

Coregulation: A Possible Legal Model for Global Governance

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Benoit Frydman

GLOBALISATION is not a legal concept. It primarily refers to a new phase of capitalism and market economy, in which transnational groups directly conduct their business strategy on a worldwide basis. By now, globalisation has also come to denote, in a broader sense, the sharp increase both in the amount and in the speed of international transactions and exchanges of all kinds, not only in finance and the economy, but also in media and telecommunications, travel, tourism and personal relationships. Some of these relations call for regulation, which has traditionally been the task of the law to provide. Therefore, globalisation, whether or not legal by nature, involves regulatory issues that the law has to address.¹

Basically, globalisation challenges our traditional views on the law in a way that is neither difficult to express nor to understand. Traditionally, national States played the biggest part in the setting up, the implementation and the enforcement of legal rules. National States were responsible for law and order as a whole. On the one hand, they built by far the most sophisticated and most productive law-making institutions (the Parliament, the Government, the Judiciary). On the other hand, national States alone had enough power to ensure effectively the enforcement of the law, including by the use of force. Therefore, according to an orthodox positivist view, law does not exist outside the boundaries of the sovereign will of an independent State.

However, national States do have borders. Such borders define their national territory. National territory circumscribes the natural scope of the State's authority and jurisdiction. At the same time, national territory limits, to a large extent, the State's effective power of action. As we see the legal challenge of globalisation appears quite obvious. It is basically a problem of scale : how to regulate a global environment within national borders ? How to regulate international transactions through national legislations ?

A lawyer's probable answer would be that this situation is by no means entirely new (lawyers hate nothing more than something that would be entirely new). This answer is true to a certain extent : there have always been international conflicts, international business transactions and marriages between people from different national origins; and States are accustomed to face various situations with extra-territorial effects or implications. According to this point of view, the challenge of globalisation does not call for new forms of regulation but could be addressed by traditional legal rules.

1. For a detailed analysis of the decline of State's law and the consequences of globalisation : B. Frydman, *Les transformations du droit moderne*, Kluwer (Story-Scientia), 1999.

Coregulation: A Possible Legal Model for Global Gove...

Traditionally, there are two ways to tackle legal issues involving international aspects. The first one are the rules of jurisdiction, which determine whether a State is or is not entitled to regulate events happening partly or sometimes totally outside its borders. Such rules are based on special links or “sufficient contacts” between a particular state of affairs and one legal order. These rules have been enforced for a long time, either unilaterally by certain States, or through multi-lateral agreements, which makes them more consistent and hopefully more effective. It is only fair to say that this field of law is growing up rapidly. At the same time, it must be stressed that such rules of jurisdiction prove themselves to be relatively ineffective or even counter-productive in a globally integrated environment. In Internet regulation for instance, as we will see later, the classical rules of jurisdiction allow any State to interfere with any data posted on the Internet, as soon as these data can be accessed from a computer located on its own territory. In sum, each State is competent for everything, which leads to the simultaneous applicability (and sometimes enforcement) of conflicting legal standards, thus creating an indescribable chaos.

The second traditional solution is for the international community, made up of the sovereign States, to agree on common rules or standards. These rules are set up through international conventions. They sometimes lead to the establishment of permanent specialized institutions to which the member-States might delegate the power to make and to implement new regulations, such as the World Trade Organization (WTO) or the European Union (EU) for instance. These international bodies undoubtedly are important pieces in the current legal landscape. According to some authors, these gradual and peaceful transfers of competence from national States to regional or international organizations would eventually lead to a new deal or a new political order where post-national States or super-States would call the shots. Following such a scenario, globalisation only means a gradual shift in the scale of political bodies (from national States to regional communities or international organisations) and not a fundamental change in the rule of law or in the model of State’s regulation.

Nevertheless, this model of a European or even a cosmopolitan State in charge of law and order does not stand up to close analysis. As a matter of fact, economic organisations were never meant to become international substitutes for national States. The European community was never conceived as a State but rather as a free market meant to operate without too much States’ interference. The European Union is based on an utopia : building a legal order and a political union on a market, without the framework of a State.

