Vrije Universiteit Brussel

Global law will be Responsive Law, at least with regard to Cyberspace

De Hert, Paul; Mantovani, Eugenio

Published in:
Tilburg Law Review

Publication date:
2012

License:
Other

Link to publication

Citation for published version (APA):
De Hert, P., & Mantovani, E. (2012). Global law will be Responsive Law, at least with regard to Cyberspace. *Tilburg Law Review*, *17*, 346-359.

Copyright
No part of this publication may be reproduced or transmitted in any form, without the prior written permission of the author(s) or other rights holders to whom publication rights have been transferred, unless permitted by a license attached to the publication (a Creative Commons license or other), or unless exceptions to copyright law apply.

Take down policy
If you believe that this document infringes your copyright or other rights, please contact openaccess@vub.be, with details of the nature of the infringement. We will investigate the claim and if justified, we will take the appropriate steps.

Download date: 27. Mar. 2025

MARTINUS NIJHOFF PUBLISHERS

Tilburg Law Review 17 (2012) 346–359

Tilburg Law Review

brill.com/tilr

Global law will be Responsive Law, at least with regard to Cyberspace

Paul de Hert[a] & Eugenio Mantovani[b]

a) Professor of Law and Technology, Tilburg Institute for Law and Technology (TILT) and Faculty of Law and Criminology, Vrije Universiteit Brussel
paul.de.hert@vub.ac.be

b) PhD researcher, Research Group *Law Science Technology & Society*, Vrije Universiteit Brussel; seconded researcher, *Centre for Science, Society and Citizenship* (CSSC, Rome) – in the framework of the Marie Curie program VALUE AGEING
eugenio.mantovani@cssc.eu

Abstract
Multilevel global law is defying formal hierarchy in favour of a qualitative and responsive approach. As the cases of Solange and Kadi indicate, Courts may start giving priority to the legal order that better protects the values at stake. In law making, global law may be more and more responsive. Gone are the days of executives crafting ready-made treaties and bullying ratification back home; communities will react and force lawmakers to adjust and consult. The spectacular fiasco of Acta is a good example. The ACTA case, however, also instils the doubt whether this 'responsiveness' will be a general feature of global law or only of global information society law (cyberspace). Referring to the work of Andrew Murray on internet regulation and his discussion of failed enforcement against Wikileaks, one cannot but be prudent. The specific features of the internet make cyberspace another space than regular space. However, it is perhaps not to bold a pick to hold that the mechanism of responsiveness is, in due time and in some unexpected ways, to become a general characteristic of all law.

Keywords
global law; responsive law; ACTA; Murray; Cyberspace

1. Introduction

'There was private law and public law, national law and international law, each with its own domain (…)' could be the incipit of a class on global law

[1] Adapted from D Kennedy, 'The Mystery of Global Governance', Kormendy Lecture, Ohio Northern University, Pettit College of Law (2008). Available at: <http://www.watsoninstitute.org/blss/media/docs/kennedy.pdf> accessed 2 July 2012.

© Koninklijke Brill NV, Leiden, 2012
DOI 10.1163/22112596-01702024

in the near future.[1] When no national system is completely autonomous, and no supranational system is completely autonomous either, political ordering is no longer something governed by a more or less precise, more or less stable hierarchy of domestic legal norms, but by multilevel systems of national and supranational norms. While there is no consensus of the notion of global law, just as there is no single definition, but several, a few would disagree that law making, but also law enforcement and jurisdiction, are steadfastly maturing into multilevel, non-hierarchical enmeshment of national, regional and international legal sources.

There is also little doubt about global law as a highly attractive field of knowledge and research for any lawyer. The peculiarity of this article is that it is written by a couple of lawyers and academics coming from the field of law and technology studies. What does developing global law have to share with the sizzling wires of the burgeoning information society? In our view, a common interest in regulatory theories.

Starting from a general definition of global law, the first part of the article discusses and, by using the opinions of legal authorities, underlines the relevance of the concept as both descriptive and normative representation of our times of global governance.

