Four Myths about Regulating in the Information Society - A Comment

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Introduction

One of the first things lawyer learn in their Legal Writing Course is to avoid terms like "obviously". Your arguments are either convincing in themselves, then one does not need "obviously" - or they are not obvious, then obviously "obviously" is a dangerous camouflage only inviting deconstruction. Societies, however, need their assumptions on what is "obvious" to avoid infinite regress. But they know better to call these assumptions obvious; they use - to use ROLAND BARTHES' intriguing concept - myths, concepts which use common notions, words, pictures, give them meaning and create a powerful association which surpasses the used signs, their obvious meanings to create an unquestionable truth.[1]

And so the Information Society has created its own set of myths to simplify discourse and to immunize itself against criticism. Some of these myths are about regulating in the Information Society, and some of those will be commented on: the myth of technological neutrality, the myth of "internationalization", the myth of "code as code", and finally the myth of "self-regulation".

Before addressing those myths two notes of caution seem to be necessary.

Many of the phenomena I touch upon are associated with Information Society in a manner that suggests causation as regards its main characteristic, information and communication technology. It is said e.g. that information and communication technology has caused (or at least significantly accelerated) internationalization. This in itself might constitute one of the myths of the Information Society; it seems sufficient to me to simply state that there is a *parallelism* between the elements which we associate with the Information Society and e.g. internationalization.

The other note refers to method: Whenever members of the "law community" talk about phenomena of the kind mentioned they should clarify the mode in which they are addressing issues: Is what they talk about meant to be descriptive, do we see e.g. certain traits which reflect spatial or conceptual extension beyond the local, regional and national toward something international or even global as evidence for internationalization? Or is it that they hold and argue that

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[1]   ROLAND BARTHES, *Mythologies*, Seuil: Paris 1957, 197ff.

internationalization is something that *should* be achieved, in other words, is the approach normative? And finally are phenomena addressed because there is a discrepancy between what has been observed descriptively (A) and what has been demanded normatively (B) so that it is time to formulate strategies how to move from (A) to (B), in short is the discourse political? While - for reasons of space - I will not address all three levels for all four myths, I will at least try to keep these levels apart.

The Myth of Technology Neutrality

Now and then legislators in the Information Society are reminded to remember technological neutrality. And legislators claim that their regulations are indeed technologically neutral. Particularly when they resort to criminal law, a regulatory tool which offers itself whenever there is doubt since it is symbolically potent while it does not seem to involve costs, at least not directly, legislators claim to make sure that the world (and particularly its values) as we have known it will continue even if some appearances may have changed, in short, what has held offline, should, indeed, hold online.

Is this a correct description of what has happened in e.g. Internet regulation so far? If we look at the recent regulatory package of the European Union on electronic communication we must concede that this package by its very term "electronic communication" tries to group various technologies under one heading. Such an attempt - not fully successful upon closer analysis - seeks to combine - for certain competition oriented aspects - different technologies under one heading. Such an approach, however, is technologically sensitive rather than technologically neutral because it seizes upon the specific competition related aspects of one group of technologies which seem to have characteristics in common which they do not share with other technologies or previous stages of those technologies.

But what about the area of internet contents regulation, an area where that myth seems to flourish. The lower court judge who, in that famous internet provider case in Munich, some years ago, had been chastised for applying the standards appropriate for booksellers who order books upon request of their customers, to internet providers, might see it differently. The consensus that at least internet *access* providers should profit from a lower standard of responsibility had been reached rather quickly. Not necessarily everything that has been done online may lead to prosecution as easily as it would if it had been done offline. On the other hand, looking at the plethora of copyright regulation in recent years, the more appropriate formula, seems to be that what still may be possible offline, should certainly not be allowed online. And as a final example, we might look at the law of domain names. Domain names on the Internet can be treated like trademarks, indeed an example of some sort of neutrality; but

trademarks on the Internet, in most jurisdictions, cannot co-exist, as trademarks in the offline-world, in different geographical areas.

These remarks are not meant as an entry point to a discussion on the merits of such regulatory approaches; rather they serve as simple reminders of the fragility of the "offline/online"-adequacy.