The main purpose of international economic organizations as a whole is to stimulate economic growth and international commerce, by suppressing or reducing the obstacles to a global open market,

Benoit Frydman

these barriers being for the main part tariffs and national States legislations. One of the main tasks of these organizations is to single out national regulations of all kinds (such as health regulations, environmental standards, labour law and social security, technical norms, etc.) that distort international competition, either purposefully or by accident, and to compel their members States to suppress or amend their legislation. In other words and to put it roughly, their job is not to replace national regulation but to dismantle it. At the same time, it is perfectly true to say that these organizations are creating new rules to regulate international commerce; they are contributing to a new global order. However, this new regulation entirely differs in its form, purpose and content from the national rules that it is sometimes said to “replace”.

My point here is not to criticize the EU or the WTO but to stress that globalisation involves not only a (gradual) shift in the level of regulation, but more deeply a dramatic change in the content and the model of what we have been accustomed to regard as “the law”. This would not be the first time in history that dramatic economic changes would lead to a revolution in law. In his *Lectures on the Industrial Revolution in England*², the famous British historian Arnold Toynbee primarily characterizes the industrial revolution neither as an economic, nor as a scientific or a technical event but firstly as a profound legal change. Toynbee starts his chapter devoted to “The Chief Features of the Revolution” with the following sentence : “The essence of the Industrial Revolution is the substitution of competition for the medieval regulations which had previously controlled the production and distribution of wealth”.³ *Mutatis mutandis*, we could now define globalisation by changing only two words in Toynbee’s definition : The essence of the *Global* Revolution is the substitution of competition for the *national* regulations which had previously controlled the production and distribution of wealth.

II. Main Features of Global Regulation :

Along with globalisation, a revolution in thought is on its way that is about to bring important changes not only to the level and content of regulation as well as to the law making process, but also and more deeply, to the shape and the very nature of legal rules. In this paper, I would like to identify and discuss some of the main features of this ongoing revolution. In particular, I would like to illustrate this new regulatory model with two topical cases which are of peculiar

2. Posthumously published in 1884 (London, Rivingtons). Reprinted as *The Industrial Revolution* (Boston, Beacon Press, 1956).

3. Toynbee, *o. c.*, 1956, p. 58, quoted in J. Bernard Cohen, *Revolution in Science*, The Belknap Press of Harvard University Press, Cambridge Massachusetts and London, 1985 (8th printing, 2001), p. 267.

Coregulation: A Possible Legal Model for Global Gove...

interest namely the issue of global warming and the issue of Internet regulation.

Before I come to these cases, let me first briefly characterize five main features of the new model of global governance :

1. A shift from institutional regulation, based on command and punishment, to economic regulation, based for the main part on incentives and disincentives;
2. A correlative shift from public regulators to private actors, or more accurately the emergence of a so called “coregulatory” regime involving public authorities as well as private business, which are supposed to “cooperate” with each other.
3. A shift from primary rules, imposing or forbidding some specific behaviour, to secondary procedural rules, which do not straightforwardly define and impose a standard of behaviour, but rather set up a system that would ideally lead to an automatic settlement of the issue.
4. The increasing involvement of complex technical devices in the implementation of legal regulations, such as sophisticated measure tools and computer filtering softwares.
5. And finally, the emphasis put on basic human rights and fundamental liberties, this last feature belonging more to the rhetoric of global governance than to its internal logic.

The first and main characteristic of the new model is the *shift from institutional to economic regulation*. This feature is of paramount importance. I would like to devote some time to explain it. Since Hobbes, modern law (i.e. State’s law) has been defined in political terms, which means in terms of power. In his famous *Leviathan*⁴, Hobbes defined law as the commands addressed by the sovereign to those who are under its authority. Commands and prohibitions are the classical forms of such legal rules. They read as follow : ‘you ought to do this’ or ‘you must not do that’. And if you violate such command, you will be fined or put in jail.

In the global environment, where States do not enjoy sovereign powers of command anymore, orders often give way to a new style of rules, which are based on incentives rather than threats. In other words, State’s law often uses sticks, while global governance prefers to use carrots.

4. Th. Hobbes, *Leviathan or the Matter, Forme & Power of a Common-Wealth Ecclesiastical and Civill*, Penguin Classics (first published in 1651).