Based on this doctrinal introduction, the second part of the article illustrates global law in relation to two typical legal operations: jurisdiction and law making. In jurisprudence, we refer to two fundamental rights-centred Dworkinian 'hard cases': a national one (Solange, 1986) and a European one (Kadi, 2008). In law making, we describe the remarkable failure of ACTA, the Anti-Counterfeiting Trade Agreement, to show that, these days, individuals and communities, including parliamentary assemblies, no longer blindly trust, but defy and confront law making, especially when it comes as a package crafted far away from home.

The third and last part of the article is about cyberspace. In this section, we engage with Andrew Murray's regulatory theory of cyberspace which he derives from Actor Network Theory (ANT) and Social Network Theory (SNT).[2] Enabled or facilitated by the use of information and communication technologies, Murray argues that communities respond and react to regulatory command and control interventions forcing authorities to consult, to adjust and to change. In cyberspace at least, the object of the law, the good to be regulated, such as copyright, becomes an active subject.

---

[2] Andrew D Murray, *The Regulation of Cyberspace* (Routledge-Cavendish 2007).

2. Global Law: Views from Legal Scholars

Talk of global law has been around for some years through the languages of unification, harmonisation, or convergence of law and legal systems. Though no agreement or common definition is found, the concept of global law can be safely taken to epitomise the demise of the hegemony of the Westphalian national state over the system of legal sources.

'Transplant' theorists suggest that global law could be the paradoxical outcome of the law's own success as 'the' mode of ordering, massively diffused throughout the world's legal systems, working in an almost semiautomatic way across the worlds through codes.[3] In this connection, James Gordley, a private law scholar, sees a turning point in the adoption, in 1911, of a Chinese civil code. Ever since, he claims, the basic structure and concepts and ideological assumptions of construct and more broadly private law, is globally shared. One can travel anywhere. He or she will know that larger legal concepts, like liability, are analysed much in the same way in Brussels and in Jakarta.[4]

The University of Sydney website nicely illustrates global law as 'encompass[ing] not just international law, but an approach to law that is transnational in scope, taking in the domestic laws of different countries, and integrating an understanding of domestic regimes within the broader context of international laws, instruments and institutions.'[5] This characterisation of global law as an approach to law that is transnational in scope tallies well with the views expressed by Sabino Cassese, international law scholar and constitutional judge.

Cassese describes global law as being based on agreements situated in a grey zone between global regulatory systems and national regulators,[6] in the field of arms control, food safety, financial instruments, internet governance, coffee and cocoa, fishing, forest, water, climate, to name but a very few.[7] Cassese and others[8] suggest the linchpin of global law should be

---

[3] William Ewald, 'Comparative Jurisprudence (II): The Logic of Legal Transplants' (1995) 43 American Journal of Comparative Law 489.

[4] James Gordley, *The Philosophical Foundations of Modern Contract Doctrine* (Oxford University Press, Oxford 1993).

[5] See University of Sydney, 'Master of Global Law' (2012) Available at: <http://sydney.edu.au/law/fstudent/coursework/global-law.shtml> accessed 30 June 2012.

[6] Sabino Cassese, 'Administrative Law without the State? The Challenge of Global Regulation' (2005) 37 Journal of International Law & Policy 663, 668.

[7] ibid 673.

[8] Sabino Cassese and others (eds), *Global Administrative Law: Cases, Materials, Issues* (2nd edn, Institute for International Law and Justice 2008); Benedict Kingsbury, Nico Krisch

guaranteeing the actual application, by global regulatory bodies and institutions, of principles and procedures of transparency, participation, and duty to give a reasoned decision.[9]

The principles-based, normative vision of Cassese is contrasted by scholars looking at the practice of the law. William Twining, for instance, warns against the dangers of generalisation and convergence, which, he writes, 'are only *prima facie* true in a superficial way.'[10] Convergence of law, be it contract or administrative law, tells very little about law in action in different countries and within different contexts within the same country. Convergence of global systems is a distinctly metropolitan perspective and suffers from the limitations of Hobbesian state centralism, he surmises.[11] At the same time, Twining does not doubt that 'there clearly are important general patterns and meaningful discourses about law in the world as a whole and in large parts of it'. The challenge is to identify which general patterns are meaningful and workable and to identify the important differences.

