, Internet regulation is a problem for international law because it blurs its traditional divisions between public and private, decision-making is no longer a prerogative of the state – the main unit of international law and because the main principle of international law – sovereignty, is mainly understood as the ability of the state to apply its own laws within its territory, which the Internet makes burdensome. Despite these challenges, states continue to assert their sovereignty and act in accordance with international law by using three different approaches – country of origin, country of destination and targeting. The first two are ineffective because they adopt the common denominator philosophy, thus creating an unfair balance between Internet users and states. The targeting approach offers a promise that international law can effectively deal with Internet regulation, but so far, it has been applied only in specific areas of Internet law. The future of Internet regulation depends solving two dilemmas – choosing between national and transnational regulation and between hierarchy and networking. International law has a place in this as it is the dominant way of regulating relations between states. However, it needs adaptation to the specifics of the online environment, rather than equivalent application as in the offline environment. The networked nationalism approach accounts for the challenges of Internet regulation, while at the same time preserving the core features of international law. It is therefore, a potential way in which it can achieve effective regulation of the Internet.

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