Benoit Frydman

More generally, the global regulation model is closely related to the standard economic analysis of law, which regards classical legal rules which some scepticism, if not hostility⁵. According to the standard economic analysis of law, primarily developed within the School of Chicago, a free-market economy would ideally regulate every kind of transactions in a more effective way than any legal rule whatsoever. Legal rules often generate extra-costs that could prevent the invisible hand of the market from providing the optimal allocation of economic resources. According to this model, the best regulation would be provided by deregulatory measures that would dismantle inefficient national legal rules and replace them by nothing else but the rules of the market. As I said earlier, this philosophy partly but significantly inspires the policy of international economic organizations, such as the WTO for instance, as well as legal reforms imposed by financial international organizations, like the International Monetary Fund (IMF) or the World Bank to developing countries asking for loans. This is part of the idea to substitute global competition to national legislations, which is the very core of the new ideology.

However, since we are not living in a perfect world (not yet), some kind of legal initiatives could still be justified, according to the orthodox law & economics advocates, either in order to strengthen deficient market mechanisms or in case of market failures. Even in such situations, legislators would be better inspired not to go back to the traditional commands-rules, but rather to mimic the market or even to create an artificial market in order to solve the issue at hand more efficiently and at a lower cost.

III. GLOBAL WARMING AND TRADABLE POLLUTION PERMITS:

Such an artificial market was set up in the new international regulation adopted (but not yet in force) to combat global warming. In 1992, the United Nations framework convention on climate change officially declared that “change in the Earth’s climate and its adverse effects are a common concern of humankind”. Consequently, the convention laid down the objective of stabilizing greenhouse gas emissions in the atmosphere at a level not damaging to the environment. However, it was only in 1997 that industrialized countries committed themselves, in the Kyoto Protocol, to reducing by 2010 their overall emissions of such greenhouse gas by at least 5 per cent below 1990 levels⁶. There were a lot of discussions at that time (and later in The Hague, Marrakech and Bonn) about the best way to achieve this goal.

5. For a critical presentation of standard economic analysis of law, see : B. Frydman and G. Haarscher, *Philosophie du droit*, Paris, Dalloz, 2nd ed., 2001, esp. pp. 44-58.

6. The texts of the UN framework Convention and the Kyoto Protocol are available at the following address : <http://unfccc.int/resource/convkp.html>.

Coregulation: A Possible Legal Model for Global Gove...

Classical environmental regulations were ruled out as too complex and too constraining, thus too difficult to implement, especially at a global level. In other words, it was soon decided that there would be no global environment law in the traditional meaning of this word. Eco taxes were also considered during the discussions. Such taxes would be justified from an economic point of view since it causes the agents to internalise the social cost of their polluting activities. Moreover, taxation would generate less bureaucracy than complex technical norms. However, national governments in Europe as well as in the United States and elsewhere were afraid that such global eco taxes would not be very popular. Instead, they decided in favour of a system of tradable pollution permits, similar to those having been set up before at a local level within the United States.

The general philosophy and functioning of a system of tradable pollution permits is quite easy to catch. Imagine that the current level of greenhouse gas emissions amounts to 1000. And let us say that a regulator wants to reduce it down to 500 in a five years period of time. In this case, the regulator starts by issuing pollution permits up to 1000 and distributes them to the polluting agents according to the amount of emissions they are responsible for. These pollution permits give to their owners the right to emit greenhouse gas up to a certain level. On year 2, the regulatory authority issues new pollution permits but limits them to 900 and so on until year 5, when the sum of pollutions permits are reduced to 500. From year 2 to year 5, each operator has to face the gradual diminution of its rights to pollute. To confront this problem, each agent has several possibilities. It can stop the polluting activity or move to another place (the latter being no longer possible in a global system). It can also decide to invest in cleaner technologies. If it chooses to do so, it might happen that it no longer needs the pollution permits that were granted to it. In this case, it is entitled to sell these rights on the market (Special markets for such pollution permits are operating in stock exchanges, such as Wall Street). Economic operators may also decide not to invest in new technologies. In this case, they will logically need more pollution permits that were distributed to them at the beginning of the year. These agents will have to go to the market and buy additional rights to pollute.

According to their advocates, this tradable pollution permits system is advantageous in more than one respect. First, the system appears effective since it leads progressively and almost automatically to the assigned objective. Second, this system better protects the freedom of the economic agents and consequently favours the most efficient economic options. Third, the selling of pollution permits allows a fair sharing of the extra costs generated by the investment in cleaner technology. The price of the permits, which varies according to the law of supply and demand, also fosters the most efficient solutions.

Benoit Frydman

The system of tradable pollution permits is a classical application of the theorem of the Nobel Prize Winner Ronald Coase. The Coase Theorem, which is the fundamental theoretical basis of the standard economic analysis of law, shows that externalities are dealt with more efficiently by the distribution of property rights as long as the transaction costs of these rights are nil or low.

