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## **The Role of Law in the Governance of the Internet**

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It reads like a truism: lawyers are trained to handle the law. This statement becomes meaningful if one distinguishes governance by law from the use of other governance tools. Many of them come in legal form, like a Pigouvian tax laid down in a statutory provision<sup>1</sup>. But the actual governance effect is not a legal one<sup>2</sup>. Put differently: it can be measured against the benchmark of governance by law (1). For the Internet, governance by law is a rare exception (2). There are more explanations for this practice (3). But the Internet is indeed a challenge for governance by law (4). Thus far, the result looks like a dilemma: traditional governance by law lacks efficacy, governance by non-legal tools falls behind the normative benchmark. But for a good many Internet issues, the dilemma can at least be mitigated by an exercise in reinventing governance by law (5).

## 1. Governance by law as a normative benchmark

Governance by law is not fashionable. Modernists pejoratively call it command-and-control regulation. The cruder the rationalist model, the easier it becomes to demonstrate the comparative advantages of fancier regulatory tools. For governance by law is not very efficacious, and the regulatory cost is rather high. But the world out there is neither rational nor simple. Unlike any other governance tool, governance by law has stood the test of time on a long-term scale. History alone would therefore justify the presumption that governance by law achieved the right balance.

But the analysis need not stop there. It would certainly be preposterous to claim that our time has already uncovered all the secrets of this governance tool. But for quite a number of them, we do possess a conceptual language. This is not the occasion to elaborate on these issues *in extenso*<sup>3</sup>. Sketchy remarks must suffice.

Governance by law is on purpose fuzzy. This property enables it to handle fundamental relativism, or incompatible normative currencies<sup>4</sup>. If the political process ended up in partial dissent, the authorities entrusted with rule application are able to finish the regulatory work<sup>5</sup>. Its fuzziness makes governance by law disturbance-proof. It can be readjusted to external shocks, to

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1 For an overview see *Christoph Engel: Die Grammatik des Rechts*, in: Hans-Werner Rengeling (ed.): *Instrumente des Umweltschutzes im Wirkungsverbund*, Baden-Baden (Nomos) 2001, 17-49 (19-23).

2 *Tamar Frankel: The Common Law and Cyberspace*, Boston University School of Law Working Paper 01-21, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=292614](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=292614) (5/7/2002) asks a question related to the one posed here, but treats it in an entirely different manner. She is interested in how the methodology of rule-making, be it by common or statutory law, can match the challenges of the Internet; despite its title, the following paper is even more remote: *Tom W. Bell: The Common Law in Cyberspace*, in: *Michigan Law Review* 97 (1999) 1746-1770: the article is about regulating the telecommunications infrastructure of cyberspace.

3 See in greater detail *Engel* (note 1) 23-34; see also *Daniel H. Cole/Peter Z. Grossman: When is Command-and-Control Efficient? Institutions, Technology, and the Comparative Efficiency of Alternative Regulatory Regimes for Environmental Protection*, in: *Wisconsin Law Review* 1999, 887-938.

4 More from *Christoph Engel: Offene Gemeinwohldefinitionen*, in: *Rechtstheorie* 32 (2001) 23-52.

5 See in greater detail *Adrienne Windhoff-Héritier: Politikimplementation. Ziel und Wirklichkeit politischer Entscheidungen*, Königstein 1980, 29-31.

boundedly rational administrators<sup>6</sup>, and to unexpected creative reactions of the addressees<sup>7</sup>. Law is more than a governance impulse.

Legal governance is text-bound. The application authorities listen to the addressee and explain themselves. The addressee therefore knows what the law is heading for<sup>8</sup>. The discourse reminds the addressee of normative expectations<sup>9</sup>. It also provides the addressee with an opportunity for raising concerns about the adequacy of the rule. It thus serves, in the terminology of *Albert O. Hirschman*, as a voice mechanism<sup>10</sup>. By its discursive character, the law has access to the cognitive models on which the addressees base their view of the world. This feature makes it less likely that the addressees misunderstand the law's intention. Not so rarely, the law even has a chance to reshape the preferences of the addressees.

Governance by law is context-sensitive. It is essentially a mechanism for piece-meal engineering. It can live up to path dependency<sup>11</sup> and to local resistance. The law is inherently evolutionary<sup>12</sup>. It collects and even generates experiences and uses them to permanently reprocess governance.

Last, but not least, governance by law naturally respects democracy and the rule of law. Rule generation is done by Parliament. And rule application is entrusted to a layered system of public authorities, and to the courts<sup>13</sup>.

## 2. The different regulatory practice

Against this background, one might expect governance by law to be pervasive. But at least as far as the Internet is concerned, the role of governance by law is limited<sup>14</sup>. After initial failures,

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6 See in greater detail *Christoph Engel*: Legal Responses to Bounded Rationality in German Administration, in: *Journal of Institutional and Theoretical Economics* 1994, 145-162.

7 Insightful *Gerhard Wegner*: *Wirtschaftspolitik zwischen Selbst- und Fremdsteuerung – ein neuer Ansatz* (Contributions Jenenses 3) Baden-Baden 1996.

8 Cf. *Renate Mayntz*: Implementation von regulativer Politik, in: id. (ed.) *Implementation politischer Programme II*, Opladen 1983, 50-74 (65-69).

9 More on this by *Iris Bohnet*: *Kooperation und Kommunikation. Eine ökonomische Analyse individueller Entscheidungen* (Die Einheit der Gesellschaftswissenschaften, 98) Tübingen 1997.

10 *Albert O. Hirschman*: *Exit, Voice and Loyalty*, Cambridge 1970.

11 See only the leading article by *W. Brian Arthur*: *Competing Technologies, Increasing Returns and Lock-In by Historical Events*, in: *Economic Journal* 99 (1989) 116-131.

12 Extensively *Stefan Okruch*: *Innovation und Diffusion von Normen. Grundlagen und Elemente einer evolutionären Theorie des Institutionenwandels*, Berlin 1999.

13 Cf. *Margaret Jane Radin/R. Polk Wagner*: *The Myth of Private Ordering. Rediscovering Legal Realism in Cyberspace*, in: *Chicago-Kent Law Review* 73 (1998) 1295-1317 (1296 and passim): private Internet ordering is anarchic, not liberal; id. 1317: banishment is the only sanction available; for a practical case see *Thomas B. Nachbar*: *Paradox and Structure. Relying on Government Regulation to Preserve the Internet's Unregulated Character*, in: *Minnesota Law Review* 85 (2000) 215-318 (265); cf. also *Lawrence Lessig/Paul Resnick*: *Zoning Speech on the Internet. A Legal and Technical Model*, in: *Michigan Law Review* 98 (1999) 395-413 (425) on abusively restrictive private filtering technology; a similar point is made by *Joel Reidenberg*: *Yahoo and Democracy on the Internet*, in: *Jurimetrics* 42 (2002) [forthcoming, at note 78]: “Geographic determinacy would enable US intellectual property rights holders to distribute their content on the Internet and engage in self-help by blocking access to those rogue countries that do not adequately protect American rights.”

some jurisdictions have even deliberately withdrawn from this regulatory technique<sup>15</sup>. The regulatory scene is dominated by both alternative regulatory approaches and alternative actors<sup>16</sup>. Three approaches are most prominent: explicit self-regulation, implicit governance by technical code, and self-help.