But would such an adequacy principle be desirable from a normative point of view? The equality principle requires that what is equal is to be treated equally, and whatever is different has to be treated differently. Technology provides a significant difference, in particular information and communication technology. Information and communication technology has changed information handling in our societies, making such handling less dependent on restrictions of quantity, distance and complexity. This technology has removed what once were silent inherent barriers to the use of organizational power, just to name one set of its effects. Legislators always have the technologies of the day in their minds when they regulate. It is one of the silent but nevertheless present assumptions in their minds on which they build their concepts. Consequently, to maintain the function of checks and balances in our societies, technology specific responses to such changes in the power structure are needed. One such approach has been data protection (privacy) regulation. In the process of developing this concept of regulation many legislators, it has to be conceded, included (non-electronic) automated and even manual data handling under the application of such laws - under the strong suggestion from the data processing industry which claimed technological neutrality and feared discrimination against electronic data processing. This fear was justified - indeed, data protection legislation has to discriminate against electronic processing because of the specific risks of this technology. "Paper related" technologies were thus included, where it did occur, not because of some neutrality principle, but because even these paper related technologies did pose a threat in an environment that already contained electronic processing and was moving fast towards full electronic automation.

Why then has the "offline/online-adage" received so much prominence when it has been observed so little? Times of change create special burdens for legal systems. Legal systems are more strongly pressed to provide orientation and at least mid-term stability and predictability. Legal systems are prepared to cope with change. Laws by their own definition are abstract rules of the past for concrete cases which occur in the future. However, in times of change, law is confronted to larger extent with the changing faces of phenomena and takes more time to evaluate which of the changes are essential and which are accidental. Again this is an everyday task of the law, and it is called interpretation, but with technological change this task grows in quantity and complexity. But -as said before - law takes its time, it is a process to deliberately slow down processes to be able to reflect on them. Times of change, however, are also used by all those forces which had been frozen into the political compromise of past legislation. This is their moment to test whether these compromises still hold.

Also, with technological change new players enter the scene claiming their own share. So the time the legal system takes to adjust is highly charged politically; court decisions are criticized, patience to wait for high court decisions is running out, the legislator is under pressure to show to be in command. This is the time for symbolic legislation, which regardless to what extent it serves new interest groups or appeases the old ones, has to be seen to meet the challenge. And one way, not the only one, but perhaps the most favored way is to show that the old values will survive in the new world. Whatever real changes a new technology may bring, the "Law of Suppression of Radical Potential"[2] has to show to contain them, to integrate them - at least symbolically - into the old value system. This is role of the "offline/online" myth. It is under this hood then that the new technology may eventually produce change. But by then it will no longer be noticed as change, the new shares will already have been distributed, and a new political compromise will have been frozen into law.

The Myth of Internationalization

Internationalization or its younger brother globalization are often attributed to information and communication technology. But both phenomena are, indeed, examples for that need for caution mentioned in the introduction. Neither are they new phenomena, nor is law particularly inept to deal with them. The International Law of Trade has a long history. International Private Law which in spite of its name has always been national law, has seen many successful attempts at harmonization. International trade law practice has heavily and successfully relied on the almost universal principles of contract law and on the processes of arbitration. There is the great example of European Union Law as dynamically stable body of regional law.

What is changing, however, or to be more careful what might be changing, are the parties concerned by internationalization. Small and medium sized companies, and individual consumers as well as individual entrepreneurs may be exposed in larger numbers to the international effects of law. And this implies a qualitative change: Concepts of national or regional consumer protection e.g. are on their way to become introduced into International Trade Law which still builds on the classical contractual assumptions of equal and informed parties.

Currently, in spite of the heated battles at The Hague, all this remains speculation. It still has to be seen to what extent economic restraints will lead to alternative solutions for conflicts in commercial exchanges (cutting losses, using trusted third parties, gestures of good will, alternative dispute resolution).

However, this trend in "democratizing" the subjects of international law has indeed another effect on internationalization and this time on internationalization

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[2]   BRIAN WINSTON, *Misunderstanding Media*, Harvard University Press: Cambridge 1986, 23f.