In 2000 in The Hague, the Europeans and the Clinton administration came close to an agreement. The Europeans, including the French socialist government of Lionel Jospin, accepted the principle of tradable pollution permits, although they insisted to limit the use of such permits to the half of each party's obligations as stated within the Kyoto Protocol. In other words, despite the system of exchangeable pollution permits, each State would have to take positive measures to reduce its greenhouse gas emissions up to a limit of half of its agreed quota. This compromise was rejected by the Americans who made no secret of their intent to do nothing in order to reduce greenhouse gas pollution in the United States and to buy all the extra pollution permits that would be needed from the Russians and other Eastern European countries, which were given in the Kyoto Protocol many more rights to pollute than what the current level of their economic activity actually requires.

The European “half-and-half” proposition is interesting because it shows that the European States were reluctant to fully commit themselves to the new model of economic regulation and wanted somehow to preserve the classical form of the rule of law, which meant in this case : formally declare that it is wrong to pollute and that the industrialized members of the international community should be forbidden to pollute the atmosphere of the planet beyond a certain level.

Similarly, many European citizens, and not just ecological activists, were chocked by the system of tradable pollution permits. This is perfectly understandable since exactly at the same time several States, such as Belgium, decided to include in their constitutional catalogue of basic human rights, the new fundamental right to a healthy environment (Belgian Constitution, art. 23). In this context, it appears, at least at first sight, quite paradoxical to assert the right to everyone to a healthy environment, while at the same time creating new “rights to pollute” in an international convention. This is a small example of the difficulty to reconcile the new model of regulation with the prevailing rhetoric of human rights.

Since then, as you know, the Bush administration has formally declared that the US would not ratify the Kyoto Protocol and would deal unilaterally with the greenhouse gas effect, in contrast to the European countries, which ratified the protocol last May. Before coming into force, the protocol will have to be ratified by 55 countries, being responsible for at least 55% of the global emissions of greenhouse

Coregulation: A Possible Legal Model for Global Gove...

gas. According to official figures, the level of emissions within the European Union has already been reduced down by 3,5 % in 2000 in comparison with 1990 levels. Nevertheless, important new initiatives would be required in order to achieve the target set out in the Kyoto Protocol.

IV. Internet Content Coregulation :

The Internet offers another outstanding example of the emergence of a global environment calling for new global regulatory mechanisms.

Until the late nineties, it was often asserted, especially within the Internet community, that cyberspace was a new environment enjoying complete freedom, a “new frontier” according to American mythology, that would escape any regulation whatsoever. First attempts by national States to regulate the Internet were met with strong scepticism and deep hostility. In reaction to the Communication Decency Act adopted by the US Congress in 1996⁷, John Perry Barlow issued in the name of the Electronic Frontier Foundation a *Cyberspace declaration of Independence*, which starts like this :

*“Governments of the Industrial World, you weary giants of flesh and steel, I come from Cyberspace, the new home of Mind. On behalf of the future, I ask you of the past to leave us alone. You are not welcome among us. You have no sovereignty where we gather. We have no elected government, nor are we likely to have one, so I address you with no greater authority than that with which liberty itself always speaks. I declare the global social space we are building to be naturally independent of the tyrannies you seek to impose on us. You have no moral right to rule us nor do you possess any methods of enforcement we have true reason to fear. (...) We are creating a world that all may enter without privilege or prejudice accorded by race, economic power, military force, or station of birth. We are creating a world where anyone, anywhere may express his or her beliefs, no matter how singular, without fear of being coerced into silence or conformity. (...) We believe that from ethics, enlightened self-interest, and the commonweal, our governance will emerge.”*⁸

Today, this Declaration is a thing of the past. Some of the provisions of the criticized Communication Decency Act were eventually struck down by the US Supreme Court as contravening the freedom of speech guaranteed by the 1st Amendment of the American Constitution.⁹ Nevertheless, at the same time as Internet connections and

7. 1996, C.D.A. 47 U.S.C..

8. http://www.eff.org/Publications/John_Perry_Barlow/barlow_0296.declaration.