Internet self-regulation by now is almost a classic<sup>17</sup>. The term self-regulation is an oxymoron. If all affected persons agree to a set of rules, there will no longer be any socially harmful behaviour to be altered. The term self-regulation will only become understandable if one unpacks the concept of consent. It implies that at least some actors have subordinated to group pressure. Alternatively, the whole regulating group may have given in to outside power from the other side of the market or from government. A case in point is the complex system for the attribution of domain-names set up by ICANN<sup>18</sup>. The Internet is particularly apt for self-regulation, because the regulatory body can often rely on technical enforcement mechanisms. If a member of the group, or even an outsider, does not abide by the rules, it is relatively easy to ban him from further traffic<sup>19</sup>. The regulating body could even unleash killer software against electronic trespassers<sup>20</sup>.

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- 14 For an overview see *Yochai Benkler*: Net Regulation. Taking Stock and Looking Forward, in: *Colorado Law Review* 71 (2000) 331; extensively *Klaus W. Grewlich*: Governance in 'Cyberspace'. Access and Public Interest in Global Communications (Law and Electronic Commerce 9) The Hague 1999.
- 15 *Monroe E. Price/Stefan G. Verhulst*: In Search of the Self. Charting the Course of Self-Regulation on the Internet in a Global Environment, Cardozo Law School, Public Law Working Paper No. 015 (2000) 1, pointing to the experiences of the U.S. with the Communications Decency Act (CDA) and to the experiences of Germany in the CompuServe case; in greater detail on the CompuServe case *Gunnar Bender*: Bavaria vs. Felix Somm. The Pornography Conviction of the Former CompuServe Manager, in: *International Journal of Communications Law and Policy* 1998/1, 1-4; *Franz C. Mayer*: Europe and the Internet. The Old World and the New Medium, in: *European Journal of International Law* 11 (2000) 149-169 (151-153); see also the French Yahoo case Tribunal de Grande Instance de Paris, ordonnance de référé, 11/20/2000, <http://www.juriscom.net/txt/jurisfr/cti/tgiparis20001120.htm> (4/16/2002) ; id. Document de travail sur le rapport d'expertise, 11/6/2000, <http://www.juriscom.net/txt/jurisfr/cti/tgiparis20001106-rp.htm> (4/16/2002) ; id. Ordonnance de référé, 8/11/2000, [http://www.legalis.net/cgi-iddn/french/affiche-jnet.cgi?droite=decisions/responsabilite/ord\\_tgi-paris\\_110800.htm](http://www.legalis.net/cgi-iddn/french/affiche-jnet.cgi?droite=decisions/responsabilite/ord_tgi-paris_110800.htm) (4/16/2002) ; Ordonnance de référé, 5/22/2000, <http://www.juriscom.net/txt/jurisfr/cti/tgiparis20000522.htm#texte> (4/16/2002) ; *Brendon Fowler/Cara Franklin/Bob Hyde* : Can you Yahoo!? The Internet's Digital Fences, in: *Duke Law and Technology Review* 2001, 0012; *Michael A. Geist*: Is There a There There? Toward Greater Certainty for Internet Jurisdiction, in: *Berkeley Technology Law Journal* 16 (2001) 1345-1406, at note 16 ss.; id.: The Legal Implications of the Yahoo! Inc. Nazi Memorabilia Dispute, in: *Juriscom* January/March 2001; *Paul Schiff Berman*: The Globalization of Jurisdiction. Cyberspace, Nation States, and Community Definition, forthcoming, at notes 62 ss.
- 16 For an analytic framework see the National Research Council: *Global Networks and Local Values*, Washington 2002, 190-204.
- 17 Out of the rich literature see e.g. *Peter P. Swire*: Markets, Self-Regulation, and Government Enforcement in the Protection of Personal Information, <http://www.acs.ohio-state.edu/units/law/swire.htm> (5/7/2002); *Neil Weinstock Netanel*: Cyberspace Self-Governance. A Sceptical View From Liberal Democratic Theory, in: *California Law Review* 88 (2000) 395-498; *Éric Brousseau*: Internet Regulation: Does Self-Regulation Require an Institutional Framework ? <http://panoramix.univ-paris1.fr/ATOM/pdf/eric/wp/new/EBISNIERegInt0801.pdf> (5/7/2002).
- 18 For details see *Grewlich* (note 14) 193-216; *A. Michael Froomkin/Mark Lemley*: ICANN and Antitrust, <http://personal.law.miami.edu/~froomkin/articles/icann-antitrust.pdf> (1/30/2002) and, critically, *Milton Mueller*: ICANN and Internet Governance. Sorting Through the Debris of 'Self-Regulation', in: *Info* 1 (1999) 497-520.
- 19 Specifically for ICANN rules: *Michael A. Froomkin*: Of Governments and Governance, <http://www.law.miami.edu/~froomkin/articles/governance.htm> (5/9/2002) at note 34; see also *David R. Johnson*, <http://www.cli.org/selford/spam.htm> (12-1999); *Radin/Wagner* *Chicago-Kent Law Review* 1998 (note 13) 1317; *Joel R. Reidenberg*: Governing Networks and Rule-Making in Cyberspace, in: *Emory Law Journal* 45 (1996) 911, at note 34.

Finally, private regulators can rely on social norms<sup>21</sup>. This is not only true for the famous 'netiquette'<sup>22</sup>. They can even surge on the spot, as illustrated by the reactions of a virtual community to 'cyber rape'<sup>23</sup>.

While self-regulation is the application of a well-known regulatory method to just another field, Internet lawyers have been much attracted by what looked like an entirely new regulatory technique: rules embedded in technical code<sup>24</sup>. Actually, there are predecessors in technical standardization, and in telecommunications regulation<sup>25</sup>. Code is different from self-regulation in a number of respects. The governance effect of code is normally not made explicit. It appears to be just the way things are<sup>26</sup>. This makes code a powerful subterfuge for policy-making<sup>27</sup>. Moreover, code is a self-enforcing governance tool. It needs no separate implementational authority. It is simply embedded in network design<sup>28</sup>. Code can literally hard-wire solutions<sup>29</sup>. Finally, the governance effects of code are not so rarely even unintended. For code is typically developed by technicians who tend to be concerned by not much more than technical efficacy.

