

THE INTERNET: TOWARDS A GLOBAL POLITICAL SYSTEM

Andrew C. Dawson

International cooperation and cyber-market regulation

The world is embracing the Internet; millions of people are shopping, banking, talking and even giving birth 'on-line'. The Information Age has well and truly arrived and its potential seems limitless. Today, to most people the advent of the Internet means a revolution of communication and convenience. But how will we look back upon it in decades' time? Without the benefit of a crystal ball any answer to this question is purely speculative. If we did have a crystal ball, could it show that the Internet eventually rendered geographical boundaries obsolete and it therefore was an important factor in the creation of a new global political system?

Regulation of the Internet as a Place

There has been significant debate as to whether regulation of the Internet is warranted (Dawson 1998:281-283). Nonetheless, governments are attempting to deal with regulatory issues, such as objectionable on-line content and on-line criminal activity, cast upon them by the Internet. For example, in Australia the Department of Communications and the Arts published the report 'Principles for a Regulatory Framework for On-Line Services in the *Broadcasting Services Act 1992* in July 1997. The most widely publicised recent overseas regulatory initiative was the US's *Communications Decency Act 1996*, which was eventually struck down in June 1997 in *Reno v American Civil Liberties Union* as being unconstitutional.

The move towards regulation has been based largely upon the traditional concept of jurisdiction defined by geography, a concept which Johnson and Post (1996:1367) argue is entirely inappropriate for the Internet. The Internet transcends geographical borders and, therefore, undermines 'the feasibility and legitimacy of laws based upon geographic boundaries'. In other words, the Internet renders obsolete sovereignty based upon geography. Examples of this might include China's inability to prevent dissidents circulating political information banned in China on the Digital Freedom Network (www.dfn.org) and Germany's failed attempt in 1996 to ban a web site

which emerged outside its borders (www.efa.org.au). Similarly, the proposed extension of the operation of the *Privacy Act 1988* (Cth) to the private sector has been criticised because the worldwide nature of the Internet means the Act could not be effectively enforced against overseas websites (Hughes 1997:24).

Johnson and Post argue that the only way regulation of the Internet can work is if Cyberspace is treated as analogous to a physical place rather than as 'mere transmission medium.' This means a new legal system applicable only to Cyberspace needs to be established. The effect of such a system would be that any Internet user who logs on to the Internet would enter a distinct legal jurisdiction. Their on-line activities would be subject to Internet law and the effect of logging on would be the same as crossing a geographical border where that territory would be governed by its own particular laws. The authors, then, envisage a separate legal system for Cyberspace that applies equally to those using the Net across the globe. Clearly, for such a system to develop and operate effectively, new law making and enforcement institutions will need to be created.

The Potential for Self-Regulation

Johnson and Post suggest that a new legal system for the Internet will arise through self-regulatory processes. They demonstrate how trademark, copyright, fraud, antitrust and defamation law and the regulation of Net-based professional activities could operate effectively within such a system.

However, it is doubtful whether self-regulation of the Internet would be wholly successful. It has been argued that the larger a group is, the further it will fall short of

Andrew C. Dawson is a paralegal with Phillips Fox Solicitors, Sydney. The author is indebted to Mark Donoghue and Suzanne Falvi for their comments on earlier versions of this paper.

providing an optimal amount of a collective good (Olson 1965:48). In the case of the Internet, the group is users of the Internet and the collective good is an effective self-regulatory system. The larger the group, the less likely it is that there will be cooperation between members of the group to produce an outcome that benefits the group as a whole. Therefore, the larger the number of users of the Internet, the less likely it will be that the users will cooperate to create an effective self-regulatory system.

Recent studies of self-regulation in relation to common property resources support this view. These studies are relevant if the Internet is treated as a common resource open to anyone with the necessary technology (Dawson 1998: 275-276; 283-284). The studies suggest that self-regulation will only succeed if a distinct, identifiable group who are using the resource are able to exclude others and are bound by strong sanctions (Sethi and Somanathan 1996: 766). Johnson and Post postulate that impenetrable internal borders could develop in Cyberspace. The communities within those borders would be comparatively smaller, could exclude others through the use of special passwords and entry fees and would be subject to the sanction of banishment – having access to the community revoked. It is, therefore, possible that self-regulation could succeed within such communities.