9. Reno, Attorney General of the United States, v. American Civil Liberties Union (“Reno I”, U.S. S.C. 1997, N° 96-511), <<http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=000&invol=96-511>> AND Ashcroft, Attorney General of the United

Benoit Frydman

on-line activities are growing dramatically, national States are continually trying to recover some kind of control over the network. They solemnly reaffirmed that the rule of law should apply to cyberspace, according to the principle : “what is illegal off-line is illegal on-line”. Consequently, national States have claimed jurisdiction on cyberspace issues according to the classical rules of jurisdiction. These rules, which I mentioned earlier, give jurisdiction not only to the State where the message, allegedly illegal or damaging, is created and disseminated but also to any State on whose territory the problematic message is received or distributed. These rules are traditionally used in press litigation, like libel cases. Extended to Internet issues, they virtually give every State jurisdiction on every data posted on-line as soon as these data may be accessed from a computer located on the national territory. This means in practice that every State may impose its national legislation to every website and every message posted on the Internet.

This strange case of universal jurisdiction leads to practical problems, especially when legal standards vary from one country to another and even more when contradictory legal standards prevail in different parts of the world. The legal status of “hate speech”, meaning racist and xenophobic speech as well as incitement to hatred and to violence, provides a particularly good example.

In the United States, racist speech officially called for the protection of the First Amendment of the Constitution, as a variety, however disgusting, of legitimate political speech. As a consequence, Congress can make no law that would restrict racist or xenophobic speech because of its controversial content. The opposite situation prevails in Europe, where racism and xenophobia are not falling within the scope of protected speech but, on the contrary, are regarded as criminal offences in almost every country. As a result, most racist and other rightwing extremist websites and newsgroups are hosted in the United States where they take advantage of the shield provided by the First Amendment. These data could of course be easily accessed from Europe, despite the fact that they are illegal here. According to a survey by the Simon Wiesenthal Centre, the number of so called “problematic” websites hosted in the United States exceeds 3000, among them at least 500 allegedly authored by European citizens, thus escaping their national law.¹⁰

States, v. Free Speech Coalition (“Reno II”, U.S. S.C, 2002, N° 00-795) <<http://supct.law.cornell.edu/supct/html/00-795.ZS.html>>

10. Simon Wiesenthal Centre, “Problematic Sites on the Internet” http://www.wiesenthal.com/problematic_sites/>

Simon Wiesenthal Centre, “Internet Report and Analysis”, *Digital Hate 2000*, CD-Rom available for sale at <http://www.wiesenthal.com/social/press/pr_item.cfm?ItemID=5723>.

Coregulation: A Possible Legal Model for Global Gove...

This issue gave rise to several proceedings, among them the famous Yahoo! case, involving the biggest web-portal in the world : Yahoo!, which is run by a Californian company, based in San Diego. As you probably know, Yahoo! runs an auction site, where one may sell and buy almost everything. Until recently, one could find among the items for sale between one and two thousand nazi paraphernalia, most of them cheap reproductions of nazi flags and various items, such as cushions and mouse pads with a printed swastika, that were sold for less than \$ 15 each.

In May 2000, a Parisian judge (who has now been appointed to the French Cour de Cassation) ordered Yahoo! to take all appropriate measures in order to prevent people located on the French territory from accessing its illegal auction sales of Nazi paraphernalia.¹¹ Yahoo! immediately challenged the French decision in the U.S.. In November 2001, a federal district Court declared that the First Amendment precludes enforcement within the U.S. of the French ruling. An appeal of this decision is currently pending before the Federal Court of Appeals for the Ninth Circuit. The hearing took place last December. It is said to have been less favourable to Yahoo! than expected. We are still waiting for the ruling. Meanwhile, former Yahoo! CEO, Tim Koogle, was sued before a French criminal Court for justifying war crimes and crimes against Humanity. The French Court asserted jurisdiction but eventually dismissed the case, considering that Yahoo! had in fact complied with the former French court order.

This case is highly typical of the legal chaos and the legal uncertainty generated by the simultaneous application of contradictory national legal standards on the Internet. National States have tried to circumvent the problem by fostering international cooperation and setting up some common international standards. This was to be achieved by the traditional tool of international conventions. In November 2001, a cyber-crime Convention was opened to signature in Budapest.¹² This Convention, elaborated within the Council of Europe was adopted by about 30 European countries, but also by prominent non-European countries, namely Canada, Japan, South Africa and last but not least the United States of America. The Convention provides for the international prosecution of on-line child pornography as well as copyright infringements, but does not extend to hate speech. This is due to pressure from the U.S. delegation, which made clear that such a regulation would contravene the First Amendment of their Constitution and prevent them from signing the treaty. As a compromise, it was decided to make these controversial provisions the subject of

