

Module 5

Legal Aspects of Internet Governance

- Law is about regulating rights and responsibilities among individuals and the entities they establish, from companies to national states.
- Rule of law and legal certainty are essential for the further growth of the Internet
- There are two approaches :
 - Use the current laws; i.e. laws used offline can be used for online.
 - Use specific cyber law approach that is tailored to the online world
 - because of the cross-border nature and sheer size of the Internet.
 - because some of the online crimes were not anticipated in the traditional laws.

They are classified as instruments applicable at national level and instruments applicable at international level.

- **National and Community Level Legal Instruments**
 - Legislation
 - Social Norms (Customs)
 - Self-Regulation
 - Jurisprudence
- **International Legal Instrument**
 - International Private Law vs. International Public Law
 - International Private Law
 - international Public Law
 - International Conventions
 - International Customary Law
 - Soft Law
 - Jus Cogens

- Legislation

- Consists of rules and sanctions, and is all binding
- To date, the priority areas for Internet legislation have been privacy and data protection, intellectual property, taxation, and cybercrime, but Internet cannot be regulated by legislation alone.
- Technological changes makes legislations obsolete.

- Social Norms (Customs)

- enforced by the community through peer-to-peer pressure In the early days of the Internet, its use was ruled by a set of social norms labelled ‘netiquette’.

2.1 User Guidelines

2.1.1 For mail:

- Unless you have your own Internet access through an Internet provider, be sure to check with your employer about ownership of electronic mail. Laws about the ownership of electronic mail vary from place to place.
- Unless you are using an encryption device (hardware or software), you should assume that mail on the Internet is not secure. Never put in a mail message anything you would not put on a postcard.
- Respect the copyright on material that you reproduce. Almost every country has copyright laws.
- If you are forwarding or re-posting a message you've received, do not change the wording. If the message was a personal message to you and you are re-posting to a group, you should ask permission first. You may shorten the message and quote only relevant parts, but be sure you give proper attribution.
- Never send chain letters via electronic mail. Chain letters are forbidden on the Internet. Your network privileges will be revoked. Notify your local system administrator



National legal instruments

- Self-Regulation
 - Is similar to social norms, but is based on an explicit and well-organized set of rules
 - Most legal cases concerning the Internet are solved through analogies.
 - While self-regulation can be a useful regulatory technique, some risks remain in using it for regulating areas of high public interest, such as content policy, freedom of expression, and protection of privacy
- Jurisprudence
 - Court decisions had a significant impact on legal developments related to the Internet.
 - More recently, the jurisprudence of European courts has become particularly important for online legal developments. For example, a CJEU judgement from May 2014 introduced new rules on the right to be forgotten, or more precisely, the right to be de-indexed, with implications for online content in Europe and beyond

International legal instruments

- International Private Law –
 - The cross-border nature of Internet activities implies the need to use international legal tools.
 - International law resolves legal disputes involving individuals and institutions from different national jurisdictions who has jurisdiction in potential legal cases between Internet companies (e.g. Facebook, Twitter) and their users scattered all over the world
 - rarely has international private law been used to settle Internet-based issues, possibly because its procedures are usually complex, slow, and expensive
- International Public Law:
 - regulates relations between nation states.
 - applies to many areas of the Internet including telecommunications, human rights, and cybercrime,.
 - could be used for Internet governance, including treaties and conventions, customary law, soft law, and *ius cogens* (compelling law – a peremptory norm).
 - Important for dealing with Internet issues, since most Internet court cases involve aspects such as contracts, torts, and commercial responsibilities.
- International Conventions –
 - developed by umbrella organizations such as the United Nations
 - ITU International Telecommunications Regulations
 - The only convention that deals directly with Internet-related issues is the CoE Convention on Cybercrime.
 - other international legal instruments are applicable to Internet issues, from the UN Charter to more specific instruments dealing with, for example, human rights, trade, and IPR.

- International Customary Law -Includes two elements:
 - General practice, and recognition that such practice is legally binding - It usually requires a lengthy time-span for customary law to emerge. For example, the Law of the Sea rules were crystallised over the centuries. Best example is ccTLDs and gTLDs
- Soft Law - Contain principles and norms, and are usually non-binding –
 - e.g. WSIS documents – including the Final Declaration, the Geneva Plan of Action, the Tunis Agenda for the Information Society, and Regional Declarations – have the potential to develop certain soft law norms -
 - soft law is less formal approach, flexible
 - provides greater opportunity for a multi-stakeholder approach than does an international legal approach
- Jus Cogens –
 - A norm, accepted and recognized by the international community of States as a whole, and can be modified based on their consensus.
 - Examples include racial discrimination, crimes against humanity, genocide, slaves and piracy laws... etc.

- Jurisdiction is the authority of the court and state organs to decide on legal cases.
- The relationship between jurisdiction and the Internet has been ambiguous, since jurisdiction rests predominantly on the geographical division of the globe into national territories.
- The following criteria establish jurisdiction in particular cases:
 - Territorial Principle – the right of the state to rule over people and property within its territory.
 - Personality Principle – the right of the state to rule over its citizens wherever they might be (nationality principle).
 - Effects Principle – the right of the state to rule on economic and legal effects on its territory, stemming from activities conducted abroad.

- Universal jurisdiction –
 - the power of a state to punish certain crimes, wherever and by whomsoever they have been committed, without any required connection to territory, nationality, or special state interest.’ e.g. crimes as piracy, war crimes, and genocide.
 - Internet has introduced universal jurisdiction to a much broader set of cases based on the principle of accessibility.
 - Possibility of invoking jurisdiction through a limited criterion such as Internet access could give rise to several issues, including forum-shopping. Namely, the court proceeding could be initiated from any country with access to the Internet.
- The conflict of jurisdiction arises when more than one state claims jurisdiction on a particular legal case. In this context, almost every Internet activity has an international aspect that could lead to multiple jurisdictions or a so-called spill-over effect.
- The protection of EU citizens’ personal data stored beyond Europe’s borders has contributed to some of the most disputed cases in recent years.