If such a self-regulating Internet group develops, the only sanction it could impose upon its members is banishment from the group. Society may deem such a sanction as too light. For instance, a member of an Internet group may defraud another one of its members of thousands of dollars and, because they reside in a jurisdiction where they are effectively immune from prosecution, may only face the sanction of banishment. There is also the possibility that such a group may itself be conducting socially undesirable activities such as the distribution of child pornography between its members. Although self-regulation may succeed in such a group, the group itself is socially undesirable.

It is apparent that there needs to be regulation on a Net-wide basis so that the defrauder is subject to the same sanction wherever they reside and the child pornography group can be removed from the Internet and its members prosecuted. Self-regulation is unlikely to succeed on such a Net-wide basis due to the large number of people across the world using the Internet and the difficulty of finding strong sanctions that would bind them all.

Towards a Global System?

So what of regulation of larger groups using the Internet and of issues which are Net-wide? Take e-commerce for example. Goods and services can be purchased on the

Internet, banking and investment decisions can be made and businesses can order goods from their suppliers. Millions of consumers and businesses across the globe regularly conduct business in the cyber-marketplace. Markets in most jurisdictions are regulated to prevent fraud and anti-competitive behaviour and to set relevant standards. It is likely that businesses and consumers will come to expect similar protection in the cyber-marketplace and such protection is essential for the Internet to achieve its full commercial potential.

Following Johnson and Post's argument, existing market regulation would be ineffective for Cyberspace because it is based upon geographical boundaries. Therefore, regulation of a cyber-market stretching across the globe would only be possible if there were uniform rules for each and every trader regardless of their geographic location. It is doubtful whether self-regulation alone can produce such rules. The remaining alternative is some form of international cooperation between governments for the implementation and enforcement of uniform standards and regulations. This could occur by way of treaty in much the same way as the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) does for intellectual property. Alternatively, an existing international body could take on the responsibility of developing, implementing and monitoring a new legal system.

Global Participation

Would nations participate in such a regime? One approach to examining this issue is to consider the institutionalist theory of international politics. Under this theory an international regime will develop where states must coordinate their behaviour to achieve a desired outcome (Wu 1997:658). The institutional approach suggests that states will participate in international agreements to lower transaction costs and establish uniform standards of behaviour. Clearly, one of the benefits of regulating cyber-commerce would be to facilitate trade by ensuring uniform standards of behaviour among participants and lower transaction costs. Therefore, institutionalist theory suggests there is potential for the development of an international system.

A similar result arises under the liberal theory of international relations. Under liberal theory, the state's preferences drive its behaviour. These preferences are, in turn, determined by the preferences of the various groups the state's government represents. International cooperation occurs if different sovereigns have comparable preferences (Wu 1997:661). It is likely that many states will share the desire to maximise their economic returns

from Cyberspace, for which goal secure cyber-markets are necessary. Furthermore, it is arguable that in many states, businesses will have an incentive to lobby governments to secure cyber-markets.

This overview of liberal and institutionalist theories of international cooperation suggests that, in principle, there is potential for the development of an international framework for the regulation of cyber-commerce. It may also be argued that these theories are already being evidenced in practice.

For instance, steps are being taken towards the development of a global e-commerce system. The OECD and the Canadian government hosted a Ministerial conference in Ottawa last October, titled 'A Borderless World – Realising the Potential of Electronic Commerce' at which the OECD adopted a global action plan for the development of electronic commerce (www.noie.gov.au/oecd/overviewb.html). The plan aims to protect participants in e-commerce and, relevantly, to develop ground rules for the digital marketplace. In a similar vein, the Clinton administration released 'A Framework for Global Electronic Commerce' on 1 July 1997 (www.ecommerce.gov/framework.htm). The document identifies nine areas in which international agreements are necessary, namely, customs and taxation, electronic payments, Uniform Commercial Code for e-commerce, intellectual property, privacy, security, telecommunications infrastructure, content and technical standards. Governments, then, have recognised the need for global cooperation and arguably the first steps are being taken towards a new digital marketplace that spans the globe and relies upon international cooperation for its success.

There have also been several other instances of international efforts to regulate the cyber-market. An Internet-wide operation involving 60 regulatory agencies across 25 countries was announced in the media on 11 September 1998 (*The Australian*:3). The operation was designed to identify and shut down the operation of those selling 'snake oils' – or fraudulent 'cure all remedies' – over the Internet. Similarly, in 1997 the Australian Competition and Consumer Commission was involved in a global operation to shut down money scams, such as pyramid selling schemes, operating on the Internet.

