Zsuzsa Detrekői

THEORETICAL AND PRACTICAL ASPECTS OF ONLINE CONTENT AND OTHER INTERNET RELATED REGULATIONS

Thesis

Supervisor: Ágnes Zsidai

Center for Theory of Law and Society

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Contents

1. The purpose and context of the research

The purpose of this study was to examine the possibilities to control and regulate online contents and to describe the ongoing tendencies. Another aim was to classify and systemize the existing models of controlling and regulation.

The internet as a tool of communication might be the most relevant medium in our lives for a long time. The regulation of the internet reveals important questions of home affairs and foreign policies and draws enormous public attention. Let's think about the scandals generated by the Anti-Counterfighting Trade Agreement (ACTA) all over Europe. Other recent example is the protest against the Stop Online Piracy Act (SOPA) and the Protect IP Act (PIPA) in the US. In addition to 7 000 smaller websites Google and Wikipedia joined the protest to. In Hungary a major guessing took place during the summer of 2010 whether the future media constitution and the media law would apply to blogs either? We might also think about the new legal institution introduced jointly with the new Penal Code: "the rendering of electronic information inaccessible temporarily or permanently". First the new institution made possible for courts to impose the blocking of a website than the Parliament extended the possibility for authorities too.

Besides the public attention other subjective motives drove the writing of this paper. I have been working for more than ten years as general counsel for [origo] one of the leading Hungarian online content provider. In addition I'm also the legal advisor of the Association of Hungarian Content Providers. I used to work for T-Online the major Hungarian internet service provider and currently I'm a legal expert at T-group on media related and copyright issues. In the last ten years I experienced the applicability, efficiency and the practical consequences of each online related new regulation. These factors made me try to collect classify and systemize the existing models of regulation all over the world and to examine generally the effect of the internet on regulation. Besides the domestic experience In 2007-2008 I had the opportunity to join the Opennet Initiative at the Berkman Center for Internet and Society at Harvard University for several months in Boston.

The objective of this paper is to develop a sort of classified system of the methods and means of internet controlling and regulation based on international tendencies and own experiences. The paper analyzed the various technical tools, the regulatory models including the specialties of the different types of content and the efficiency of certain models in countries with

different cultures. Altogether I examined the influence of the internet on the traditional jurisprudential concepts and on the process of legislation.

The results of the research were discussed in three chapters, I drew the conclusions in the forth chapter.

In *the first chapter* I summarized the basics necessary to further explanations with the title EXPLORATION OF THE PROBLEM. I described in this chapter the development of the internet from the beginning until nowadays. I also present the theoretical basis of legal research, express the causes of the necessity for regulation, I examine the influence of the internet on the traditional jurisprudential concepts and the alteration of the requirements of legislation since the appearance of the internet. In this chapter I also explained the three major specialties of the internet: possibility of unlimited data transmission (in time and in space), borderless communication, anonymity. I attempted to define the content and the content provider. I also dealt in this chapter with some cultural and historical specifics of the flux of information.

The *second chapter* is focused on the issues WHOM and HOW. The title of the chapter is methods of control. The chapter deals not only with the regulatory methods -- including in a wider sense the self-censorship and the self-regulation – but also with technical tools. The chapter begins with technical tools. Practical experiences show that often difficult to distinguish between the technical tools (filters) allowing the control and the legal methods obliging the control. In the second part of the chapter I analyzed the legal and other methods. During the analysis related to the WHOM question it appears that the subjects of law and the actors obliged to use filters are almost the same.

In *the third chapter* I established a classification related to the WHAT topic. In this chapter I considered not the subjects of laws but the regulated content and not at large the online content but divided into nine content categories from the obscenity to political content and copyright issues. With reference to the content categories above I also explore the limitation of liability of online service providers. In case of each content category I tried to show and systemize the actual tendencies.

By clairfying the basics and developing the classification the study attempts to answer to the following questions in details:

- How the internet affected the traditional jurisprudential concepts?
- How the traditional requirements of legislation change since the appearance of the internet?
- What are the most substantial features of the Internet and how are they influencing the controlling of online contents?
- How can we define online content?
- Who can be considered content provider?
- Is there a correspondence between the culture, religion and history of a state and contents controlled?
- Who are typically the subjects of law? Through which private actors (bottleneck actors) try states – or forces behind them no matter if that is politics, religion or other lobby force – control the internet?
- What are the usual methods/solutions related to those bottleneck actors?
- What are the usual content categories that different states try to control?
- Can typical tendencies determined based on the answers?