Although they look similar, self-regulation and self-help are fundamentally different<sup>30</sup>. The difference is best explained by the economic concept of property rights<sup>31</sup>. In self-regulation, the property right is with the individuals to be protected by the rules. The protectees thus keep the right to be free from intrusion. Only the technology of bringing protection about is changed. It is no longer administered by government, but by potential intruders as an organised group. With

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- 20 For the details see *Henry H. Perritt*: Cyberspace Self-Government, Town Hall Democracy or Rediscovered Royalism?, in: *Berkeley Technology Law Journal* 12 (1997) 413-481 (437 s.).
- 21 On this see in detail *Mark A. Lemley*: The Law and Economics of Internet Norms, *Chicago-Kent Law Review* 73 (1998) 1257-1294.
- 22 For an unofficial list see *Sally Hambridge*: Netiquette Guidelines, <http://www.cybernothing.org/cno/docs/rfc1855.html>.
- 23 *Lawrence Lessig*: Code and Other Laws of Cyberspace. New York 1999, 74-78 tells the story.
- 24 Most prominent are *Lessig* (note 23); *Joel R. Reidenberg*: Lex Informatica. The Formulation of Information Policy Rules through Technology, in: *Texas Law Review* 76 (1998) 553-593; *Paul Schiff Berman*: Cyberspace and the State-Action Debate. The Cultural Value of Applying Constitutional Norms to 'Private' Regulation, in: *University of Colorado Law Review* 71 (2000) 1263-1310; *Neil Weinstock Netanel*: Cyberspace 2.0, in: *Texas Law Review* 79 (2000) 447-49; see recently also *Serena Syme/L. Jean Camp*: Code as Governance, The Governance of Code, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=297154](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=297154) (5/7/2002).
- 25 For an economic analysis see *Henning Knorr*: Ökonomische Probleme von Kompatibilitätsstandards. Eine Effizienz-Analyse unter besonderer Berücksichtigung des Telekommunikationsbereichs (Law and Economics of International Telecommunications 18) Baden-Baden 1993.
- 26 *James Boyle*: Foucault in Cyberspace. Surveyance, Sovereignty and Hard-Wired Censors, in: *University of Cincinnati Law Review* 66 (1997) 177-205 (205), cf. also *Lessig* (note 23) 6 and 13: "problems can be programmed away"; *Berman* (note 24) *University of Colorado Law Review* 2000, 1265.
- 27 Cf. on the concept of subterfuges *Guido Calabresi*: Ideals, Beliefs, Attitudes and the Law. Private Law Perspectives on a Public Law Problem, Syracuse 1985, 60 s. and 63 s.
- 28 *Reidenberg* (note 24) *Texas Law Review* 1998, 555; *Berman* (note 24) *University of Colorado Law Review* 2000, 1264 compares it to building a wall around a park in order to prevent cars from driving into it, instead of forbidding them access; see also *Boyle* (note 26) *University of Cincinnati Law Review* 1997, 177.
- 29 *Reidenberg* (note 19) *Emory Law Journal* 1996, at note 61; *Boyle* (note 26) *University of Cincinnati Law Review* 1997, 177: "hard-wired censors"; see also *Lessig* (note 23) 15-17.
- 30 See in particular *Kenneth W. Dam*: Self-Help in the Digital Jungle (Chicago John M. Olin Law and Economics Working Paper No. 59) Chicago, 1998; see also *Tom W. Bell*: Pornography, Privacy, and Digital Self-Help, [http://papers.ssrn.com/sol3/delivery.cfm/SSRN\\_ID257689\\_code010215520.pdf?abstractid=257689](http://papers.ssrn.com/sol3/delivery.cfm/SSRN_ID257689_code010215520.pdf?abstractid=257689) (5/7/2002).
- 31 Extensively *Thrainn Eggertsson*: Economic Behaviour and Institutions, Cambridge 1990.

self-help, however, the property right shifts to the intruder. There is no longer any effort to force the intruder to behave in a socially acceptable way. On the contrary, it is taken for granted that such intrusions happen and cannot be prevented. Persons who fear the effect fence themselves off<sup>32</sup>. Well-known examples are the PICS standard for the protection of minors<sup>33</sup>, and the P3P standard for privacy protection<sup>34</sup>.

The individual need not be his own protection agent. He can instead entrust an intermediary with the task. Again, two examples: Internet service providers like America Online promise their customers a childproof Internet access<sup>35</sup>. Continuously improving the filter software then becomes part of the commercial service. Each individual buys as much protection as he is prepared to pay for. Competition drives the development of better protection techniques<sup>36</sup>. A second example are the charge-back mechanisms of credit card companies<sup>37</sup>. These mechanisms are a private substitute for legal rules on consumer protection.

### 3. Explaining the shift

Positive analysis would be interested in explaining why the role of law is so limited for the governance of the Internet. It could test a series of hypotheses. Path dependence might play a role in that the Internet originated in an academic environment characterized by high trust in technical design and social norms<sup>38</sup>. Public choice theory would ask whether a declared hands-off policy might in fact be a subterfuge for government interference without democratic control<sup>39</sup>. The use of non-legal governance tools might be no more than the regulatory fashion of our days. Or the shift might be a reaction of U.S. policymakers to a hostile public perception of the social role of lawyers. All these explanations imply that the Internet could very well be governed by law if the

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32 One can interpret the shift as an application of a fundamental insight by *Ronald H. Coase*: The Problem of Social Cost, in: *Journal of Law and Economics* 3 (1960) 1-44; more on this interpretation from *Christoph Engel*: The Internet and the Nation State, in: *id./Kenneth H. Keller* (eds.): *Understanding the Impact of Global Networks on Local Social, Political and Cultural Values* (Law and Economics of International Telecommunications 42) Baden-Baden 2000, 201-260 (254-258).

33 *Berman* (note 24) *University of Colorado Law Review* 2000, 1274.

34 <http://www.w3c.org/p3p>.

35 More by *Lessig* (note 23) 66-71; *Reidenberg* (note 19) *Emory Law Journal* 1996, at note 30.

36 *David G. Post*: *Governing Cyberspace*, in: *Wayne Law Review* 43 (1996) 155-171 (168-171); on the – limited – danger of abusing filters see *Cass R. Sunstein*: *Republic.com*, Princeton, Princeton University Press 2001; *Mark S. Nadel*: *Customized News Services and Extremist Enclaves in Republic.com*, in: *Stanford Law Review* 54 (2001) 831-886; *id.*: *The First Amendment's Limitations on the Use of Internet Filtering in Public and School Libraries*, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=136450](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=136450) (1/30/2002).

37 More at OECD/GD (96) 142.

38 On the evolution of the Internet see in greater detail *Michael Dertouzos*: *What Will Be. How the New World of Information Will Change our Lives*, San Francisco 1997, 25-54 and passim; *Paul A. David*: *The Internet and the Economics of Network Technology Evolution*, in: *Christoph Engel/Kenneth H. Keller* (eds.): *Understanding the Impact of Global Networks on Local Social, Political and Cultural Values* (Law and Economics of International Telecommunications 42) Baden-Baden 2000, 39-72; National Research Council (note 16) 23-45.

39 This is the central hypothesis of Milton Mueller for the policy of the U.S. government toward ICANN, *Mueller* (note 18) *Info* 1999, 504 s. and passim.

legislator were only determined to do so<sup>40</sup>. However, the next section will show that a number of features of the Internet are a real challenge to governance by law.

## 4. Challenges for governance by law

### a) Introduction

Publicly, the Internet is predominantly perceived as a global phenomenon (b). But this is neither the only, nor the most demanding challenge to governance by law. The Internet entails more libertarian challenges for the legal system (c). Its egalitarian culture (d), the speed of its evolution (e) and its decontextualizing effects are not easy to cope with for the law (f).