It appears that there will be ongoing international cooperation to address future cyber-market issues such as the areas highlighted in 'Framework for Global Electronic Commerce.' Another possible area which would necessitate

cooperation is highlighted by the US Securities and Exchange Commission's (SEC) crackdown on 29 October 1998 on 44 stock promoters fraudulently promoting more than 235 small companies on the Internet. This crackdown would be ineffective against web sites fraudulently promoting companies if they are based outside the SEC's jurisdiction. Once again, international cooperation is necessary for effective regulation.

Additionally, the increasingly global nature of corporations is also likely to create a need for international cooperation with respect to corporate taxation (Kohl: 1998:450) and disclosure requirements (MacMillan 1998: 528).

There has recently been international cooperation on other Net-wide issues. On September 3 1998 police forces from 40 nations around the world were involved in coordinated raids on a child pornography ring called 'Wonderland'. In this instance, global cooperation resulted in the effective policing of this aspect of the Internet. The need for further cooperation in this area is highlighted by the CSIRO's report to the National Office for the Information Economy, titled 'Blocking Content on the Internet: A Technical Perspective,' published

in June 1998. It concluded that although blocking of objectionable on-line content from overseas websites was technically possible, it would be ineffective (www.noie.gov.au/reports/blocking/index.html). Instead, it recommended that one way to effectively regulate content was through cooperation between nations to ensure that Internet service providers adhere to the legal requirements of the jurisdiction to which the information is sent.

The Possibility of Political Unification?

What is clear is that international cooperation is essential for addressing Net-wide regulatory issues. What are the potential consequences of this increased cooperation? Given the need for on-going international cooperation over cyber-market regulation and other Net wide issues, the formation of a central body for making and policing uniform international rules is practically and financially expedient. Alternatively, an existing body, such as the World Intellectual Property Organisation or the United Nations, could adopt such a role. If such cooperation were to occur, what might be the outcome?

Take, for example, the development of global economic standards for e-commerce. In the past 130 years there have

International cooperation is essential for addressing Net-wide regulatory issues.

been two notable cases of economic cooperation between nations leading to political unity. Economic cooperation played an important role in the unification of Germany in 1871. The Zollverein, a German customs union, is recognised as being an important factor in Germany's subsequent political unification (Henderson 1984: 325; James 1989: 57), helping to foster national feeling and economic growth.

Economic cooperation has also been central to the development of the European Union. The first European institutions focused almost exclusively on economic issues. For example, the Organisation of European Economic Cooperation created in 1948, the Western European Economic Union formed in 1954, the European Coal and Steel Community formed in 1952 and the European Economic Community formed in 1958. The Maastricht treaty signed by European Union Members in 1992 arose from these foundations. A European parliament and court have been established and a single European currency was adopted in January. While economic cooperation was merely one of several factors in the movement towards political unification in Europe, its influence cannot be underestimated.

The experiences of Europe and Germany suggest that economic and legal cooperation at a supra-national level with respect to cyber-market regulatory issues may lead to the formation of a quasi-political global body. Perhaps initially this would incorporate a central body which develops rules and standards for commerce in Cyberspace. Its role might expand to scrutinise and address offensive material and criminal activity in Cyberspace and then evolve into a forum for dealing with global issues. Beyond that, its scope may resemble that of a global federation with a central body controlling global issues, while nation states retain sovereignty over purely domestic matters.

Obstacles

Clearly, the idea of a central body monitoring the Internet is based upon very big 'ifs' and in reality it may face obstacles from several quarters. For instance, it has been argued that the decision of the US Supreme Court in *Reno v American Civil Liberties Union* may restrict the US's ability to enter into international treaties concerning Internet regulation (Vick 1998: 420). As already mentioned, that decision overturned the *Communications*

Decency Act on the basis that it breached the First Amendment to the US Constitution. Given the hierarchical inferiority of international treaties to the US Constitution under American law, any international treaty to which the US is a party concerning a wide range of communication issues on the Internet must satisfy the tests laid down in *Reno v American Civil Liberties Union*. No doubt there will be other constitutional, political, cultural and ideological hurdles to be overcome.

