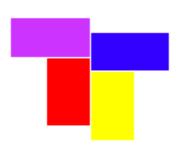# Technische Universität Berlin

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Regulation and Self-Regulation in Open Networks

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**Regulation and Self-Regulation in Open Networks
– Four Theses on Internet Governance –**

Colloquium for Prof. Dr. iur. Wolfgang Kilian to his 60th date of birth, University of Hannover, February 5th, 1999

1st Thesis

At any rate there is a need to protect traditional values of liberty, and speech, and privacy, and access within Internet communications. [Lessig 1998]

In 1998 Wolfgang Kilian proposed a working model for structuring the legal problems of the Internet. He makes a distinction between three models [Kilian 1998]:

- the model of juridification

- the model of self-regulation

- a model protecting the interests of the user [Nutzerschutzmodell].

A mixed system out of self-regulation and regulation by statutes will work best. Sometimes the nation state should be responsible for regulating the problems of the market driven economy, and sometimes it would be sufficient if private interests regulate their conflicts on their own.

There is no doubt that this distinction is adequate as a starting point. It excludes extreme positions and therefore could solve most of the conflicts. However it fails if no traditional nation state can state the rules and statutes.

But how to protect traditional values in a space where the nation state has lost his power – more or less?

2nd Thesis

To assume that the market driven economy could be best governed by the free market and the actors of the market would be very naïve – to say at least. Thus the perfect market is only a matter of theory.

This reason speaks in favor of a traditional solution: Give the state or government certain powers of intervention into the market – of course with the law as its main instrument.

On the other hand it is just as naïve to assume that the state with its institutions is the best or the only regime to

protect the traditional rights. The best example for the minor role of the states is the development of the Internet itself. It has grown without any specific influence of the states on the technical structure of the Net. There is no empirical evidence at all for the thesis that any of the current states could have developed the Net better in the same time.

This fact speaks <u>against</u> the traditional solution. To leave the decisions to the private actors in the field seems to be the best way of problem solving.

<u>The first problem</u> arises because the traditional nation state can not handle cross-border problems in a sufficient manner. The application of the traditional criteria of common and civil law is running dry because of the ubiquity of data, as Wolfgang Kilian states. Also it seems too much for the regional legislator, the European Union: In its recent proposal for E-Commerce the Union passes back the problem to the market actors and gives order to install private codes of conduct, wherever possible. International regulators like the World Trade Organization act with restraint. So everybody is good advised to put not too much hope into international treaties – at least for the near future.

<u>The second problem</u> arises because private interests tend to abuse power whenever they have the interest. The best example for abuse of power in the last time was the intend of some private groups to dominate the domain name system.

Thus it is difficult to find the true standards.

3rd Thesis

Modern political science distinguishes between types of government:

- Governance by government

- Governance with government

- Governance without government

Governance by Government

This type reflects the traditional way to govern: The traditional nation state, that is a hierarchical higher body, governs with the help of statutes.

This type has formative influence on the juridical and political thinking of our times.

Governance with Government

This type also assumes the nation state as a hierarchical actor. But unlike the former type in this kind of governance the government acts with co-ordination and consensus with the social actors, not with decrees.

Statutes of the old type function as a threat or a intimidation in the background.

Governance without Government

At least on an international level one can observe governance beyond the nation state. This type of

governance leads to results even without ordinary statutes.

I propose to adopt this typology into jurisprudence. This kind of necessary adoption of social science' knowledge allows us a significant shift: Away from the dichotomy of regulation versus self-regulation towards the distinction of governmental types: Governance by, governance with and governance without government.

The ordinary, the main type of governing is governance without government. Governance by government is just a special case.

With this adoption of a social science theory the continental jurisprudence could catch up with the modern US discussion. American jurists do label their discussion on the legal problems of the Internet with the term Internet Governance.

4th Thesis

This typological proposal prepares the ground for the fundamental shift in our point of view. Lawrence Lessig, Law Professor at the Harvard Law School, just recently expressed this shift in the perspective in a famous talk on "Governance":

> *We should ask whether freedom is protected, not whether government threatens freedom. We should ask whether the architectures of cyberspace protect traditional values of liberty, and speech, and privacy, and access - not whether government is interfering with liberty, and speech, and privacy, and access. The primary good here is a set of values, not absence of government interference independent of those values.*

Quite often these values are only protected by
a government.
But some times they are not.

Conclusion

This brings me to the following conclusion:

1. The distinction between regulation and self-regulation is not all precise. It prevents the solution of conflicting interests rather than making solutions possible.

2. Political Science offers a typology which explains governing beyond the nation state.
I would recommend to work with this typology whilst working on the solution of legal problems of the Internet.

3. The crucial question is whether we succeed to obligate the actors on a specific set of set of values. We thus need to talk on the values we would like to adopt. Specially the continental jurisprudence should get ready for a new understanding: Increasingly non-governmental actors will control and regulate these values.

Probably there is another hard lesson we have to understand:

Whether government runs things or not, w e should govern o u r s e l v e s . Right now we cannot. This much about us must change. [Lessig]

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