Neil Walker agrees with Twining's accent on pluralism and diversity between and within legal systems. In Walker's view, constitutional sites and processes are increasingly configured in a 'heterarchical rather than a hierarchical pattern.' This means that there are continuous overlaps between national legal systems, on the one hand, and international organisations, on the other hand. In his work, Walker seeks to understand whether these overlapping and contaminations foreshadow the emergence of a third, global constitutional configuration and he studies the legitimacy of such a development.[12]

---

and Richard B Stewart, 'The Emergence of Global Administrative Law' (2005) 68 Law and Contemporary Problems 15; Nico Krisch, Benedict Kingsbury, 'Introduction: Global Governance and Global Administrative Law in the International Legal Order' (2006) 17(1) European Journal of International Law 1. For a good overview on doctrine in this field, see Ming-Sung Kuo, 'Between Fragmentation and Unity: The Uneasy Relationship between Global Administrative Law and Global Constitutionalism' (2009) 10 San Diego International Law Journal 439; and Ming-Sung Kuo, 'The Concept of "Law" in Global Administrative Law: A Reply to Benedict Kingsbury' (2009) 20(4) European Journal of International Law 997.

[9] Kingsbury, 'The Emergence of Global Administrative Law' ibid.

[10] William Twining, *Administrative Law in Context: Enlarging a Discipline* (Oxford University Press, Oxford 1997); William Twining, *Globalisation and Legal Theory* (Butterworth 2000); William Twining, *The Great Juristic Bazaar* Aldershot 2002).

[11] William Twining, 'A Cosmopolitan Discipline? Some Implications of "globalisation" for Legal Education' (2001) 8(1) International Journal of the Legal Profession 1.

[12] Neil Walker, 'The Idea of Constitutional Pluralism' (2002) 65(3) Modern Law Review 317.

A more cynical voice, in starker contrast with Cassese's principles-based view, is that of Ugo Mattei. According to Mattei, global law resent from the encumbering legacies of Hobbessian and Lockian thinking on modern constitutionalism, with its embracement of state centralism *and* private individualism, property *and* sovereignty, private *and* public.[13] These two major legal and political institutions, private and public, carry on the dominant view of the world, he points out. On the one hand, 'private structures (corporation) concentrating their decision making and power of exclusion in the hands of one subject (the owner) or within a hierarchy (the CEO)'; on the other, public structures (bureaucracy) concentrating power at the top of a sovereign hierarchy.[14] In the *pars construens* of his radical critique, Mattei gives support to the vision of a legal system organised as an 'ecosystem'. In such an ecosystem, community of individuals or social groups are linked by a horizontal mutual connection to a network where power is dispersed, generally rejecting the idea of hierarchy in favour of a participatory and collaborative model, which prevents the concentration of power in one party or entity, and puts community interests at the centre.[15]

As we will underline below, Mattei's communities' activism is one of the constitutive features of Andrew Murray's architecture of responsive law in cyberspace. The point that Murray prompts is whether the communities' activisms and the responsiveness of the law that he sees at work in cyberspace can be generalised to become a general feature of global law, or whether this approach can only be developed to deal with information society issues.

3. Qualitative Turn and Responsive Law

Before entering Andrew Murray's notion of responsive law, this paragraph pushes a bit further the preliminary remarks on global law. The foregoing has shown that though several visions exist about what global law is, all

---

[13] Ugo Mattei, 'A Theory of Imperial Law: A Study on U.S. Hegemony and the Latin Resistance' (2003) 10(1) Indiana Journal of Global Legal Studies 383. Available at: <http://www.repository.law.indiana.edu/ijgls/vol10/iss1/14> accessed 01 June 2012; Ugo Mattei and Laura Nader, *Plunder: When the Rule of Law is Illegal* (Blackwell 2008).

[14] Ugo Mattei, 'The State, the Market, and some Preliminary Questions about the Commons (French and English Version)' (2011) Available at: <http://works.bepress.com/ugo_mattei/40> accessed 3 July 2012. See also Ugo Mattei, *Beni comuni: Un manifesto* (Bari 2012).