2. The methods and results of the research

2.1 Summary

At the beginning of the first chapter in EXPLORATION OF THE PROBLEM part I get from the room sized computer to the development of world wide web. Than in the theoretical basis of legal research part I study which problems create necessity for regulation, how the internet affects the traditional jurisprudential concepts and how the requirements of legislation alter since the appearance of the internet.

Necessity for regulation might arise from two reasons:

- former regulation did not cover some questions
- existing regulation wasn't capable of dealing effectively with the new problems

Apropos of the requirements of legislation we found that the preconditions of coherent regulation are not present in any state. Social relations – intended to be regulated – weren't settled because of quick development which is so rapid that provokes total changes in the social relations in short periods. The short period and the rapidly changing social relations make the crystallization of dogmatics impossible. The reconciliation of informatics and legal activity and raising adequate legal apparatus which is necessary to the regulation means further problem.

By observing the concept of law we found that the traditional jurisprudential theory regarded the law as an ensemble of rules of conducts connected with other orders (principles and targets). This criterion is basically true. However it should be noted that many states use other controlling methods paralely or alternatively with the regulation.

Another positivist criterion of the law is that they are established by the state, the state issues the laws and execute them namely the state determines sanctions for failure to perform a duty. Basically this criterion is also true although the study shows ongoing tendencies when the industrial sector alone or together with the state attempts to regulate the social relations to avoid further stricter regulation. In these cases the state accepts these rules enacted by private actors as laws.This industry based self-regulation might occur in a form of obligatory self-regulation (case in UK to handle file-sharing), co –regulation (Hungarian media law),

„encouraged" self-regulation (Press Complaints Commission in UK) or real „voluntary" self-regulation that arises from responsibility of private industrial actors however we can assume that the fear from state regulation enhances the self-regulation (Hungarian Code of Advertising Ethics coordinated by the Hungarian Advertising Self-Regulatory Board).

Regarding the third criterion of law the general validity I concluded that an important specific of the internet regulation is that legislators try to find those private actors who constitute a bottleneck in the system to be the subjects of law. Through these „bottleneck actors" legislators may control the content access of the users en masse and they can execute the law. The study analyzes six groups of subject of law whom are usually targeted by the legislators: content providers, internet service providers, search engines, cybercafés, libraries and schools.

According to the forth criterion of law the efficacy of law is guaranteed by the state agencies virtually by force. This substantive criterion of the law might change the traditional concept of law nowadays since the law only fulfills its social function if it is efficacious. *„That legal obligation which is not efficacious is seems to be a law but in reality it is not"*. As we can face in everyday and the study also makes an effort to show the serious difficulties that the states struggle in connection with the efficacy of law.

Both ways to achieve efficacy of law -- the law abiding attitude of the citizens and the execution of laws by the state – are facing basic difficulties. Almost all the requirements of traditional legislation are missing: there are no settled social relations, the legal dogmatics are not crystallized not to mention the missing adequate legal apparatus with the proper know-how. Regarding these circumstances this is not a surprise that the newly enacted laws are not abided by the citizens voluntarily (the study presents many examples). Moreover we should emphasize that probably the most important warranty of the law abiding attitude of the citizens is the consistent execution of laws. *„To enforce the laws that are not followed by the citizens put disproportionally huge burden on executive agencies, and may generate wide resistance against the legal system and therefore against the political system as well. The execution by all means is not practical in respect of the political system and often it is not possible either."* The absence of voluntary law abiding attitude the focus shifts to execution. That imposes significantly more burden on the states.

The difficulties of execution of laws are the results of the features of the internet discussed below.

To increase efficacy states make desperate attempts. One of these attempts is the case when the state gives the possibility of regulation into the hands of industrial private actors (versions of self-regulation) and hopes that they will abide more by the rules enacted by themselves.

Legislators try to increase efficacy that they target regulation to subjects who might be more easily controlled and pressured to follow the rules. In case of failure to comply with a law they might be more easily sanctioned (see ISP-s, content providers etc.).