11. TGI Paris (réf.), 22 mai 2000, 11 août 2000 et 20 novembre 2000. All the briefs, reports and rulings are published at : <http://www.juriscom.net/txt/jurisfr/cti/tgiparis20000522-asg.htm>

12. Convention on Cybercrime (Council of Europe, Budapest, November 23, 2001) <<http://conventions.coe.int/Treaty/en/Treaties/Html/185.htm>>

Benoit Frydman

an additional Protocol, which is now ready and open to signature. This Additional Protocol to the Convention on cyber-crime makes it a criminal offence to “distributing or otherwise making available racist and xenophobic material to the public through a computer system”.¹³ However, it is not, for obvious reasons, expected to be signed by the Americans, so that the problem remains more or less the same.

Another path, less traditional but more promising, that is being explored is to put the burden of Internet content regulation upon the Internet Services Providers (the so called ISPs), which are responsible for the dissemination of data through all the Internet. As you know, when a surfer wants to access some piece of information online, several intermediaries are generally involved in the communication process, among them : 1° an access provider, which gives the user an access to the Internet; 2° a hosting provider, which stored on its server the data posted by the content-provider; and generally 3° a provider operating searching services, like a search-engine or a portal, which provides guidance so that the user could obtain more easily the data he is interested in. These intermediaries have the actual power to remove, to block or to restrict availability of problematic content posted online. As a result, they have been put on a tremendous pressure, both by public authorities and by private parties, to interfere with Internet content, i.e. to take down or block access to allegedly illegal or damaging data. When they refused to do so, they were often sued and sometimes enjoined, sentenced or found liable by Courts in relation to material authored by others that they had stored, given access to or linked to.

In the United States, the previously mentioned 1996 Communication Decency Act set up a self-regulation regime leaving it entirely to the ISPs to decide what to do in relation to problematic content. In a nutshell, an ISP cannot be blamed for storing or disseminating controversial or even illegal content authored by others.¹⁴ However, at the same time, it cannot be blamed either when it decides to block information that it considers to be “obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected”.¹⁵ This last clause, called the “Good Samaritan Provision” allows intermediaries to freely censure Internet content, although the self-regulatory system as a whole does not create a strong economic incentive to do so.

13. Additional Protocol to the Convention on cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems, ETS No. : 189, open to signature in Strasbourg on 28/01/03 (<http://conventions.coe.int/Treaty/EN/cadreprincipal.htm>)

14. “No provider or user of an interactive computer service shall be treated as publisher or speaker of any information provided by another content provider”. CDA 47 U.S.C. § 230 (c) (1)

15. CDA 47 U.S.C. § 230 (c) (2). – Section 230 is entitled : “protection for private blocking and screening of offensive material”.

Coregulation: A Possible Legal Model for Global Gove...

The situation is quite different in Europe where the issue of the liabilities of intermediaries has been dealt with by the e-Commerce Directive in force since 2002 (art. 11 to 15).¹⁶ While the access provider is exonerated when it plays only a passive role of a “mere conductor”, the story is different as far as the hosting provider is concerned. The hosting provider is the ISP which stores the website or other data on its server. According to article 14 of the e-commerce directive, the hosting provider is not responsible with respect to illegal material that it stores as long as it is not aware of the situation. However, as soon as it becomes aware of the problem (most of the time because someone has sent a complaint to it), it must act expeditiously and block or remove the problematic data, in order to keep the benefit of immunity. This provision has created (maybe involuntarily) a tremendous incentive to block problematic data all over the Internet. For ISPs as for all economic operators, the stakes are high and they are understandably keen to minimize risks and avoid any damaging proceedings (such as the Yahoo! case) by complying with the directive regime. As a consequence, there have been many cases of so called “notice and take down”, thus creating a new mechanism to deal with all kinds of problematic on-line material (not only hate speech, but also copyright infringements, libels, disclosure of privacy, national security issues and so on).