[15] ibid 11.

agree that the Westphalian model of nation state law does not exist any longer in an autonomous way. Less evident, but present in the analysis of Walker, is the observation that also international law suffers from this development: the hierarchical superiority of international law over regional and national law is quite changed, if not gone for good. When judges have to decide between international law norms and national law norms, no absolute priority seems to exist. Drawing from two court cases, we show that the decision, what legal norm will apply to a specific case, is not (any longer) taken on the basis of formal hierarchical criteria, but instead on what we call, for lack of better words, qualitative criteria.

When the case *Solange* II was debated, in 1986, the protection of fundamental rights at the European level had created a layer of fundamental rights that added to the national circles of fundamental rights. At stake was the coordination of European Community secondary law with basic rights grounded in the Federal German Constitution, or Basic Law. The question that arose in court was how these layers or circles were related to one another.[16] *Das Bundesverfassungsgericht*, the German Constitutional Court, accepted the new status quo, acknowledging both the validity of the higher European, supranational source of law (abiding by a consolidated case law on the supremacy of EU law developed in Costa/ Enel[17] and Van Gend en Loos[18]), and a division of competence between itself and the European Court of Justice (ECJ).

As Adams and Witteveen underline,[19] at the same time, the German court stated that the validity of that higher source of law was not given

---

[16] For a detailed discussion see E R. Lanier, 'Solange, Farewell: The Federal German Constitutional Court and the Recognition of the Court of Justice of the European Communities as Lawful Judge' [1988] 11 Boston College International and Comparative Law Review 1 Available at: <http://lawdigitalcommons.bc.edu/iclr/vol11/iss1/2> accessed 01 June 2012; August Reinisch (ed), *Challenging Acts of International Organizations Before National Courts* (Oxford University Press 2010). Compare the Bosphorus case, decided in 2005, which allowed European Court of Human Rights to clarify the relationship between the EU's and the Council of Europe's human rights regimes. Paul de Hert and Fisnik Korenica, 'The Doctrine of Equivalent Protection: Its Life and Legitimacy Before and After the European Union's Accession to the European Convention on Human Rights' (2012) 13 German Law Journal 874 Available at: <http://www.germanlawjournal.com/index.php?pageID=11&artID=1445> accessed on 01 June 2012.

[17] Case C-6/64 *Costa v ENEL* [1964] ECR 585.

[18] Case C-26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR I.

[19] Maurice Adams and Willem Witteveen, 'Gedaantewisselingen van het recht' [2011] 86-9 Nederlands Juristenblad 540; Maurice Adams and Willem Witteveen, 'Gedaantewisselingen van het recht' [2011] Rechtskundig Weekblad 1120.

solely by its formal hierarchical position. Its validity had to be measured according to qualitative criteria. Thus, '"as long" as Community law did not contain comparably adequate fundamental rights protection (the *Bundesverfassunsgericht* upheld the admissibility of its human rights scrutiny of Community acts)',[20] and, '"as long as" equivalent human rights protection was guaranteed by the ECJ (the German judiciary will dismiss competence of German judiciary over acts of community organs).'[21] Adams and Witteveen would probably subscribe to Davor Jancic's expression 'Solange democracy'.[22] Jancic uses it to underline that, further to Solange, parliamentary involvement in EU affairs has significantly been refurbished. Solange jurisprudence had indeed the effect of enhancing the legal position of the German Parliament vis-à-vis the Federal Government and the international policy agreements contracted by it, Jancic points out.

The *Kadi* case is another example of a court decision where formal hierarchy plays second fiddle to search for qualitative judgement. This time the 'struggle between legal systems' is between the European Union's and the United Nations (UN).

The Kadi judgment of 3 September 2008[23] concerned the annulment of an EU Council regulation giving effect within the EU area to a number of UN Security Council (UNSC) resolutions specifically aimed at the freezing of funds belonging to certain persons and entities associated with Osama Bin Laden and the Taliban movement. One of the targeted natural persons, Mr Kadi and others brought an action of annulment in relation to regulation EC no. 881/2002 in so much as that act related to them, alleging a breach of their fundamental rights.