Strictly speaking, the question is still too broad. Eventually, the specific regulatory goal and the framework conditions for achieving it determine how appropriate governance by law is. Take the contrast between pornography and privacy as an illustration. Pornography is a one-to-many conflict. One individual seeks protection against a potentially unlimited number of intruders. Privacy in contrast is much closer to a one-to-one conflict. The basic situation is one in which an individual has voluntarily given another individual access to his data, but the former individual wants transparency on the use of these data for different purposes. In terms of private law, the first is a situation of torts, the second of default rules in contract law. One-to-many conflicts are not open to ex ante negotiation, whereas one-to-one conflicts in principle are. For data protection, self-help means not giving the data away in the first place. For pornography, self-help implies active efforts of the potential victim. But an even closer look reveals that specificity does not end here. Ordinary pornography is different from child pornography in that the public in the latter case primarily wants to protect the portrayed children, not the ethical standards of spectators<sup>41</sup>. And privacy is also threatened by spies, turning the conflict into one of the one-to-many type.

Policy recommendations would have to uncover all these specificities. The purpose of this section is different. It intends to analyze five challenges to governance by law that are typical for the Internet as a governance area.

### b) Globalization

For the public, the Internet is one of the hallmarks of globalization. It illustrates how permeable national borders have become<sup>42</sup>. As U.S. lawyers have put it: the U.S. constitution is no more

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40 This is indeed the basic tenet of *Jack L. Goldsmith*: Regulation of the Internet. Three Persistent Fallacies, in: *Chicago-Kent Law Review* 73 (1998) 1119-1131.

41 See in greater detail *Bernd Holznagel*: Responsibility for Harmful and Illegal Content, as well as Free Speech on the Internet in the United States of American and Germany, in: Christoph Engel/Kenneth H. Keller (eds.) *Governance of Global Networks in the Light of Differing Local Values (Law and Economics of International Telecommunications* 43) Baden-Baden 2000, 9-42.

42 *Reidenberg* (note 19) *Emory Law Journal* 1996, at note 5.



than a "speed-bump on the Information Superhighway"<sup>43</sup>; "in Cyberspace, the First Amendment is a local ordinance"<sup>44</sup>. Economists describe the effect in terms of antitrust theory. Globalization in general, and the Internet in particular, bring the nation state into a situation of monopolistic competition. The nation state still offers a relatively highly aggregated bundle of public goods. The bundles offered by different nation states are not very close substitutes. But the nation state no longer possesses an unchallenged regulatory monopoly<sup>45</sup>. This weakens the competitive advantage of public over private governance. Government still has its sovereign powers, but it cannot use them regardless of the expected action of other governments. The technically and economically global character of the Internet increases the potential for international conflict. The Compuserve case demonstrates this. In the interest of combating access of minors to pornography, a Bavarian criminal court convicted the Compuserve manager for Germany. The conviction triggered violent protests from U.S. cyber libertarians<sup>46</sup>. The example shows how difficult it can be to organize the co-existence of divergent national policy orientations in a networked world<sup>47</sup>.

Even if nations agree both in their problem perception and in their willingness to do something about the problem by law, different legal cultures can lead them into conflict<sup>48</sup>. Moreover, the visibly global character of the Internet may weaken governance by law. For it makes patent that national legal orders come under pressure from regulatory competition<sup>49</sup>. This might delegitimize governance by law.

### c) Other libertarian challenges for the legal system

Mandatory legal rules are a form of central intervention into social life. This insight should certainly not be overstated. If one follows cultural theory in mapping the world into four solidarities, governance by law is not exclusively hierarchical. The distinction between rule design and rule application gives it an individualistic trait. And normativity is essentially egalitarian in that it appeals to a basic sense of solidarity<sup>50</sup>. But it is fair to say that governance by law is closer to hierarchy than to any competing way of life. This explains why the libertarian attitude of many Internet pioneers is a challenge to this governance tool. In their own words, the challenge sounds

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43 *Reidenberg* (note 24) *Texas Law Review* 1998, 586.

44 *Boyle* (note 26) *University of Cincinnati Law Review* 1997, 179, citing *John P. Barlow*.

45 See in greater detail *Wolf Schäfer*: *Globalisierung: Entmonopolisierung des Nationalen?*, in: Hartmut Berg (ed.): *Globalisierung der Wirtschaft: Ursachen – Formen – Konsequenzen* (Schriften des Vereins für Socialpolitik, Neue Folge 263) Berlin 1999, 9-21 (9-12).

46 For the details see *Bender* (note 15) *International Journal of Communications Law and Policy* 1998/1, 1-4.

47 Cf. on institutional solutions for co-existence *Christoph Engel*: *Wege zur Bewältigung der Konflikte in der globalen Informationsgesellschaft*, in: Ernst-Joachim Mestmäcker (ed.): *Kommunikation ohne Monopole II* (Law and Economics of International Telecommunications 23) Baden-Baden 1995, 179-210.

48 For an illustration of the differences between the U.S. and the German legal culture, see *Lawrence Lessig*: *Comment on Christoph Engel: Delineating the Proper Scope of Government – A Proper Task for a Constitutional Court ?*, in: *Journal for Institutional and Theoretical Economics* 157 (2001) 220-223.

49 Out of the prolific literature see only *Lüder Gerken* (ed.): *Competition among Institutions*, Houndmills 1995.

50 The background of these concepts is explained by *Michael Thompson/Richard Ellis/Aaron Wildavsky*: *Cultural Theory*, Boulder 1990; even a fatalistic trait could be detected in the possibility of enforcing the rules against persons who just do not care.

like this: "The Net interprets censorship as damage and routes around it"<sup>51</sup>, or even ruder: "Keep your laws off the Net"<sup>52</sup>.

The challenge comes in three forms. Two of them can best be explained in the terminology of *Albert O. Hirschman*. The Internet opens up new venues for exit and for voice<sup>53</sup>. Globalization or regulatory competition is one form of exit, but it is not the only one generated by the Internet. If they fear government control, individuals can encrypt their Internet traffic<sup>54</sup>. If they fear that their Internet traffic might be traced back to the IP address of their computer, they can hide behind a firewall or send their traffic through remailers<sup>55</sup>. The more they are afraid of prosecution, the more they will dislodge their activities to parts of the Internet that are particularly hard to control. This explains why pedophiles tend to use chat or newsgroups<sup>56</sup>.

The term 'voice' characterizes the impact of members on the management of an organization. In representative democracies, formal voice is limited to the participation in elections. Indirect channels are opened up by the political parties and by the media. The Internet potentially enlarges both formal and informal channels for voice. E-votes could increase the opportunity for direct democracy<sup>57</sup>. More important is the dramatic decline of transaction costs for organizing interests. The traditional distinction between organizable and diffuse interests<sup>58</sup> becomes increasingly blurred. The law has to face resistance and lobbying by many more groups than before. National interest groups can even form political coalitions with foreign sovereigns. This is basically what happened with data protection in the U.S. Local civil society groups, the Federal Trade Commission and the E.U. Commission allied in the interest of breaking resistance against an omnibus approach.

Finally, the Internet weakens many earlier regulatory targets. It has no central exchange to be addressed by a censor<sup>59</sup>. This is an instance of bottlenecks disappearing. Another feature of the Internet is packet switching. Even if a regulator has traced socially harmful traffic, it is next to impossible to prevent it from happening; the packets would just route around the intervention. This feature confines government to ex post intervention<sup>60</sup>.