Another tendency to increase efficacy is the introduction of deterrent sanctions (high fines, long term imprisonments in some cases death sentence).

However the most widespread reaction of the states is the usage of technical tools namely putting filters on several levels either paralelly or alternatively with the regulation (in the second case we cannot speak about regulation).

> Regarding the lack of efficacy on the internet it makes the concept of law unsteady in some cases. Other cases – such as file sharing in masse in copyright law – if we accept the traditional positivist provision *„That legal obligation which is not efficacious is seems to be a law but in reality it is not"* the concept of law collapses.

Succeeding parts of the study I stressed out the most substantial features of internet which distinguishes it from traditional mediums and which are important from the aspect of the regulation attempts. These features are the following:

- The unlimited data transmission possibility makes possible that content uploaded on one point of the world become immediately available to a user located on another point of the world. It minimized the costs of communication and changes the world to a „worldvillage".
- The second feature is the borderlessness which was illustrated with the example of kuruc.info that used foreign domain and kept its content on servers abroad.
- The third feature the anonymity makes freedom of speech -- that is important for democracy – free. Thanks to anonymity the authors who don't want to publish their opinion with name might publish their opinion. However anonymity also gives space to scams. (I argued with the opinion of Lawrence Lessig the writer of Code and other laws of Cyberspace based on the ongoing practice in Hungary. According to Lessing

the internet develops in a way that everybody might be identified and everything he has done might be followed).

After the major features I tried to clear basic definitions.

Concerning the definition of online content we have faced the problem that there is no general definition of content in the Hungarian laws an decrees. Given the fact that laws and decrees are usually specialized they regulate only questions in connection with a given type of content. (Copyright law protects only contents with individual and original nature, advertisement law regulates communications and information aiming to promote the sale or popularity of goods and services.) Therefore I approached the problem from another technical side and checked simply how the legislator determines: what can go through the wire? The act C. of 2003 on electronic communications defines the electronic communications activity as such: "*Electronic communications activity: shall mean the activity in the course of which signals, signs, texts, images, voice or messages of any other nature generated in any form that can be interpreted are transmitted via electronic communications networks to one or more users…".*

Regarding the definition of content providers an interesting development is ongoing. While previously users generally visited websites containing contents edited and monitored by major publishers nowadays the focus has shifted completely to user generated contents. The most visited websites are no longer the sites created and edited by paid employees but social networks (e.g. facebook.com or iwiw.hu in Hungary) video sharing sites (such as youtube.com) blogs in brief user generated content. Obviously this focus-shifting also basically influences the regulation it matters who are obliged by the law.

Following the basic definitions I divided the unwanted contents in two major groups: illegal and harmful contents. I illustrated with the example of Nazi relics, obscenity and the case of Danish cartoons that it basically depends on the culture, religion and history of a country which content is qualified as illegal.

While in the first part of the second chapter dealing with WHOM? and HOW? questions I examined the cases of filters in the second part of the chapter I examined the legal and other methods that make possible the controlling of online contents. Both technical and legal methods target those actors that constitute a bottleneck in the system and allow them to control the contents massively. Bottleneck actors might be the ISP-s operating the internet backbone of the country, content providers, search engines and in some cases simple users of the internet. In the study I categorized these bottleneck actors and tried to show the most typical filtering and regulative methods related to each actor built on international examples. Based on this categorization the following subject of laws and related regulation were classified and demonstrated:

2.1.2.1 Technical tools: filters

2.1.2.1.1 Country level filtering:

2.1.2.1.1.1 *Internet backbone*

2.1.2.1.1.2 *Central ISP*

2.1.2.1.2 Industry level filtering:

2.1.2.1.2.1 *ISP-s*

2.1.2.1.2.2 *Search engines*

2.1.2.1.3 Public access level filtering: schools, libraries and cybercafés

2.1.2.1.3.1 *Schools, libraries*

2.1.2.1.3.2 *Cybercafes*

2.1.2.1.4 End-user level filtering

2.1.2.2 Legal and other methods

2.1.2.2.1 Country-level internet access

2.1.2.2.2 End users internet access

2.1.2.2.3 Content providers

2.1.2.2.3.1Llaws, self-censorship, self-regulation

2.1.2.2.3.2 Control of domain registrations

2.1.2.2.3.3Obligatory licensing and registration of content providers

2.1.2.2.3.4 Extended liability

2.1.2.2.3.5 Self- and co-regulation of content providers

2.1.2.2.4 ISP-s

2.1.2.2.4.1 Measures initiated by the state to prevent availability of online contents

2.1.2.2.4.1.1 Legislation

2.1.2.2.4.1.2Filtering pressured by the state without formal legislation

2.1.2.2.4.1.3 Extended Liability

2.1.2.2.4.1.4 Judicial Decision

2.1.2.2.4.1.5 Subscribers related measures

2.1.2.2.4.1.5.1Keeping records of the subscribers online activity

2.1.2.2.4.1.5.2 Obligation to report to the authorities

2.1.2.2.4.1.5.3 Denying internet service

2.1.2.2.4.1.5.4 Three stike laws or digital guillotine

2.1.2.2.4.2 Measures initiated by the state to prevent discrimination of contents

2.1.2.2.4.3 Self-regulation of ISP-s

2.1.2.2.4.3.1 Obligatory self-regulation

2.1.2.2.4.3.2 Encouraged self-regulation

2.1.2.2.4.3.3 Voluntary self-regulation

2.1.2.2.5 Search engines

2.1.2.2.5.1 Obligatory regulation

2.1.2.2.5.2 Self-regulation

2.1.2.2.6 Cybercafes

2.1.2.2.6.1 Filters

2.1.2.2.6.2 Verifying users identity

2.1.2.2.6.3 Keeping records and monitoring

2.1.2.2.6.4 Furniture and equipement requirements

2.1.2.2.7 Schools and libraries

In the third chapter I tried to classify WHAT the legislators regulate with the help examples from several countries. Based on the analysis I determined nine major content categories:

- Obscenity
- Defamation
- Hate speech
- Religious speech, including proselytizing or blasphemy
- Speech threatening national security
- Speech concerning politics or governments
- Speech promoting illegal or immoral behavior
- Gambling

Unauthorized copies of copyrighted materials

The third chapter unconventionally does not begin with a content category but with a model limiting the liability of service providers first accepted in the US.

To summarize, the study tries to show an overall absolute picture of the worldwide tendencies by classifying the subjects of law (WHO?), the related usual controlling methods (HOW?) and the content categories (WHAT?). Based on the appearing tendencies the paper examines the influence of the internet on the legislation and the traditional jurisprudential concepts.

2.2. Methods

The major sources of the study were the more than fifty country reports and the regional overviews made by the Opennet Initiative of the Berkman Center for Internet and Society at Harvard University. Moreover related foreign literature and also Hungarian articles concerning free speech played an important part in the study. Worldwide examples were gathered from foreign and Hungarians newspapers. In case of these news and articles I tried to use the seemingly more reliable papers either mentioned in Opennet country reports or trustworthy newspapers such as NyTimes, Guardian, Wired, Reuters. Nevertheless in case of some questions – merely from outside Europe – I could not check the reliability of the local newspaper (e.g. in case of UAE or India).

Besides of the methods above in some parts of the study I used historical and comparative methods as well.

With the help of the sources and methods mentioned above I made an attempt to an exhaustive demonstration and classification of the typical regulatory methods. Naturally in this rapidly developing industry with so frequent new inventions it is almost impossible. Even so the study hopefully shows an overall consistent picture and reveals the major tendencies and the motives behind them.

3. The results of the research

3.1. Conclusions

My results and conclusions might be summarized in eight thesis:

1 Then I revealed the most substantial features of internet (unlimited data transmission possibility, borderlessness, anonymity) and illustrated them with worldwide examples to point out their general validity.

2 I stressed out the deficiencies of the definitions of online content and content providers. I made an attempt to approach the online contents from the perspective of electronic communications.

3 I established the dependence of illegal and harmful contents on culture, religion and history and illustrated it with cases from several countries.

4 I worked out a system of the controlling and regulatory methods.
As a part of it I showed how the subjects of laws and filter users are identical or different. The result is in the chart below.