In a first hearing, the Court of First Instance dismissed the actions brought against the Council Regulation.[24] The dismissal was appealed in front of the European Court of Justice. In what has rightly become a landmark case, the ECJ found that the Court of First Instance had erred by dismissing the lawsuit. The dismissal infringed upon the principle of judicial review in that neither decision nor regulation, even one implementing Security

---

[20] *Internationale Handelsgesellschaft "Solange I"* [1974] 2 C.M.L.R. 540 (Solange I).

[21] Re Wünsche Handelsgesellschaft "Solange *II*" [1987] 3 C.M.L.R. 225 (Solange II).

[22] Davor Jancic, 'Caveats from Karlsruhe and Berlin: Whither Democracy after Lisbon?' (2010) 16(3) Columbia Journal of European Law 337.

[23] Joined cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* [2008] ECR 11-3533.

[24] Case T-315/01 *Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities*, ECR II-3649.

Council resolutions, can escape judicial review.[25] The court reminded that respect for human rights is a condition of the lawfulness of Community acts and that measures incompatible with respect for human rights are not acceptable in the Community.[26] It concluded that international agreements cannot prejudice the community constitutional order and fundamental rights, including the right to be heard, the right to an effective judicial review and the right to property.[27]

Some international law doctrine criticised *Kadi* for the 'constitutionalist–dualist posture' taken by the court.[28] Others, like Adams and Witteveen, mentioned above, instead argue that this is exactly what is expected from a qualitative approach, not to be afraid of shaking the coherence of the international legal system. In *Kadi*, the European Court of Justice performed as an interpretative community: confronted with a concrete case of global governance impinging on fundamental values, but still accepting the disciplining rules of the law to restrain thinking and decision.[29]

4. ACTA, Andrew Murray, and Responsive Law

Will the qualitative turn create more unpredictability in courts' decision-making? Maybe yes, maybe not, the answer to the question depending largely on the case by case assessment and by the way Courts of Justice will interpret the law and take decisions. If, vis-à-vis courts, talk of unpredictability commands prudence, it is not as impudent for the claim to be made about unpredictability with regards to treaty law making.

As the ACTA case (discussed below) suggests, the Pandora's box of global law is opened on the face of the legislator and pushes it to adopt a new way of engaging with performing international cooperation. Echoing the question asked above at the end of paragraph 1: is this new approach to (global) law making something that is becoming a dominant feature in all spheres

---

[25] Joined cases C-402/05 P and C-415/05 P para 281, referring to Case 294/83 *Les Verts* v *Parliament* [1986] ECR 1339, para 23.

[26] Joined cases C-402/05 P and C-415/05 P, ibid para 284.

[27] Joined cases C-402/05 P and C-415/05 P (n 25) para 316.

[28] Andrea Gattini , 'Case Comment' (2009) 46 Common Market Law Review 213.

[29] Owen M Fiss, 'Objectivity and Interpretation' (1982) 34 Stanford Law Review 739. Joined cases C-402/05 P and C-415/05 P (n 27) paras 287-288. While annulling the contested regulation and putting conditions on it, the ECJ made clear that its decision did not challenge the primacy of the UN SC resolution under international law.

of law making, or is it a prerogative of law making in the information society or cyberspace?

The Anti-Counterfeiting Trade Agreement (ACTA) is a draft trade agreement that addresses commercial-scale counterfeiting and online piracy by coordinating global enforcement of existing copyright (violation) laws.[30] It was drafted through 11 rounds of negotiations involving 37 countries, which opened in June 2008 and came to an end in November 2010. As for its scope, the agreement addresses issues that go beyond 'counterfeiting' – such as fake designer clothes – to encompass, knowledge transfer about, e.g., basic medicines, car parts, technology, software, etc. notably through tighter digital IP enforcement efforts.[31] The agreement was designed to curb the flow of counterfeit goods across the globe requiring States and information society actors to conform to and/or adopt relevant policing, law enforcement, and liability norms.