as a process of rule making. Being a possible subject of international law raises the interest to learn about how international law comes about. This is a process that can be dated back to developments in another area where there has been a spill-over from national legislation into neighboring legislation: the area of environmental law, which together with human rights provided the fields from which Non-Governmental Organizations started to grow. Their impact on the many national debates on internationalization helped to understand another aspect of internationalization: Internationalization proved itself to be a useful process for governments to introduce national change which they could not achieve directly as an international obligation which they had to follow to honor international law agreements. International agreements in turn have the advantage of being binary and leaving no space for modification: Either they are accepted by national parliaments or they are rejected. Possible parliamentary influence is therefore shifting to the time of negotiation; negotiations, however, to be effective are a prerogative of governments. Democratizing such processes is painful and time consuming. In the European Union e.g. it has taken a very long time till national parliaments have developed institutions and political processes to exert some influence on their governments' position in the Council, a process which is not equally effective in all member states and which still has a long way to go.[3]

In the end then the "democratization" of the potential subjects of international law at the time of information and communication technology may lead to a democratization of the making of international law. But then again this attempt to get a better hold of internationalization may prove to be elusive. And, indeed, neither the fora, nor the subjects, nor the actors of international regulation. and of Internet related regulation, in particular, are easy to grasp. There is a constant process of political "forum shopping" of testing this international organization or that international organization whether it could produce desired outcomes within a given time; there has been a time for the OECD, there has been a time for the WTO, there may be a time for the ITU, or at least with regard to some issues; there may be a time for all of them. There is space for multilateral, bilateral and even, for some players, for unilateral approaches. While the pressure to democratize the international rule making may have increased, so have the possibilities of governments to change subjects, fora, and participants. For governments, too, however these processes have become more complicated. They too have to deal with more and different players in different arenas.

This increasing complexity, however, also raises the chances of success for dedicated epistemic communities, communities, sharing cultural backgrounds and political believes, to use the interconnectivities of these multi-player, multi-issues, multi-fora games for dedicated interest oriented efforts even if they operate from outside governments or traditional power elites. They might use

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3   See: BEATE KOHLER-KOCH (ed.), *Linking EU and National Governance*, Oxford University Press: Oxford 2003.

their expert knowledge for coalition building across interest divides at least for a given period in time. The so-called "cryptography"-debate has provided some evidence for such potentialities.

Within such complex frameworks there is an equal chance, however, for government approaches which build on unilateral strategies provided such governments have access to sufficient resources or at least are perceived as having such access. So in parallel to the de-fragmentation of internationalization as just described we come across equal evidence for attempts at hegemonial solutions.

So what seems left of the myth of internationalization is either de-fragmentation (including democratization) or hegemonial aspirations, or both.

The Myth of "Code as Code"

"Code as Code" is a comment again on the relationship between information and communication technology and law. And it is a critical comment building strongly on myths which exist about law. Law, this comment seems to say, is too slow, when it finally comes into play, the "hard" technical architecture/infrastructure with its own "laws" is already in place, and law as a "soft" social process can do little about it but further stabilize such architectures or seek for minor remedies against its excesses.

This understanding of law and its technological environment is not new; it at least dates back to the early days of technology assessment when there had been the hope that if law would only intervene early enough in the design of technological systems it might have a stronger impact.

My interest here is not to review once again this understanding of the role of law in relation to technological change. Chances are that the answers reveal a similar dialectic tension as regards internationalization or technological neutrality.

It seems more interesting, however, to ask why such an old theme has been revitalized just now, and why it is now that it has received so much attention. Again, I would hold that it is the mythical quality of this concept that has been able to catch the attention.

"Code as Code" reconfirms - as I have shown - a commonly hold suspicion about laws' effectiveness. But "Code as Code" is even more interesting because of what it does not say explicitly, but what it insinuates, and it is equally interesting because of what it remains silent about.

"Code as Code" renders governments as regulators insignificant; industries decide on architectures, either, depending on their market power, unilaterally or by standardization among themselves, with governments formally providing the final stamps of approval. Even when competition law that tends to favor standardization cartels anyway tries to reign in unilateral solutions it usually

comes to late when - as it usually happens in network economies - de facto standards have been created by explicitly open, non-discriminatory practices to achieve lock-ins, at least in the end.

"Code as Code" furthermore propagates - by pointing to the "hard" architecture - a new sort of technological determinism only this time it is of course an enlightened determinism; there are indeed builders of these architectures, and it is not just the architecture which builds inevitable structures. Whatever these builders do, they seem to do it outside governments, and whatever one might do to participate in architecture building would have to be done outside traditional regulatory processes as well. In short, whatever values can be embodied will be or should be decided upon their sustainability in the market place.

