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Home > Internet co-regulation: A view from the UK

Internet co-regulation: A view from the UK

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Abstract

Review of Christopher T. Marsden: *Internet Co-Regulation: European Law, Regulatory Governance and Legitimacy in Cyberspace*, (2011, Cambridge University Press) 284 pages including bibliography, tables, diagrams, tables of cases and statutes, and index.

This book, published in 2011, represents an important addition to the already extensive literature on Internet governance and regulation, adding a welcome European perspective to a field of studies that, until recently, has tended to be influenced by American approaches. In particular, the book advances the field by placing Internet regulation within the mainstream of regulatory studies. From when the Internet went mainstream in the mid-1990s, Internet exceptionalism – the view that the Internet is both new and unique – has been a remarkably persistent theme in thinking about Internet governance and regulation (Goldman 2010 ^[5]). Early, extreme versions of exceptionalism claimed that because of unique features of the Internet – as a global, decentralised communications system – it was impossible or undesirable for it to be subject to traditional law and regulation (Johnson & Post 1996 ^[6]). Combined with the then fashionable Anglo-American tradition of deregulation, which was associated with the view that government intervention would tend to stifle innovation, this led to a generally ‘hands-off’ approach to the Internet. For example, the 1997 Clinton-Gore policy statement, entitled *Framework for Global Electronic Commerce*, famously proclaimed that:

For electronic commerce to flourish, the private sector must continue to lead. Innovation, expanded services, broader participation, and lower prices will arise in a market-driven arena, not an environment that operates as a regulated industry.
(Clinton & Gore 1997 ^[7], 2).

As the author of this book, Christopher Marsden from Essex Law School, correctly points out, exceptionalism-based deregulation did not survive the collapse of the dot.com bubble in the early 2000s and the re-emergence of state power following 11 September 2001 which, together with other factors, effectively brought an end to the myth of the Internet as a paradigm of self-organisation. As Marsden further points out, the move towards regulation in the early 2000s was further motivated by the extent of misuse of the Internet (here one thinks of the development of domain name dispute resolution) as well as the increasing importance of private law claims (such as actions for copyright infringement) in the context of a commercialised Internet.

These conclusions lead to the main focus of the book, which is an assessment of the new (and sometimes experimental) forms of regulatory practices that have been applied to the Internet, from a broadly empirical perspective. As previously remarked, this is undertaken from a European – and specifically from a UK – perspective, where, since about 2007, there has been an increased emphasis on applying forms of co-regulation. The complex, and sometimes fraught, relationship between Anglo and continental European approaches, which is a sub-text to some of the analysis in the book, is best-captured by Marsden’s statement that, the ‘*book aims to examine one area in which the excesses of deregulation were sponsored and supported by the UK Government, exposed to the rest of Europe as a best practice, but are unraveling and being re-regulated both due to their manifest failings and the tide of European regulation?*’ (p 5).

The book begins with the stated objective of answering the following question:

Is Internet regulation a paradigm of constitutionally responsive co-regulation? (p 1).

This central question represents the organising principle for much of the analysis in the detailed chapters, which present case studies of selected regulatory regimes. To properly appreciate the argument presented in the book, it is first necessary to unpack the terms used in the central question.

First, there is the vexed question of the scope of 'Internet regulation' (or 'Internet governance?'). Much ink has been spilt in attempting to define both 'regulation' (Baldwin, Cave & Lodge 2012^[8]; Freiberg 2010^[9]) and 'governance' (Rhodes 2007^[10]), including in the context of the Internet (Drake & Wilson 2008^[11]). Reflecting its predominantly empirical orientation, the book neatly side-steps these conceptual debates by adopting a broad approach to the scope of Internet governance (and regulation) from the sets of issues identified by the UN Working Group on Internet Governance (WGIG) in its influential 2005 report (WGIG 2005^[12]).

This leads Marsden to focus on three categories of intervention as part of the mapping exercise undertaken in the case studies presented in the book: infrastructure and critical Internet resources (such as administration of the DNS); issues directly related to use of the Internet and Internet governance (including Internet security and spam); and issues that are relevant to the Internet, but with a wider impact (such as intellectual property rights and international trade).

Second, reflecting the European perspective applied by the book, Marsden adopts a 'constitutional' approach to the assessment of Internet regulation. As the author explains, the book uses the term 'constitutional' in the following two senses:

First, it refers to a general adherence to principles of administrative justice, notably fair trial, due process, independence of regulator from regulated, participation by all interested parties, and transparency. Second, it specifically refers to the types of fundamental rights that may be affected by Internet regulation as it affects the specific communications medium, notably the rights of privacy and free expression that may be enhanced or infringed by Internet-based activities. (p 3).