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51 *Boyle* (note 26) *University of Cincinnati Law Review* 1997, 178, citing *John Gilmore*.

52 *Ibid.* 189.

53 See again *Hirschman* (note 10).

54 Basic *Kenneth W. Dam/Herbert S. Lin* (eds.): *Cryptography's Role in Securing the Information Society*, Washington 1996.

55 For details see *Michael A. Froomkin*: *Flood Control on the Information Ocean. Living with Anonymity, Digital Cash and Distributed Databases*, in: *University of Pittsburgh Journal of Law and Commerce* 15 (1996) 395-507 (414-427).

56 *Price/Verhulst* (note 15) *Cardozo Working Paper* 15, 13.

57 Out of the budding literature see in particular *Sunstein* (note 36). Many observers still remain critical, see e.g. *Hans-Heinrich Trute*: *The Impact of Global Networks on Political Institutions and Democracy*, in: *Christoph Engel/Kenneth H. Keller* (eds.). *Governance of Global Networks in the Light of Differing Local Values* (*Law and Economics of International Telecommunications* 43) Baden-Baden 2000, 131-154 (133-135).

58 Basic *Mancur Olson*: *Logic of Collective Action. Public Goods and the Theory of Groups*, Cambridge 1965.

59 *Boyle* (note 26) *University of Cincinnati Law Review* 1997, 179.

60 I owe this thought to *Kenneth H. Keller*.

#### d) Egalitarian culture

The Internet is a historically unlikely success<sup>61</sup>. One of the main reasons is that neither commerce nor government paid due attention to the activities at the universities. The culture of these pioneers is still quite present. Many of its traits can still be found in the technical architecture of the Net<sup>62</sup>. This culture can best be characterized as egalitarian<sup>63</sup>. The typical institution for egalitarians is the commons. Well-known examples are communal property in the Swiss Alps or fishery regimes in territorial waters<sup>64</sup>. A famous example closer to the Internet is Linux. It is commonly developed by an open community of users<sup>65</sup>.

Formal legal rules historically have not been the typical tool for governing a commons. They rather tended to rely on a mixture of access rules, strong social norms and elements of discretionary central power<sup>66</sup>. This might be more than a historic coincidence. One may cite an interest and an ideas argument<sup>67</sup>. The interest argument points to a comparative advantage of the commons. Since the regime is limited to one specific commons, it can exploit a remarkable amount of situational and even tacit knowledge<sup>68</sup>. Governance by law, however, relies on abstract general rules and on outside enforcement by independent courts. The ideas argument points to the liberalizing effect of governance by law. It on purpose distinguishes law from ethics. It is enough to obey the law. One need not believe in its justness. Everybody has equal access to the courts, independently of his beliefs or previous actions. Egalitarians might resist this liberalizing effect. And if the law wins out, the commons might not survive in the long run.

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61 The story is told by National Research Council (note 16) 23-45.

62 Impressive *Dertouzos* (note 38), throughout the book.

63 For a theoretical treatment, see *Thompson/Ellis/Wildavsky* (note 50); for an application to the Internet see *Michael Thompson: Global Networks and Local Cultures. What are the Mismatches and what can be done about them ?*, in: Christoph Engel/Kenneth H. Keller (eds.): *Understanding the Impact of Global Networks on Local Social, Political and Cultural Values (Law and Economics of International Telecommunications 42)* Baden-Baden 2000, 113-130.

64 Lots of examples are analysed by *Elinor Ostrom: Governing the Commons. The Evolution of Institutions for Collective Action*, Cambridge 1990.

65 Out of the fairly extensive literature on Linux see *Josh Lerner/Jaen Tirole: The Simple Economics of Open Source*, [http://papers.ssrn.com/paper.taf?abstract\\_id=224008](http://papers.ssrn.com/paper.taf?abstract_id=224008) (5/9/2002); *David McGowan: Legal Implications of Open-Source Software*, [http://papers.ssrn.com/paper.taf?abstract\\_id=243237](http://papers.ssrn.com/paper.taf?abstract_id=243237) (5/9/2002); *Jennifer W. Kuan: Open Source Software as Consumer Integration Into Production*, [http://papers.ssrn.com/paper.taf?abstract\\_id=259648](http://papers.ssrn.com/paper.taf?abstract_id=259648) (5/9/2002); *James E. Bessen: Open Source Software: Free Provision Of Complex Public Goods*, [http://papers.ssrn.com/paper.taf?abstract\\_id=278148](http://papers.ssrn.com/paper.taf?abstract_id=278148) (5/9/2002).

66 See in greater detail the material by *Ostrom* (note 64).

67 On the basic distinction between interests and ideas, see *Victor Vanberg/James M. Buchanan: Interests and Theories in Constitutional Choice*, in: *Journal of Theoretical Politics* 1 (1989) 49-62; *Albert S. Yee: The Causal Effects of Ideas of Policies*, in: *International Organization* 50 (1996) 66-108. On both sides of the theoretical battle-field, this distinction is disputed. Rational choice partisans claim that it is difficult to trace ideas in isolation. Constructivists claim that what this dichotomy calls interests in their view of the world is communication as well, just using a different – rational choice – language. But there is something out there like behaviour driven by identity and discourse, rather than interest. Moreover, rational choice models routinely assume away what ideas help individuals do: making sense of their environment. Likewise, the dichotomy highlighted by the interest/ideas divide is not about communication. It is about motivation, or rather about self-definition. Interests capture motivation irrespective of the surrounding social environment, whereas ideas characterise motivation by or in contrast to the prevailing self-definition of the group.

68 Basic on tacit knowledge *Cowan, Robin/David, Paul A./Foray, Dominique: The Explicit Economics of Knowledge Codification and Tacitness*, in: *Industrial and Corporate Change* 9 (2000) 211-253.

### e) Speed of evolution

The Internet almost epitomizes rapid evolution. Many observers have asked whether the law can keep pace<sup>69</sup>. The quicker evolution progresses, the less its direction can be predicted. That increases the danger of overfitting. Precisely because the old rules were well adapted to the previous social phenomena, they have a hard time in coping with the qualitatively new phenomena that supplant them. The risk is aggravated by the relatively early stage of network evolution. To use a far-fetched parallel, the advent of motor vehicles was applauded by the U.S. public as the solution to a then urgent social problem – horse manure in the streets<sup>70</sup>. It might well be that the legislators of these days do not even have a glimpse of the true social impact of global networks.

### f) Decontextualization

In the physical world, individual life is socially embedded<sup>71</sup>. Internet communication differs in two respects: it is communication without physical contact, and without cultural control. Using the Internet is a lonely affair. One sits in front of one's screen and retrieves material that others have posted a shorter or longer period ago. Even if one chats or uses an instant messenger service, one does not see or hear the interlocutor. Social psychology shows that the difference matters. Cooperative attitudes are much easier actualized by face-to-face communication. Normative convictions are stabilized along with it<sup>72</sup>. The second effect results from the dissolution of community and propinquity. The Internet allows both propinquity without community, and community without propinquity<sup>73</sup>. Internet traffic becomes not socially visible and is therefore hard to control by the local culture. Over the Internet, locally dispersed communities can find together. This could lead to the dissolution of one national culture into many epistemic communities. The process might lead into single-issue constituencies. Solidarity can no longer be taken for granted. Integration is at risk. In short: the Internet is a powerful decontextualizer<sup>74</sup>.