For instance, the German Federal Office for the Protection of the Constitution (*Bundesamt für den Verfassungsschutz*) twice notified eBay, the world largest shopping website based in California, about the sale of Nazi-related songs, books, clothing and paraphernalia on its “marketplace”. Contrary to Yahoo!, the company each time reacted positively to the notice and promptly disabled access to the controversial items. In addition, eBay formally declared that it “will no longer host the sale of memorabilia from the Nazi period or anything related to fanatical groups.”¹⁷

Moreover, although search engines are not formally covered by the e-commerce directive, a report from the Berkman Center of Harvard University¹⁸, shows that the number 1 Google (also based

16. Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (‘Directive on electronic commerce’, EU, January 17, 2000, to be implemented by January 17, 2002): Art. 12-15 <http://europa.eu.int/eur-lex/pri/en/oj/dat/2000/L_178/L_17820000717en00010016.pdf>

17. “Germany Presses eBay to Combat NeoNazi Trading”, Ananova, January 16, 2002 <http://www.ananova.com/news/story/sm_496463.html>. -

A. Rosenbaum, “Nazi Items Gone from Ebay Under German Pressure”, Newsbytes, January 17, 2002 <http://www.infowar.com/class_1/02/class1_011802a_j.shtml>

18. J. Zittrain and B. Edelman, Documentation of Internet Filtering Worldwide (Berkman Center for Internet & Society, Harvard Law School) at <<http://cyber.law.harvard.edu/filtering/>> (last visited on November 21, 2002).

Benoit Frydman

in California) has quietly excluded 65 sites from listings available at Google.de and 113 from listings available at Google.fr. Most of these sites are anti-Semitic, pro-Nazi or related to white supremacy (e.g. stormfront.org). It has also banned “Jesus-is-lord.com”, a fundamentalist Christian site that is adamantly opposed to abortion. In a press interview, a Google spokesman indicated that each de-listing came after a specific complaint from a foreign government, but he refused to hand down a list of the targeted websites.

These examples show that the informal “notice and take down system” is efficient. In a way, it allows Europeans to play behind the back of the US Constitution and to reach American Internet providers despite the shield of the 1st Amendment. The system is even too efficient, potentially leading to the removal of legitimate controversial material, thus having a “chilling effect” on free speech. In order to avoid this result, it has been suggested to complete the “notice and take down” procedure with a procedure of “reply and stay up” that would provide a better balance between the interests of the complainers and the right to free speech.

I do not want to go into further details here¹⁹. What is interesting to stress is the emergence of a new model of Internet “coregulation” (the word was first used by the French Conseil d’Etat in 1998 and is now common parlance²⁰), which entails a form of cooperation between public authorities (which set up free speech standards and their limits) and private actors, namely the Internet services providers, which are ingeniously encouraged to use technical devices in order to enforce these standards. Like the tradable pollution permits in the issue of global warming, the Internet content coregulation necessitates a shift from institutional States’ regulation, using mainly commands and punishments, to an economic regulation that tries to create incentives for ISPs to participate in Internet content regulation. Again, the new model also involves a shift from primary content-based rules (i.e. free speech standards and limitations) to procedural mechanisms, namely the “notice and take down” and “reply and stay up” procedures. The most surprising is that these procedural solutions seem to work effectively, even when there is no global agreement on the legal standard that has to be applied, like in hate speech matters.

Conclusion :

19. For a more detailed analysis, see : B. Frydman and I. Rorive, « Regulating Internet Content through Intermediaries in Europe and in the United States », *Zeitschrift für Rechtssoziologie*, 23 (2002), Heft 1, pp. 41-59.

20. I. Falque-Pierrotin, « La gouvernance du monde en réseau », in *Gouvernance de la société de l’information, Cahier du centre de recherche Informatique et droit*, n° 22, Bruylant-Presses Universitaires de Namur, 2002, pp. 109-115, esp. p. 110.

Coregulation: A Possible Legal Model for Global Governance...

There is some evidence that globalisation, like the industrial revolution, is bringing about a new model of legal regulation. In this new model, national States will still be involved, although they are likely to lose the sovereignty that chiefly characterised traditional law. The new model, which could be called “coregulation”, implies a shift from the commands and punishments traditionally imposed by the States’ institutions to new forms of mechanisms mainly based on market regulation, incentives and disincentives. Contrary to traditional legislation, these new mechanisms do not usually prescribe a specific standard of behaviour, but rather set up procedural systems, such as “artificial markets” or “notice and take down” procedures, which favour an quasi automatic settlement of the conflict of interests, according to the principles of the game theory. Traditional and new human rights, such as freedom of speech and the right to a healthy environment, are often put forward in the debates about global governance, although they do not seem to play an essential role in the effective working of the new coregulatory model.