Chapter 12

All’s WELL that Ends WELL: A Comparative Analysis of the Constitutional and Administrative Frameworks of Cyberspace and the United Kingdom

Jonathan Bishop
Swansea University, UK

ABSTRACT

Constitutional and Administrative Law is a core component of legal studies throughout the world, but to date little has been written about how this might exist on the Internet, which is like a world without frontiers. John Perry Barlow’s “Declaration of the Independence of Cyberspace” served to start the debate about the legitimacy of nation-states to impose laws on such a virtual space. It has been argued that the nation-states won as there are now a significant number of laws regulating the Internet on national and international levels. It can however be seen that there are commonalities between the two entities. For example, there are commonalities in the way they function. There are also commonalities in the way civil rights exist, and the existence of civil remedies and law enforcement. These are all explored in the chapter, which also presents two concepts about the authority of the state in regulating behaviour in online communities. One of them, “sysop prerogative,” says that owners of website can do whatever they want so long as they have not had it taken away by law or given it away by contract. The second, ‘The Preece Gap’, says that there is a distance between the ideal usable and sociable website that the

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users want and that which the owners of the website provide in practice. Two other concepts are also introduced, “the Figallo effect” and the “Jimbo effect.” The former describes an online community where users use their actual identities and sysop prerogative is delegated to them. The latter describes those where sysop prerogative is exercised by one or more enforcers to control users who use pseudonyms. The chapter concludes that less anonymity and a more professionalised society are needed to bridge the gap between online and offline regulation of behavior.

INTRODUCTION

At the dawn of the Worldwide Web when there was a heating up of imposition of laws by nation states on the international communications networks, one isolated voice spoke out and was cross-posted more times than the author could imagine. In March 1999, the strategy for regulating government exploitation of the Internet in the UK was set out for the first time in the Modernising Government White Paper. Until late 2005 the focus of policy development in respect of interactive and transactional services online had been based upon consideration of how to drive up access and demand (Saxby, 2006). However, government intervention with regard to the Internet has to some people been unwanted, as was voiced quietly vehemently by John Perry Barlow (see Figure 1) in his ‘Declaration of the Independence of Cyberspace’ (Barlow, 1996). He openly declared in this document, “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.” This text is now one of the cornerstones in the history of the Internet. Barlow’s concept of cyberspace as a homeland without and beyond frontiers is somewhat challenging to the concept of a nation state put forward by Adam Smith (Smith, 1966) but perhaps more consistent with the view of a nation as an ‘imagined community’ put forward by Benedict Anderson (Anderson, 1991).

Barlow’s separation between the virtual world and the “real world” has been overturned by legislation and legal cases as soon as analysts began to worry about “spill over” from problems in cyberspace to problems in the real world (Manjikian, 2010). However, as Manjikian suggests, the legal and political systems are only one part of the story. Legitimate questions on the authorship of websites in Cyberspace and its users as opposed to whether it can be considered a sovereign body can still be asked. Cyberspace may still exist as a cultural society, where its users share the same technologies and share similar networks of mental artefacts, such as beliefs, values and experiences (Bishop, 2010a). A question that might arise is whether Barlow’s document could be considered a constitution for the Internet. If so what impact does it have on the way we think about the constitutional and administrative laws that make up ‘the British Constitution’. Definitions abound as to what a constitution is. It has been pointed out that a source that can be used to find information on such a definition would be the WELL (Whole Earth ‘Lectronic Link), a California-based online community (Rheingold, 2000). It has also been argued that our current understanding of what a constitution is largely depends on the constructions which nineteenth-century constitutionalism placed upon it, locking the constitution into a series of complex relationships with liberal views of the modern nation state (Castiglione, 1996). A current understanding of constitution is that it is a set of principles which determine the way a country will be governed, and a description of the order in which the principles should be invoked (Hey & Pasca, 2010). Others have defined a constitution as something to which people subscribe to which sets out rules they agree to abide by. Based on these definitions, John Perry Barlow’s document could be consid-

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