	Country -level access	Content providers	ISP-s	Search engines	Cyber cafes	Schools libreries	End user access
Technical tools (filters)	X		X	X	X	X	X
Legal and other methods	X	X	X	X	X	X	X

5 I examined and illustrated the typical regulation of the nine major content categories.

6 Concerning the process of legislation I explored that the preconditions of coherent regulation are not available since the appearance of the internet.

7 Concerning the traditional jurisprudential concepts I stressed out that due to the lack of efficacy the concept of law unsteady in some cases.

8 Altogether based on the different examples from abroad the tendencies below evolve:

We can conclude that the appearance of the internet twisted the traditional procedure of legislation. While previously longer period had passed before the legislation therefore social relations could have settled since the appearance of the internet the activity of the users and newly available contents has basically shocked the states. This situation resulted in many types of reaction.

On the one hand not democratic states try to achieve the effect they wish with solutions beyond legislation. One way to control the availability of contents is by using filters. The simplest method is to put filter on the internet backbone when it enters to the country. Thus they can filter the whole internet traffic without the participation of industrial private actors. Similar solution when internet service might be bought only from state owned ISP or internet traffic entering into the country passes through the system of the state owned ISP. In these cases traffic might be controlled without any related legislation. Moreover these states might easily push ISP-s to put filter on their own networks without any legislation. In addition we saw examples which were extreme even in dictatures. In Cuba and in North Korea users can only access intranet created by the state. Another frequent trend out of the concept of law since the development of the internet is when industrial sector attempts to regulate the social relations. The reason and the advantage of this trend is that industry might see through more easily the tendencies and therefore might add know-how needed for legislation. Another advantage is that industrial actors presumably are more willing to follow those rules that they had created. However this is not formal legislation as we could see from the examples but the state also appears in these regulations. In case of co-regulation the state regulates together with the industrial sector, in case of obligatory self-regulation the state forces self-regulation and in case of encouraged self-regulation the state induces self- regulation. The real „voluntary" self-regulation was also mentioned but I also emphasized the assumption that the fear from state regulation enhances the self-regulation. Within the concept of law in case of both democratic and anti-democratic states also we can see that legislators to increase efficacy try to target as subject of law those private actors who constituted a bottleneck in the system. These actors – whom I tried to classify together with the related regulations in chapter two – usually might be more easily identified, controlled and pressured to follow the rules and in of failure to comply with a law they might be more easily sanctioned. In point 2.2.2. I particularly dealt with regulation of the end-user level however it is also clear at that level that

apart from few exceptions usually legislators try to control end-users access through the same bottleneck actors.

An atypical tendency has also appeared in the study when the purpose of the legislator is not the disappearance of certain contents. On the contrary in these cases the states consider legislation to keep industrial actors from discrimination of the rival services and contents and to assure the availability of these services and contents (Net Neutrality topic).

Mainly in less democratic countries we saw legislative methods that did not determine the direct state purpose but tried to achieve indirectly the target of the state. Among others extended liability, the obligation to keep subscribers records, mandatory reporting obligation of ISP-s, in case of cybercafés the duty to identify users, to monitor and to record log of users activity, to install hidden cameras, to arrange computer monitors in a visible way fall into this category.

Self-censorship is also an indirect effect that appears not only in antidemocratic countries as we could see in the study. The cause of self-censorship might be the fear from strict sanctions and overbroad/obscure regulation. Not only the fear from the reaction of the state might trigger self-censorship. The fear from deterrent sanctions included in laws for contents violating the rights of private persons might also lead to self-censorship. Not only regulation might generate self-censorship. The fear from aggression and from moral condemnation provoked by the publication of certain contents might also be the cause of self-censorship.

I made an attempt to show how the form of government, the religion, and the history of a country influence which contents are regulated and when necessity for regulation occurs.

Apropos of necessity for regulation we could see that in anti-democratic countries the state tries to control all the social relations including the branches of press and communication as a source of information and possibility of communication in order to force state values on the population. The purpose of the legislator is to enact the necessary regulation for this control.

In democratic states necessity for regulation usually occurs related to concrete issues. In many cases it turns out that the real purpose is not the proper regulation of the social relation but to create political capital. Politicians tend to pick certain problems up (which might be already regulated in other contexts) and try to find spectacular solutions which can be effectively communicated and which can increase the popularity of their parties (three strikes laws in case of copyright infringements) It is not grateful to argue these spectacular – and many times

doubtful – solutions because the speaker might seem to query the whole purpose and not just the doubtful solution.