These are unfavourable conditions for governance by law. Legal rules are normally mirrored in social or professional custom. They become part of behavioural routines. This translation of law into custom becomes more cumbersome if the local community no longer serves as a learning environment, and if it no longer sanctions violations of the parallel social norm. Moreover, no legal provision has ever been implemented to each and every case. Law enforcement therefore has to strike a delicate balance. If the deviation is socially visible, the law should as a rule react extensively. If not, it often suffices to marginalize deviant behaviour. The Internet makes such a strategy much more demanding. The less culturally homogenous the constituency, the less pre-

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69 For example *Price/Verhulst* (note 15) Cardozo Working Paper 15, 1 and 7; *Reidenburg* (note 24) *Texas Law Review* 1998, 586; *Richard Posner*: Antitrust in the New Economy, in: *Antitrust Law Journal* 68 (2001) 925-943.

70 I owe this parallel to *Kenneth Keniston*.

71 Basic, *Mark Granovetter*: Economic Action and Social Structure. The Problem of Embeddedness, in: *American Journal of Sociology* 91 (1985) 481-510.

72 See in greater detail *Bohnet* (note 9).

73 *Thompson* in *Engel/Keller* (note 63) 124.

74 I owe this insight to *Robert McAdams*.

dictable becomes widespread interest in a case. And the Internet makes it much more difficult to control access to public opinion. One no longer needs an established media enterprise for disseminating information about the case to a broader group. It is enough that the group regularly access a newsletter or a website.

## 5. Reinventing governance by law

### a) Introduction

The long list of challenges seems to justify regulatory practice: the Internet does not look like a promising field for governance by law. Other governance tools would have to step in. But that reaction is premature. The law might be able to parry the challenges. Ideally, two strategies may be distinguished: the first strategy adds elements of governance by law to non-legal governance tools. This is now commonly called hybrid governance<sup>75</sup>. The second strategy could be dubbed reinventing governance by law<sup>76</sup>. Hybrid governance is a fuzzy concept. It may well be that pragmatism will eventually call for some form of it. But the following section tries to answer the more demanding question: how close can the governance of the Internet, in the light of the listed challenges, come to the normative benchmark of governance by law? It takes the challenges up in turn, starting with globalization (b) and other libertarian challenges to the legal system (c), and going on with egalitarian culture (d), the high speed of evolution (e) and decontextualization (f).

### b) Addressing globalization

Regulatory issues transcending the sphere of influence of the single nation state are no new phenomena. Whenever a foreign national was present, territorial and personal jurisdiction had to be reconciled. And for a long time states cooperated in the interest of preventing individuals from circumventing national control. A classic example is extradition. The more an international conflict can be standardized, and the more the states agree on a solution, the more it becomes attractive to conclude an international treaty. This also holds true for the Internet. The most prominent example is the WIPO treaty on the protection of copyright in the Internet<sup>77</sup>. The G-8 states have scheduled negotiations regarding international agreements on a whole series of questions relating to the Internet: child pornography, sexual abuse, drug dealing, money laundering, electronic

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75 Programmatic *Klaus W. Grewlich*: Conflict and Good Governance in "Cyberspace" – Multi-level and Multi-Actor Constitutionalization, in: Christoph Engel/Kenneth H. Keller (eds.): *Governance of Global Networks in the Light of Differing Local Values* (Law and Economics of International Telecommunications 43) Baden-Baden 2000, 237-264; see also National Research Council (note 16) 190-204 and for market regulation *Jay P. Kesan/Andres A. Gallo*: Neither Bottom-Up nor Top-Down. A Tacit Public-Private Cooperative Solution for Internet Regulation, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=289668](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=289668) (5/7/2002).

76 Cf. *Cass O. Sunstein/Richard Pildes*: Reinventing the Regulatory State, in: *University of Chicago Law Review* 62 (1995) 1-129; *Thomas Vesting*: The New Economy – A Challenge for a New Public Law, [mimeographed, 6 and passim] talks about a "new public law (beyond the nation state)".

77 Agreement of 2 February 1996, WIPO document CRNR/DC/94, also published in *International Journal of Industrial Property and Copyright Law* 1997, 208.

fraud, computer piracy, as well as industrial and state espionage<sup>78</sup>. The new technical possibilities brought about by the Internet make it even easier for governments to cooperate in the enforcement of their common rules<sup>79</sup>. Nonetheless, the potential of public international law should not be overestimated. The conclusion and ratification of treaties is a time-consuming process. And universal or quasi-universal agreement is not frequent. If the territorial coverage of the treaty is limited, it might be circumvented by directing traffic to non-member states.

A rather futuristic approach purports to overcome these limitations by establishing cyberspace as an independent legal order<sup>80</sup>. But there is nothing visible like Net sovereignty or a Net government that was able to legislate and enforce its own rules. Moreover, almost any serious conflict is not confined to the virtual world of the Internet. This is obvious when Internet communication concerns issues of the physical world, like the distribution of instructions for bomb-making. And even pornography and hate-speech not only raise concerns because access to them becomes so easy. They are disliked for the potential effect on taboos or values characteristic for a local community in the physical world. Cyberspace sovereignty would therefore be replete with conflicts at the boundary to the physical world.

Much more down-to-earth is the old-fashioned, extraterritorial application of national laws<sup>81</sup>. Public international law allows nation states to apply their national law to international issues if the issue is linked closely enough to their internal affairs<sup>82</sup>. This is also a practical policy option, whenever the state has a hostage on its territory. This is more often the case than not. Physical products sold over the Net have to be delivered locally. Internet service providers usually have at least a local outlet. If the purchase of a virtual product can be traced back to a local customer, national law can address him<sup>83</sup>. Not so rarely, states can even mitigate the risk of international conflict by restricting the application of their rules to the effects felt on their territory.

For the U.S., the global character of the Net is even less of a challenge. For many Internet issues, they have the realistic option of unilaterally imposing their will on the Net in its entirety<sup>84</sup>. For the U.S. is not only in terms of military or economic power a hegemonic actor. More important is the fact that the Net architecture has been shaped by U.S. actors<sup>85</sup>. The U.S. could use this as a

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78 More on this by *Jack Goldsmith*: Against Cyberanarchy, in: *University of Chicago Law Review* 65 (1998) 1199-1250 (1230-1232); moreover, a whole bunch of elder treaties applies to Internet communications as well, for details see *Engel Internet and Nation State* (note 32) 446 s.

79 *Goldsmith Cyberanarchy* (note 78) at note 138.

80 *Reidenberg* (note 19) *Emory Law Journal*, at note 19; *David R. Johnson/David G. Post*: Law and Borders – the Rise of Law in Cyberspace, in: *Stanford Law Review* 48 (1996) 1367; *Joel P. Trachtman*: Cyberspace. Modernism, Jurisdiction and Sovereignty, in: *Indiana Journal of Global Legal Studies* 5 (1998) 561-582.