From the overwhelmingly pragmatic perspective of the Australian approach to regulation, it is unusual for regulatory intervention to be assessed from a constitutional perspective. In particular, while it is common-place for regulatory regimes in Australia to be assessed by reference to transparency and procedural fairness (Australian Government 2010^[13]), the extent to which a regime impacts fundamental human rights is rarely, if ever, factored directly into the assessment process. The emphasis on human rights in Marsden's book reflects the extent to which rights have become entrenched across European law and society, including in the design and assessment of regulatory regimes, providing a refreshing contrast to Australian (and US) approaches.

Third, 'responsive regulation' refers to the influential model, first proposed by Ayres and Braithwaite, which, essentially taking the form of a compliance pyramid, matches the form of intervention to regulatory compliance risk (Ayres & Braithwaite 1992 ^[14]). 'Really responsive regulation', on the other hand, as proposed by Baldwin and Black, goes beyond regulatory compliance risks, to make the case that regulators should be responsive to other factors, including the operating and cognitive frameworks for firms; the institutional environment; and regulatory tools and strategies (Baldwin and Black 2008 ^[15]). Marsden essentially applies this framework to examine Internet regulators 'on their own merits' rather than by reference to unrealistic regulatory ideals, such as misguided attempts to apply offline standards of regulation and accountability to Internet regulation (p 222). This leads to an analysis of what Marsden refers to as 'Potemkin regulators' – namely, entities that appear to perform a regulatory function, but are limited in terms of resources, actual functions and substance. Noting that, while not unique to Internet regulation, they are especially prevalent in areas such as child protection and Internet gambling regulation, he concludes that:

Potemkin regulators are dangerous not only because they perform a function that government has abdicated responsibility for, but also because they perform that function inadequately, incompetently and at a cost to themselves, governments and consumers. (p 224).

Fourth, co-regulation refers to a variety of forms of regulation, falling between self-regulation and direct government regulation, which 'generally involves both industry and government (the regulator) developing, administering and enforcing a solution, with arrangements accompanied by a legislative backstop' (ACMA 2010 ^[16], 15). The book takes a very broad approach to what amounts to co-regulation, making an important contribution by distinguishing twelve 'ideal types' of Internet self- and co-regulation (which Marsden terms the 'Beaufort scale'), ranging from pure, unenforced self-regulation – such as the virtual world of Second Life – to government-mandated co-regulation – such as the UK domain name authority, Nominet. A major thesis of the book is that Internet regulation in Europe is, on the whole, characterised by a movement (or what Marsden calls the 'direction of travel') away from self-regulation towards greater state involvement in various modalities of co-regulation.

As Marsden argues, there are a number of explanations for this, including the 'legitimacy gap' of pure self-regulation, the failure of 'Potemkin regulators' (including failures in accountability and transparency) and the European regulatory agenda, including the need to comply with the European human rights framework. In this respect, the book concludes that:

Co-regulation offers the state a route back into questions of legitimacy, governance and human rights in the digital environment, and therefore opens up more interesting conversations than a static no-regulation versus state-regulation binary choice. (p 242).

In assessing the book, it must be appreciated that it represents a truncated version of a much larger report resulting from two multi-year studies (2001-04 and 2006-08) funded by the European Commission (Marsden et al 2008^[17]), which was based on a considerable number of case studies. In the course of cutting back the report for publication as a monograph, it may be that some of the technical and methodological background, which is of interest mainly to the specialist, has necessarily been excised.

Nevertheless, much of the value of the book, especially for the non-European, lies in the detailed empirical material presented in the case studies in chapters 3 through 6. The case studies, which deal with the three broad Internet governance issues identified by the WGIG are, in general, organised from less government intervention (self-regulation) through various forms of co-regulation to private regulation, in the form of Internet filtering and blocking. The case studies dealt with in these chapters, as well as their categorisation in terms of Marsden's 'ideal types', are best summarised in the following table:

Book Chapter	Typology of regulation (? ideal types?)	Case Studies
3: Self-organisation	'Pure' unenforced self-regulatory (Second Life)	Second Life
	Acknowledged self-regulatory (Bebo; Creative Commons)	Bebo Creative Commons
	Post facto standardized self-regulatory (IETF)	
	Recognized self-regulatory (W3C)	
4: Self-regulation and standards	Approved compulsory co-regulatory (ICANN)	ICANN/Nominet IETF/W3C
	Independent (mandated) body with stakeholder forum (Nominet)	
	Discussed self-regulatory (IMCB)	
5: Co-regulation and medium law (essentially regulation of convergent content, including mobile content, video-on-demand and IPTV)	Approved compulsory co-regulatory (PEGI Online)	ICSTIS-IMCB
	Scrutinized co-regulatory (NICAM; ATVOD)	NICAM-PEGI ATVOD
	Independent (mandated) body with stakeholder forum (ICSTIS)	
	Co-founded self-regulatory (FOSI)	ICRA/FOSI
		IWF

6: ISPs, filtering and co-regulation (essentially private filtering and censorship)	Sanctioned self-regulatory (PEGI; Euro mobile)	INHOPE-EuroISPA
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Table 1 - Ideal Types of Self- and Co-Regulation.