As with all international mixed agreements, the European Commission, acting on a mandate from the Council, was the negotiator on behalf of the European Union, while the Member States were represented by the rotating presidencies. Before the agreement could become binding on EU countries, consent from the European Parliament had to be obtained.[32] After four contrary votes in four committees,[33] in the 2-5 July 2012 plenary session, the European Parliament withheld its consent, rejecting ACTA. The draft text, the outcome of lengthy negotiations between dozens of domestic and international offices and experts and lobbies, came to naught.

One of the reasons of the 'no' was arguably the ambiguity of many provisions. Content users did not like the undetermined notion of 'commercial-scale'[34] Privacy advocates did not appreciate the provisions

---

[30] On copyright and legal aspects of enforcement see Augustì Cerillo and others (co-ordinators), *Challenges and Opportunities of Online Entertainment: Proceedings of the 8th International Conference on Internet, Law & Politics,* Universitat Oberta de Catalunya. Barcelona, 9-10 July 2012 Available at: <http://edcp.uoc.edu/symposia/IDP_2012.pdf> accessed 29 July 2012.

[31] EDRI, *Cooperative Efforts in ACTA's Digital Chapter*, Issue 05 number 27 Available at: <http://www.edri.org/files/2012EDRiPapers/Article27.pdf> accessed 29 July 2012. Axel Metzger and Rita Matulionyte (coordinators), *Opinion of European Academics on ACTA*, 3 December 2010, open for signatures until February 7, 2011. Available at: <http://www.iri.uni-hannover.de/tl_files/pdf/ACTA_opinion_110211_DH2.pdf> accessed 3 July 2012.

[32] As well as ratification by individual Member States.

[33] EP Press Release, ACTA now rejected by four EP committees, 6 May 2012.

[34] Article 23 ACTA defines acts carried out on a 'commercial scale' as 'commercial activities for direct or indirect economic or commercial advantage.' Will someone who mixes music be criminally prosecutable?

on the disclosure of personal data, ACTA imposing a duty to disclose data of network subscribers both of infringing and non-infringing intermediaries.[35] Digital rights activists criticised the ambiguity on the role of a key player, or node, internet providers or intermediaries.[36] Economists saw ACTA provisions on border control as imposing on specific copyright controls potentially of *any* goods traded covered by IP rights, including, e.g., goods of humanitarian importance such as generic drugs. Consumer associations saw in it the viaticum to not-so-subtle coercive tactics against alleged copyright infringers, e.g., charging large sums of 'settlement' payments to avoid court appearances.[37]

Another important reason for ACTA to be rejected concerned the secret nature of the negotiations of the agreement phase, which excluded the general public. In conclusion, the ACTA was not convincing. 'Given the vagueness of certain aspects of the text and the uncertainty over its interpretation, the European Parliament could not guarantee adequate protection for citizens' rights in the future under ACTA', concluded David Martin, one of the European Parliament rapporteurs.[38]

Are the days of parliamentary rubber-stamping, (when the executive went away to an international forum and signed a draft, returned home and the national parliament ratified – no questions asked), gone? We will answer this question using Andrew Murray's theory of responsive regulation, which, *prima facie* seems to sit quite comfortably, almost to demonstrate *ex post*, ACTA law making fiasco.

Andrew D. Murray would most probably say yes, indeed, those days are gone: at least when the regulator touches information society issues. As mentioned in the introduction, Andrew Murray derives his theory on regulation of cyberspace from studies on Actor Network Theory (ANT) and Social Network Theory (SNT).[39] According to Murray, communities or, in

---

[35] Article 27.3 ACTA.

[36] EDRI, 'What makes ACTA so controversial (and why MEPs should care)' Available at: <http://www.edri.org/files/acta-bklt-p2s.pdf> accessed 3 July 2012.

[37] EDRI, ibid.

[38] David Martin, MEP, (Rapporteur), Committee on International Trade, European Parliament, 24 April 2012, 2011/0167(NLE).