81 Comprehensively *Werner Meng*: Extraterritoriale Jurisdiktion im Öffentlichen Wirtschaftsrecht, Heidelberg 1994; *Anton K. Schnyder*: Wirtschaftskollisionsrecht. Sonderanknüpfung und extraterritoriale Anwendung wirtschaftsrechtlicher Normen unter besonderer Berücksichtigung von Marktrecht, Zürich 1990.

82 *Stephan Wilske/Teresa Schiller*: International Jurisdiction in Cyberspace. Which States May Regulate the Internet?, in: *Federal Communications Law Journal* 50 (1997) 117-179.

83 See in greater detail, *Goldsmith* (note 78) *University of Chicago Law Review* (1998) 1202-1205 and passim.

84 *Jack L. Goldsmith*: Unilateral Regulation of the Internet. A Modest Defence, in: *European Journal of International Law* 11 (2000) 135-148; *Yochai Benkler*: Internet Regulation. A Case Study in the Problem of Unilateralism, in: *European Journal of International Law* 11 (2000) 171-185.

85 See in detail *Raymund Werle*: The Impact of Information Networks on the Structure of Political Systems, in: *Christoph Engel/Kenneth H. Keller* (eds.): *Understanding the Impact of Global Networks on Local Social,*

handle for imposing its will on the Net at large. For diplomatic reasons, the U.S. would wish to make its hegemonic power not too obvious. But close observers feel that the apparent internationalization of the domain name management is actually no more than a clever cover for U.S. hegemonic action<sup>86</sup>.

At the limit, there is an even stronger option. In order for the Internet to work, each computer has to have an unequivocal address, the so-called IP-address. This feature makes it possible to technically renationalize the Internet<sup>87</sup>. Nation states would use their sovereign power in order to force their local Internet service providers to program their routers in such a way. Technically, the data packets would still frequently cross national borders. But, functionally, the Internet would fall apart into purely national spaces.

The use of hegemonic power or even the renationalization of the Internet are harsh reactions. States might prefer to use them as a threat, rather than actually employing them. If they do, they engage in one form of hybrid regulation, namely self-regulation under the shadow of hierarchy<sup>88</sup>. If the private rules are legal and can be enforced in court, this type of hybrid regulation is still relatively close to governance by law.

### c) Addressing other libertarian challenges for the legal system

The Internet does not only create new opportunities for exit and voice. Along with this, government gains new tools for exercising power over its citizens<sup>89</sup>. This is particularly true for the detection power of government. The Microsoft antitrust case is an illustrative example. The anti-trust authorities seized the whole internal e-mail traffic of the company and were able to prove infractions of antitrust rules. Before the Internet, the same internal communication would have been on the phone and therefore futile. Of course, firms will learn and encrypt their traffic or go back to personal communication. But clever administrators will find new possibilities to exploit the Internet's potential. And, again, there are hybrid options. One is entrusting private actors with the enforcement of public legal rules<sup>90</sup>.

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Political and Cultural Values (Law and Economics of International Telecommunications 42) Baden-Baden 2000, 159-186 (160-165).

86 See again *Mueller* (note 18) *Info* 1999, 497 and *passim*.

87 Cf. *Goldsmith* (note 78) *University of Chicago Law Review* 1998, at note 82 and at note 113.

88 The term has been coined by *Fritz W. Scharpf*: *Games Real Actors Play. Actor-Centered Institutionalism in Policy Research (Theoretical Lenses on Public Policy)* Boulder 1997, 197-205; for applications to Internet regulation see *Reidenberg* (note 24) *Texas Law Review* 1998, 586; *Price/Verhulst* (note 15) *Cardozo Working Paper* 15, 12 s.; *Elizabeth de Garzia Blumenfeld*: *Privacy Please. Will the Internet Industry Act to Protect Consumer Privacy Before the Government Steps in?*, in: *Business Lawyer* 54 (1998) (abstract available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=141627](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=141627) (5/9/2002)).

89 The point has often been made, see e.g. *Jeffrey Abramson*: *Democracy and Global Communications*, in: *Christoph Engel/Kenneth H. Keller* (eds.): *Governance of Global Networks in the Light of Differing Local Values (Law and Economics of International Telecommunications 43)* Baden-Baden 2000, 119-130 (121-124).

90 *Boyle* (note 26) *University of Cincinnati Law Review* 1997, 178; this option is again no novelty of the Internet age, for material from the off-line world see *Udo di Fabio*: *Verwaltung und Verwaltungsrecht. Zwischen*

Equally ambivalent is the effect of the Internet on the quality of regulatory targets. It is easier for an enforcement authority to control traffic with a defined IP-address than controlling the conversations of a natural person. As the Compuserve case proves<sup>91</sup>, even worldwide-active Internet service providers are vulnerable to the enforcement authorities of a single nation state. They are a particularly attractive regulatory target if government wants to redress a general problem. It is enough to oblige their Internet service provider to filter out some socially harmful contents. In both respects, government can even proactively improve the vulnerability of regulatory targets. It can insist on technical features that make it easy to trace Internet traffic<sup>92</sup>. The most prominent example is public access to encrypted traffic<sup>93</sup>. And government can support the commercialization of the Net in the interest of increasing its regulability<sup>94</sup>.

#### **d) Addressing an egalitarian culture**

Incentives for the commercialization of the Net are also the most powerful tool for opening up the egalitarian culture of the Net to governance by law. But the effect comes at a high price. It is tantamount to destroying, or at least seriously weakening, the egalitarian culture. If the law does not want to go that far, normativity is its strongest tool. If the normative expectations of the legal rule come close enough to community values, they can corroborate each other. In practical terms, that might mean codifying the most salient elements of Net culture. For a test of this approach, spam might be a good target<sup>95</sup>. If the law made it an infraction to send unsolicited commercial e-mail, the Net community might perceive this as a positive signal. It might become more attentive to normative expectations of the law that are not yet mirrored in its cultural norms. Systems theory generalizes the approach. Instead of imposing its will on the egalitarian Net culture, the law could strive to increase the resonance of this culture for legal demands. The actual governance effect on netizens in this perspective is one of the egalitarian Net culture itself, not a legal one<sup>96</sup>.

#### **e) Addressing the high speed of evolution**

Internet communication is not the only social phenomenon to develop rapidly. The fuzzy character of the law empowers it in principle to address such issues. It then leaves the general rule relatively *in abstracto*. The experiences gathered during its application are used for the gradual specification of the rule. If the legislature expects rapid changes, it can even go further. It can

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gesellschaftlicher Selbstregulierung und staatlicher Steuerung, in: Veröffentlichungen der Vereinigung deutscher Staatsrechtslehrer 56 (1997) 235-282 (242-251).

91 See again *Bender* (note 15).

92 *Boyle* (note 26) *University of Cincinnati Law Review* 1997, 178.

93 For the details see *Dam/Lin* (note 54) 167-215 and *passim*.

94 *Lessig* (note 23) 53.

95 On spamming see *David Sorkin*: Technical and Legal Approaches to Unsolicited Electronic Mail, in: *University of San Francisco Law Review* 35 (2001) 325-384.