Moreover, a global federation potentially faces even larger problems such as questions of sovereignty, governance and funding. Having recognised those difficulties, the Internet, by promoting easier communication across the globe, will help facilitate the development of a global identity which in turn would facilitate the creation of a supra-national body. Furthermore, the Internet is making global cooperation essential for effective regulation. This cooperation will also foster an increased sense of the global community.

At the same time there are factors beyond the Internet requiring increased global cooperation and arguably fostering a sense of global community. For example, global warming and ozone depletion have led to international initiatives such as the 1997 Kyoto agreement. Similarly, the global financial crisis which was triggered by the 1998 Asian financial crisis has led to plans for global action to alleviate its effects. In September 1998 the US announced a plan for the world's largest 22 economies to coordinate action to spur economic growth. Furthermore, the crisis has actually given rise to the suggestion that future global financial crises can only be avoided if there is a global government regulating the world's financial markets (Soros 1998). The increasing need for cooperation at a supra-national level to address global issues reinforces the proposition that an extensive global political system is a distinct possibility.

Conclusion

How future historians will actually regard the impact of the Internet on the world can only be a matter of conjecture. It is a possibility that in decades or centuries from now, students may be taught that the Internet made geographic concepts of sovereignty obsolete and pressure for cyber-market regulation led to the creation of a central body concerned with regulation of e-commerce. From

Economic and legal cooperation at a supra-national level with respect to cyber-market regulatory issues may lead to the formation of a quasi-political global body.

this body a new global system of laws developed, from which arose the world's federal constitution.

Today the idea of a global federation may still seem a bit far-fetched and the obstacles to its formation may seem insurmountable. However, it should be remembered that 60 years ago the idea of a Europe unified without military force also seemed beyond the realm of possibility.

Policy

References

- Dawson, Andrew C. 1998, 'The Intellectual Commons: A Rationale for Regulation,' *Prometheus* 16(3): 275-289.
- Henderson, W.O. 1984, *The Zollverein*, Frank Cass.
- Hughes, Timothy 1997, 'Regulation of the Net,' *Reform* 71: 23-27.
- James, H. 1989, *A German Identity 1770-1990*, Routledge, New York.
- Johnson D.R. and D. Post 1996, 'Law and Borders – The Rise of Law in Cyberspace,' *Stanford Law Review* 48:1367-1402.
- Kohl, Uta 1998, 'The Horror-Scope for the Taxation Office: The Internet and its Impact on Residence,' *UNSW Law Journal*, 21(2): 436-451.
- MacMillan, Fiona 1998, 'Corporate Disclosure On-Line: An Appropriate Response to Globalisation,' *UNSW Law Journal*, 21(2): 514-529.
- Olson, M. 1965, *The Logic of Collective Action*, Harvard University Press, Cambridge, Mass.
- Sethi, R. and E. Somanathan, 1996, 'The Evolution of Social Norms in Common Property Resource Use,' *American Economic Review* 86(4): 766.
- Soros, George 1998, Reported in *Sydney Morning Herald*, 19 September 1998: 33.
- Vick, Douglas 1998, 'The Internet and the First Amendment,' *Modern Law Review* 61: 414-420.
- Wu, Timothy 1997, 'Cyberspace Sovereignty – The Internet and the International System,' *Harvard Journal of Law & Technology* 10(3): 647.

THE 12TH ANNUAL NORMAL COWPER ORATION AND DINNER

WITH GOVERNOR JOHN A. KITZHABER

on 'THE MORAL BASIS OF POLITICS'

PRESENTED BY THE AUSTRALIAN INSTITUTE OF POLITICAL SCIENCE

Governor Kitzhaber of Oregon will explore ethics and the place of moral authority in current political life from a new perspective.

Oregon has been at the forefront of US social policy reform in a number of areas, including the decriminalisation of marijuana and the legalisation of doctor-assisted suicide.

Date: Monday 22 March 1999 Time: 7.00 pm for 7:30 pm

Venue: *The Strangers Dining Room,
New South Wales Parliament House
Macquarie Street, Sydney*

Price: \$85 for AIPS members ; \$95 for Non-members

The Australian Institute of Political Science, founded 65 years ago, is a non-partisan organisation which promotes discussion and understanding of political and cultural issues in Australia. Please phone (02) 9810 5642 for further information.