Concerning the forth criterion of the law - the efficacy I emphasized how legislators are unable to deal with social relations developing since the appearance of the internet and what kind of desperate attempts they make to reach a solution.

We can generally conclude that despite the previous tendency when mainly anti-democratic countries favored filters nowadays countries deemed to be „democratic" also use filters frequently to increase efficacy. They ignore the fact that removed content can be replaced elsewhere in no time and state administration obviously cannot compete with this rapidity. Industrial actors cannot be instructed so quickly to change settings of filters that unwanted contents wouldn't be replaced. Not to mention counter effects as we could see in case of Pirate Bay in Denmark. Another interesting question from the point of efficacy that many times not just content targeted by the legislators are blocked but other legal contents are also fall under blockage due to technical difficulties. This unwanted blockage violates the rights to free speech of the content providers that publishes legal contents and that also means that the law is not efficacious.

Another desperate legislative reaction is the introduction of deterrent sanctions. In case of anti-democratic long term imprisonments or even death sentence (e.g. in Iran for „insulting the religion" or in Pakistan for the defamation of the Prophet Mohammad) might seem to be normal. But deterrent sanctions appear to be extraordinary in democratic countries and generate strong outcries and anti-campaigns which do not further the acceptance of the norms and do not enhance law abiding attitude of the citizens. Such deterrent sanctions were shown in the US where several hundred thousand dollar compensations were decided in lawsuits filed by the RIAA against users who made music tracks available on a peer-to-peer network. I consider desperate legislative reaction all the regulatory attempts that confront the features of the internet. Example for these attempts might be the regulations following the Hadopi model. In the French and New Zealand cases we could see that the punishment is not imposed on the infringers therefore it contradicts the principle nulla poena sine lege. I also regard as a desperate attempt the plan of the obligatory filtering in Australia where the whole traffic of the country would have been pre-censored in order to protect children.

Regulations based on desperate legislative reactions do not result in law abiding attitude of the citizens therefore to reach efficacy the law enforcement as a method remains. However:

„To enforce the laws that are not followed by the citizens put disproportionally huge burden on executive agencies, and may generate wide resistance against the legal system and therefore against the political system as well. The execution by all means is not practical in respect of the political system and often it is not possible either. „

Regarding the lack of efficacy on the internet it makes the concept of law unsteady in some cases. In some other cases – such as file sharing in masse in copyright law –the concept of law collapses.

Hopefully the study made it clear that starting the regulation of the internet is a slippery slope. Countries that start attempts to solve a problem by regulating the internet from then on will most likely choose the internet regulation instead of other more effective solutions. In case of child pornography the purpose is acceptable for everybody. But even in case of Europe we can see that following the child pornography the next topic is copyright infringements then gambling prohibitions. Moreover in case of such regrettable events as the Breivik mass murder a claim for the filtering of hate speech appears till the legislators reach the end of the slope and think of solving the problem of anorexia by prohibiting the blogs dealing with anorexia as was the case in Germany and France. The study made an attempt to clarify that internet regulation does not provide a solution in many cases. Moreover attempts to regulate the internet usually damage free speech which is the basis of democracy and don't provide effective solution because the regulation doesn't reach its wishful goal but cause disadvantage in competition for the local service providers.

3.2. Possibilities of utilization

Utilization is possible in two ways. On the one hand in Hungary the literature concerning internet regulation is not extensive therefore the study hopefully fills the gap. However foreign articles are numerous, they basically focus on a special subject and the overview is rare. The study attempts to show an overall overview of the regulatory methods exceeding the special territories.

On the other hand the study might be used in the territory of legislation. A shorter version of the study was published in August 2010 in the Infocommunicationand law. The article *„Can the internet be regulated?"* made a cry for help because of the former defects of the draft media law initiated in June 2011 and supported by five parties and the flaws of the ongoing draft media constitution on free speech and basic rules of media contents to avoid the children illnesses of the media constitution and to accept a better version of it.

Based on the described cases the study might help legislator to avoid legislation in Hungary that infringes severely free speech but does not help solve the problems.

4. Publications

4.1 Publications in connection with the research

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4.2. Other publications

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