[39] On Murray's work: Eugenio Mantovani and Paul de Hert, 'Review of The Regulation of Cyberspace by Andrew Murray' (2008) 2(1) Studies in Ethics, Law, and Technology 1; Andrew D Murray, 'Nodes and Gravity in Virtual Space' (2011) 5(2) Legisprudence 195; Andrew D Murray, 'Internet Regulation' in David Levi-Faur (ed), *Handbook on Regulation* (Edward Elgar 2011); Andrew D Murray, 'Uses and Abuses of Cyberspace: Coming to Grips with the Present Dangers' in Antonio Cassese (ed), *Realizing Utopia: The Future of International Law* (Oxford University Press 2012).

social network theory language, *nodes*, are elements of a network that act and relate to each other - whether they are diplomatic bureaus of the state, organizations, trade unions, interest groups, small groups, or individuals. The individual is considered an opinion maker, not alone, but as a member of a community of other individuals.[40] Communities are central because they give signals to, e.g. markets, and regulators, they give or remove legitimacy. The presence of these reactive communities/nodes in cyberspace characterise regulation as being torn by the ability to control and effectiveness and legitimacy of control mechanisms.[41] This distinction is for Murray normative.

According to the British scholar, law operators should come to terms with the dynamic characteristics of the environment they seek to regulate. In order to be effective, it is advisable, that the regulatory model 'harnesses, as best as possible, (i.e. chaos theory permitting), the relationships already in place between the actors.'[42] In order to be legitimate, traditional command and control intervention should be tempered by techniques which 'afford all participants in the regulatory matrix an opportunity to shape the evolutionary development of *their* environment'.[43]

This hybrid regulator ought, thus, to measure his intervention in a two-stage process: first, map the environment (the 'communications that naturally occur between regulatory actors') and, secondly, 'predict what feedback will occur after intervention is made'. This gives rise to a regulatory 'hybrid' system where law must be open to the regulatory web or matrix and to be able to negotiate with it.[44]

ACTA is an illustrative case of responsive law in which communities, other than those traditionally devoted to shape the law, reclaim opportunities to shape the evolutionary development of *their* environment. In this sense, Murray's 'symbiotic regulation' shares some features with those international law scholars, mentioned in paragraph one, who insist on the plurality and diversity of law in action (Twining), constitutional enmeshment (Walker) and, in particular, Ugo Mattei's vision of an ecosystem, 'generally rejecting the public/private dichotomy and its idea of hierarchy, in favour of a participatory and collaborative model, which prevents the

---

40 Murray 'Nodes and Gravity in Virtual Space' ibid, 204.

41 Andrew D Murray, *Regulation of Cyberspace: Control in the Online Environment* (Routledge-Cavendish 2007).

42 ibid 244.

43 ibid 243.

44 ibid 229.

concentration of power in one party or entity, and puts community interests at the centre'.[45]

5. Cyberspace is Different

Are we precipitating the conclusions that the responsiveness of the law in ACTA is or, following Mattei, should be, illustrative for all law, and not only information society law? Although the parallelism arouses the interest of the author, Murray opines that responsiveness of the law concerns primarily cyberspace. Murray reaches this conclusion after putting his theory to the test in the Wikileaks case.[46]

Facts of this case are well known. In November 2010 a web site named Wikileaks began to reveal confidential and even secret US government diplomatic cables both via its website and international media. According to Murray, the revelation of confidential cables had seriously violated the right to privacy of state officials. Notwithstanding the blatant violation of a fundamental right, Murray observes that, as a matter of fact, the law could not be enforced and Wikileaks could not be brought to justice.

Indeed, a bank had brought a lawsuit against Wikileaks for revealing confidential information about it. Lodged in the United States, the lawsuit sought to obtain an order of injunction against Wikileaks' domain name registrar 'Dynadot' to halt access to the web address.[47]

The questions arose as of whom to sue. Indeed, as UK newspaper *The Guardian* reported 'people behind Wikileaks include Tibetan, Chinese, and Thai political campaigners, an Australian hacking author, and (…) a mathematician living in West London.' A person representing Wikileaks never showed up in court.[48] The relevant forum and applicable law were difficult to establish. Personal data were gathered in the United States and leaked via servers in Sweden and other countries globally, including in the United States. Outraged cyber activists and free speech groups, such as American

---

45 Mattei, 'The State, the Market, and some Preliminary Questions' (n 16) 2.

46 Murray, 'Uses and Abuses of Cyberspace' (n 41) 3.

47 *Bank Julius Baer & Co. Ltd. and Julius Baer Bank and Trust Co. LTD v. Wikileaks, Wikileaks. Org and Dynadot LLC* California Northern District Court, filed in on February 6, 2008 Case Number: 3:2008cv00824.