"Code as Code", in this reading, finally reveals itself not as a neutral new approach to supplement other regulatory approaches in the Information Society. Rather "Code as Code" is a cultural code in itself by which assumptions of a specific society at specific time seek to make their impact on other regulatory cultures which are still based on different assumptions. In short "Code as Code" might be read just as another myth joining the myth of internationalization in an attempt at unilateralism. It should be added, to avoid misunderstandings, that such attempts are not restricted to the United States. The European Union with its reciprocity clause in the Database Directive has shown equal tendencies, even if, in that particular case, perhaps with the silent agreement of the United States, who had intended to use that clause for their own internal interests.

The Myth of "Self-regulation"

As so many myths, "Self-Regulation" is a semantic puzzle: What the term seems to refer to is very often neither regulation nor is it - in its effects at least - restricted to the "selves" exercising it. Self-regulation almost always implies regulatory overspill which neglects those having been spilled upon a say in further spilling.

 "Self-Regulation" might rather be understood as a term seeking for legitimacy for an already existing practice with the expectation that its official recognition might eventually lead to a de-legitimation of other current practices still conflicting with those seeking self-regulation. A more adequate term that might help to demystify "Self-Regulation" is the term used by CLAIRE CUTLER, VIRGINIA HAUFLER and TONY PORTER in a 1999 publication: "Private Authority".[4] Of course, private authority lacks the charm of   "Self-Regulation" which borrows from the positive connotations of democracy which, after all, is - isn't it? - nothing else but a form of "self-regulation".

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[4]   *Private Authority and International Affairs*. State University of New York Press: Albany 1999.

Private authority, to remain more precise then, has to be reckoned with. Regulation in complex economic systems is negotiated regulation; and if negotiated regulation failed there will remain negotiated application. Building on private authority saves resources and may even have efficiency gains. But building too strongly on private authority reveals a dilemma; it makes Information Society too easily appear as a neo-feudalistic society; a perception that, by the way, has gained some popularity among those criticizing recent approaches to copyright and related rights in the Information Society.[5]

One way to balance this perception is the introduction of concepts like "co-regulation"[6] which insists on the state setting the rules and borders of private authority, remaining silent, however, on the influence of private authority already on the setting of these frameworks.

Furthermore private authority, as a regulatory tool, even more strongly suffers from deficiencies common to current regulatory tools in the public sector, while it is lacking some of the possible remedies for the latter. In an Information Society governmental regulatory approaches are increasingly under pressure to become more transparent. The application of private authority remains, what it indicates, "private"; and only in those instances when it endangers the very functioning of markets; competition law procedures, which themselves again very strongly rely on negotiation, might bring such authority into the open, and even then basic materials, in the interest of business secrecy, would remain under seal.

Against such a background it is very difficult to create sufficient trust for "self-regulation" to spread, in its current format, more widely in the Information Society, except as an ideological catch-word.

Final Observation

Technological Neutrality, Internationalization, Architecture and Self-Regulation are, of course, not, as it may seem by now, the Four Horsemen of the Information Society Regulation Apocalypse.

However, those terms do more than just describe characteristic traits of regulation in the Information Society. They contain a normative agenda precisely by avoiding a discussion of normative values, by setting tools in the place goals. As true myths they hide their own agenda under the layer of the apparent. Internationalization, technical neutralization, architecture and self-regulation with their tool approach tend to marginalize - as I have tried to show - other tools,

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5   PETER DRAHOS; JOHN BRAITHWAITE, *Information Feudalism, Who owns the Knowledge Economy?* Earthscan: London 2002.

6   For a description: MONROE PRICE; STEFAAN G. VERHULST, *The Concept of Self-Regulation and the Internet*. In: JENS WALTERMANN; MARCEL MACHILL (eds.), Protecting Our Children on the Internet. Towards a New Culture of Responsibility. Bertelsmann Foundation Publishers,: Gütersloh 2000, 133-198.

tools with which to continue building a more democratic society; they tend to hold on to the existing structures of regulation, to current patterns in the distribution of information, communication channels and processing capacities. At the same time, ironically, by their conservative character they cannot avoid becoming more visible against the background of the progressive technological possibilities they themselves proclaim and thus - as I have also tried to show - reveal their own deficits and fragilities even more clearly.

It will be up to the law community in the Information Society to bring such inconsistencies into the open and to make its choices which trends to favor, and which to avoid./--