96 This is the basic idea of "reflexive law" see *Gunther Teubner*: *Recht als autopoietisches System*, Frankfurt 1989; see also comprehensively on the theoretical background *Niklas Luhmann*: *Ökologische Kommunikation*, Opladen 1986.



calibrate the degree of legal certainty, e.g. by allowing the administration to revisit activities that it had approved earlier in the light of new evolutions or new insights<sup>97</sup>. Another option is switching from ex ante to ex post regulation. The classic tool for this is torts. The statute states not much more than the prohibition to intrude into other persons' life, limb or property without proper justification. What this actually means is figured out by the courts after a violation happened. But such openness comes at a price. Before the fact, the addressees have little guidance. This might make them shy away from socially beneficial activities, or it might on the contrary make them behave like gamblers. And ex post interventions are of little help if private actors have literally hard-wired the solutions<sup>98</sup>.

This explains why governments have looked out for regulatory options that allow effective earlier interventions and greater certainty for the addressees at a time. If properly administered, this can be a property of regulated self-regulation. The term characterizes indirect legal interventions into private regulatory activities. They can come in very diverse form. Basically, the law has three options: it can supervise substance, it can regulate organization and procedure, and it can modify the framework conditions for private ordering.

The legal procedural rules on foreign arbitral awards can serve as a blueprint. Most arbitral awards are implemented by the parties to the dispute without outside enforcement. But arbitration would be less effective if the plaintiff knew in advance that the award cannot be enforced against him. This is why all legal orders have a procedure for their enforcement. The state offers the parties to rely on its sovereign powers for the purpose, but it makes this service conditional upon the compliance with basic organizational and procedural rules. And it reserves judgement if the substance of the arbitral award looks patently unjust<sup>99</sup>.

If the courts reviewed the substance of the case in full, arbitration would no longer make much sense. The same holds true for legal attempts to control the substance of self-regulation. But such supervision might intervene into grossly unsatisfactory rules. One test is how deeply third parties are affected. Another looks at how much the interests of minorities within the regulatory entity are disregarded.

While statutory rules on the enforcement of arbitral awards are very reluctant to interfere with the substance of the award, they apply much closer scrutiny to organization and procedure. Similarly, the law might see to the appropriate balance of interests within the private rule-making body. And it might oblige the body to give outside interests a voice. An example for this approach is the Canadian Standards Association's Code for the Protection of Personal Information. The body worked with stakeholders from government, industry and consumer groups<sup>100</sup>.

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97 German environmental law has relied on this extensively. For the details, see *Christoph Engel: Planungssicherheit für Unternehmen durch Verwaltungsakt*, Tübingen 1992, 59-78.

98 Cf. *Reidenberg* (note 24) *Texas Law Review* 1998, 587.

99 Out of the abundant literature see only *Albert Jan van den Berg (ed.): International Arbitration and National Courts. The Never Ending Story*, The Hague (Kluwer) 2001.

100 *Reidenberg* (note 24) *Texas Law Review* 1998, 589.

The law can use its sovereign powers to exercise control over substance and procedure of private ordering. However, it is often more elegant to offer the private body something in return, but to make it conditional upon compliance with legal demands. In the case of arbitral awards, this is done by selective incorporation of the award into the legal order<sup>101</sup>. Likewise, leverage can come from legal rules that make it difficult for individuals to free-ride on private regulatory activities. The law can, for instance, make a conditional exception from antitrust rules for the common regulatory activities of an industry. That allows the industry to conclude a contract and to enforce it against members. If the industry needs the participation of the opposite market side, law can also conditionally oblige the buyers to do so<sup>102</sup>. An example from the field of Internet regulation are computer tampering laws against corrupting filtering mechanisms built into Web browsers<sup>103</sup>.

If the law considers regulated self-regulation a promising approach, it need not wait for private initiatives. It can proactively stimulate private regulatory activities by positive or negative incentives<sup>104</sup>. Liability rules are a powerful negative incentive. By a safe-harbour approach, liability can be made conditional upon the non-existence of or the non-compliance with acceptable private rules. This approach has been used by the U.S. Communications Decency Act<sup>105</sup>. And it has again been used for solving the U.S.-E.U. dispute over data protection<sup>106</sup>.

## f) Addressing decontextualization

In a clumsy way, the law can disregard the social and cultural context entirely. It can simply rely on the sovereign powers of the state or on physical force. But this is hardly ever a practical option for addressing a mass phenomenon. The real problem for law is not mass disobedience. The traffic laws on speeding are massively violated. But all know about the speeding limits. And when they are ticketed, they grudgingly pay their fines. The true challenge is a situation where large parts of the population even disregard the validity of the legal rule. If they simply did not know the rule, publicity might help. But if a large and visible group declares its unwillingness to accept the rule as a normative expectation, the law comes into troubled waters.

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101 More on this technique by *Matthias Schmidt-Preuss*: *Verwaltung und Verwaltungsrecht. Zwischen gesellschaftlicher Selbstregulierung und staatlicher Steuerung*, in: *Veröffentlichung der Vereinigung deutscher Staatsrechtslehrer* 56 (1997) 160-227 (203-207).

102 An illustrative example is the treatment of used cars under German law. The manufacturers have negotiated a self-restraint agreement with government. It obliges them to take back used cars and to see to their environmentally friendly treatment. A government ordinance makes the termination of car tax conditional upon the presentation of a document that certifies that the user has handed in his car to the manufacturer, *Verordnung über die Entsorgung von Altfahrzeugen und die Anpassung straßenrechtlicher Vorschriften*, of 4 July 1997, *Bundesgesetzblatt* 1997 I 1666. More on the background by *Ludger Giesberts/Juliane Hilf*: *Kreislaufwirtschaft Altfahrzeug. Altfahrzeugverordnung und freiwillige Selbstverpflichtung (Abfallwirtschaft in Forschung und Praxis* 105) Cologne 1998.

103 *Reidenberg* (note 24) *Texas Law Review* 1998, 583 s.

104 *Reidenberg* (note 24) *Texas Law Review* 1998, 588 and *passim*.

105 For the details, see *Boyle* (note 26) *University of Cincinnati Law Review* 1997, 190 s.

106 For an overview see National Research Council: *Global Networks and Local Values*, Washington 2002, 135-156.

One should not overstate the decontextualizing effects of the Internet. But at least for some issues, this might be the result. As long as the issues are not too many, the law might pragmatically withdraw the pertinent rules. This reaction might be wise, since visible disregard might result in unravelling obedience to the law in general. Others who had been willing to play by the rules might change their behaviour if they feel like suckers. But this may be no more than a punctual and a provisional reaction. In the long run, the law will have to find ways to overcome the challenge of socially disembedded behaviour. This is easier to do if the traditional local culture is supplanted by new, personal ties. The law can then try to understand and exploit the internal logic of these cultures. But if the local culture indeed risks falling apart, the issue of integration cannot be avoided in the long run. This is, however, a task that the law cannot handle on its own.

## **6. Conclusions**

There is no reason to hail the demise of governance by law. The law already possesses the capacity to parry many of the challenges inherent in the Internet. But most of this generic knowledge stems from different policy fields. It has not been tested on the Internet. And it could well be that the Internet has more challenges for governance by law than those already understood. Such prudence is particularly warranted because most issues of Internet governance combine several of these challenges. However, the appropriate reaction is not a flight from law. What these challenges actually call for is a multiplicity of social learning efforts, aiming at reinventing governance by law under changed conditions.