48 David.Leigh and Jonathan. Franklin 'Whistle while you work', *The Guardian* (London, 23 February 2008) Available at: <http://www.guardian.co.uk/theguardian/2008/feb/23/internet.usa/print> accessed 30 June 2012.

Civil Liberties Union (ACLU),[49] defended Wikileaks in court as *amici curiae*, using the First Amendment and *Reno* jurisprudence.[50] The case pending, Wikileaks site had remained online through the support of web users globally, while groups of online activists carried out Distributed Denial of Service Attacks (DDOS) on a number of sites that had attempted to suffocate Wikileaks, including Amazon, PayPal and MasterCard. The injunction, initially granted, was lifted and the applicant bank, voluntarily dropped charges against Wikileaks.

For Murray, the Wikileaks case shows a specificity about legal cooperation in cyberspace that does not apply to real space. Online content cannot be stopped using principles of jurisdiction, domicile and enforcement of rights and duties bordered by one's physical location in space. The ultimate reason may be, he suggests, that cyberspace is essentially a cyberlibertarian terrain. 'Content may just be beyond the direct control of the international legal community, as predicted by the cyberlibertarians, after all', he says.[51]

6. Conclusion

In conclusion, it may not always be possible for lawyers to get their hands on the map. Legal documents do not suffice to organise global legal cooperation in cyberspace because the field is ridden with many communities who react, granting or removing legitimacy and effectiveness. One understands the frustration of the lawyer who, in the Wikileaks case for instance, has to give up because his or her toolbox operates not. One wonders, however, whether frustration is justified at all. There are other regulatory practices than the law, aren't there?

If we understand Murray correctly, responsive law encourages respect for other practices, giving a chance to their unexpected creativity, other than the law's, to come to grips with new events or new needs.[52] Responsiveness of the law is what Murray suggests for cyberspace regulation, at least.

---

[49] Application to Appear as Pros Intervenors or Amici Curiae <http://www.aclu.org/files/images/asset_upload_file63_34218.pdf> accessed 31 July 2012.

[50] *Reno v. ACLU* [1997] 521 US 844 concerning the trading of forbidden material on the Internet.

[51] Murray, 'Uses and Abuses of Cyberspace' (n 41) 3.

[52] Serge Gutwirth, Paul de Hert and Laurent de Sutter, 'The trouble with technology regulation from a legal perspective: Why Lessig's 'Optimal Mix' will not work' in Roger Brownsword and Karen Yeung (eds), *Regulating Technologies. Legal Futures, Regulatory Frames and Technological Fixes* (Hart Publishers 2008) 193.

It is probably too bold a pick to hold that the same mechanism of responsiveness will become a general characteristic of global law. We are quite optimistic, but the optimism should be backed by more research. Responsiveness can be triggered by many instruments and practices.

Patrick Goold, in a recent analysis of copyright law, notes that legal scholarship in this more classical area of law is changing.[53] Legal scholars start doing just more than providing normative advice about the law. Because judges and legislators do not listen to academic opinions, academics express themselves, not only through law reviews or similar traditional academic outlets, but through publicly oriented books and social media.

Rather than aim normative advice to lawmakers, scholars give their advice to the public generally. The public then holds the lawmakers accountable for enacting bad laws.

In this way, academics are retaining their position as normative advice givers. Again, we see a crucial role in this development for technology, but the example shows that the impact of it (and responsiveness as a possible result) goes beyond the scope of cyberspace law and touches upon other domains of law.

[53] 55 Patrick R Goold, 'The Evolution of Normative Legal Scholarship: An Example from Copyright Discourse (2012) Available at SSRN: <http://ssrn.com/abstract=2077417> or <http://dx.doi.org/10.2139/ssrn.2077417> Accessed 30 July 2012.