In the crucial seventh chapter of the book, the author compares and analyses the case studies presented in the earlier chapters ? which certainly illustrate the extent to which the Internet has been subject to regulatory experimentation ? identifying the factors that have led to success, failure, sustainability or ossification. This analysis leads Marsden to conclude that, in general, there is a case for greater government intervention, not merely because of the legitimacy deficit of private bodies, and the associated problems of accountability and transparency, but because of the compelling need for industry to take consumer and other stakeholder rights more seriously (p 219).

Overall, the book represents an impressive summary of the state of play of government intervention (or lack thereof) across a variety of Internet-based issues, especially from a UK (and, consequently, European) perspective. As such, it is a welcome departure from much US-inspired commentary, with its generally predictable anti-government bias. In this respect, Marsden is correct to point out that, in most of the areas studied in the book, the key questions are no longer whether or not to regulate the Internet, but the form which regulation should take.

There is no doubt that, as Marsden concludes, in Europe the recent trend has been towards a greater reliance on forms of co-regulation, which seems to reflect the current European regulatory paradigm. By comparison with the Europeans, however, Australia has a long experience with hybrid forms of regulation, with forms of co-regulation being generally preferred, especially in the field of electronic communications, since at least the regulatory reforms of the late 1980s and early 1990s. The Australian experience, including in broadcasting and telecommunications regulation, suggests that there is a case for being less sanguine about the prospects for co-regulation than Marsden seems to suggest; although to be fair, the book, from its predominantly empirical orientation, certainly does not propose forms of co-regulation as a ?fix-all? solution to all Internet issues. Instead, the book makes the case for co-regulation, involving multiple stakeholders, to be fully taken into account in regulatory Impact Assessments (IA) by government, and as generally being more workable than the alternatives.

Possibly the most important achievement of the book (apart from the vast amount of material assembled in the case studies) is how it succeeds in placing Internet regulation within mainstream regulatory theory. To an extent, this may be part of the domestication of the Internet ? how it is no longer something different or, as Marsden puts it, an ?exotic outlier? (p 44), but has become entrenched in our everyday existence, including as an object of law and regulation. From an Australian perspective, the importance attributed by the Europeans to incorporating human rights considerations into regulatory design is not merely interesting, but potentially instructive.

Nevertheless, and despite its many fine features, there are some areas in which the analysis in the book may have been improved. First, while the book admittedly focuses on the ?how? of regulation, and not on the ?why? or ?when?, it remains the case that the form taken by regulation is necessarily related to the purpose of regulation. It is in the relationship between regulatory justifications and forms of regulation that there still remains much scope for analysis of what distinguishes Internet regulation from other forms of regulation. That said, to go too far down the path of regulatory justifications would have diluted the central message of the book.

Second, while the book promises to evaluate Internet regulatory practices so as to identify those which have been successful and have merit, the metrics for doing so are not as clearly explained as they might be. Moreover, the conclusions drawn in the final chapters are not as expressly related to the arguments in the earlier chapters as they might be, with the reader sometimes left to draw her or his own inferences from some of the relatively succinct suggestions made in the concluding chapters. To an extent, however, this potential weakness seems to be related to the extremely ambitious nature of the research project, and the need to follow through on some of the claims in the concluding chapters, which will possibly be taken up in a further study, co-authored with Ian Brown from the Oxford Internet Institute, to be published in 2013 (Marsden & Brown 2013 ^[18]).

This leads to the third and final point, which is that, given the dynamic nature of this field of study, the book is very much a snap-shot of the state of Internet regulation at the point in time at which the research, and especially the case studies, were undertaken, which was mainly during the period 2006-2010. Since then, there have been significant developments in a variety of areas, including child protection, social networking services, digital copyright regulation and domain name governance. The extent to which research on Internet governance and the law is subject to rapidly becoming out-of-date is, of course, an unavoidable occupational hazard.

In short, the author, who is soon to hold the Chair of Media Law at Sussex Law School, has done a remarkable job in bringing together research in such disparate areas, as well as subjecting the diverse regulatory practices to a coherent analytical framework. There is a wealth of interesting detail on Internet regulatory regimes, with the explanation of the European regimes being especially helpful for non-Europeans. By bringing Internet regulation and governance in from the cold ? by subjecting it to mainstream regulatory theory ? the book has opened up major new research perspectives, which will no doubt be explored in anticipated future publications from the author, as well as other researchers.

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