- Harmonisation of national laws could result in the establishment of one set of compatible rules at global level.
- With harmonised rules in place, the question of jurisdiction would become less relevant.
- Harmonisation might be achieved in areas where a high level of global consensus already exists, for example, regarding child sexual abuse content, piracy, slavery, and terrorism.
- Harmonization not possible in other cases due to cultural differences. Another potential consequence of a lack of harmonisation is the migration of content to countries with lower levels of Internet regulation. Using the analogy of the Law of the Sea, some countries could become ‘flags of convenience’ for online content.

- The alternative dispute resolution (ADR) is a mechanism available in place of traditional courts.
- Dispute resolution tools include arbitration and mediation. Online dispute resolution (ODR) uses the Internet and technology in the process of dispute resolution.
 - Decisions are made by one or more independent individuals chosen by the disputants
 - Provides a faster, simpler, and cheaper way of settling disputes
 - One good example of arbitration in the online world is the Uniform Domain Name Dispute Resolution Process (UDRP).
 - gTLDs are enforced to use this process to resolve disputes
 - Some ccTLDs use this either as is, or customize it based on national laws and regulations
- Arbitration overcomes the potential conflict of jurisdiction. It is often easier to enforce arbitration awards in foreign countries by using the New York Convention regime rather than to enforce foreign court judgement.

- Since arbitration is usually established by prior agreement, it does not cover a wide area of issues when no agreement between parties has been set in advance (libel, various types of responsibilities, cybercrime).
- Many view the current practice of attaching an arbitration clause to regular contracts as disadvantageous for the weaker side in the contract (usually an Internet user or an e-commerce customer).
- Some are concerned that arbitration extends precedent-based law (US/UK legal system) globally and gradually suppresses other national legal systems
- Arbitration has been used extensively in commercial disputes.
 - . The main international instrument is the United Nations Commission on International Trade Law (UNCITRAL) 1985 Model Law on International Commercial Arbitration.
 - The leading international arbitrations are usually attached to chambers of commerce.

- IPR issues cover:
 - Copyrights
 - Trademarks
 - Patents
 - Designs
 - Utility Models
 - Trade Secrets
 - Geographical Indications
 - Plant Varieties

- Copyright is a legal term which describes the rights that creators have over their original works.
- The expressions of an idea is copyrighted, but not the idea itself...
- The Internet provides powerful tools for protecting and monitoring the use of copyrighted material .
- Such a protection creates an issue between an authors' rights vs. the public interest of using such ideas
- So far copy right represented by major record and multimedia companies, have been very active in protecting their IPR. The public interest is often seen as having been vaguely perceived and not sufficiently protected. This, however, has gradually been changing, mainly through numerous global initiatives focusing on the open access to knowledge and information (e.g. Creative Commons).

- Two main international regimes exist for IPR.
 - WIPO manages the IPR regime based on the Berne and the Paris conventions.
 - WTO regime is based on TRIPS. The shift of international IPR coordination from WIPO to the WTO was carried out to strengthen rights protection, especially in the field of enforcement.
- Some developing countries have been concerned by this development. Their concern is that the WTO's strict enforcement mechanisms could reduce the maneuvering room of developing countries and the possibility of balancing development needs with the protection of international IPR.

- Stricter copy right regimes are available through WIPO Copyright Treaty (1996).
- In the USA, stricter protection of copyright was introduced through the US DMCA³¹ of 1998.
- In 2011, in the USA, two bills were promoted – SOPA and the PROTECT IP Act (PIPA) – which provided new means to fight online piracy, including blocking access to infringing websites and banning search engines from linking to such sites. Both bills were postponed, following protests.
- At international level, the Anti-Counterfeiting Trade Agreement (ACTA) tried to address IPR infringements in a way that may have opened the possibility for private (companies) enforcement and policing actions. After strong protests in Europe, the European Parliament voted against ACTA.
- At a regional level, the IPR provisions in the Trans-Pacific Partnership Agreement, a trade agreement among 12 Pacific Rim countries, signed in February 2016, carry tough enforcement rules in addition to increasing the copyright term.

- Copyright offenders use software tools, for example, to distribute music and videos illegally online. Copyright defenders can use software, too.
 - A Trojan redirects users to websites where they can legitimately buy the copyright-protected work (e.g. a song) they tried to download.
 - Freeze software blocks computers for a period of time and displays a warning about downloading pirated content
 - Hard drive scans find and attempt to delete any pirated files found.
 - Interdiction prevents access to the Internet for those who try to download or share pirated content.
- Microsoft introduced digital rights management software to manage the downloading of sound files, movies, and other copyrighted materials. Similar systems were developed by Xerox (ContentGuard), Philips, and Sony (InterTrust).

- A trademark is a symbol or a word(s) legally registered or established by use that represents a company or product.
- Trademarks are relevant to the Internet because of the registration of domain names
- Cybersquatting is the practice of registering names of companies and selling them later at a higher price
- When ICANN was formed in 1998, one of the first tasks it was asked to undertake was to develop and implement a mechanism for the protection of trademarks in the field of domain names.
- The UDRP was developed by WIPO and was introduced by ICANN as an answer to this request

- A patent confers the patent owner the exclusive right to exclude others from making, using, or selling an invention.
- Traditionally, a patent protects a new process or product of a mainly technical or production nature. Only recently have patents been granted for software.
- With the continuous evolution of Internet technologies, more and more companies are applying for patents (covering technologies in the field of VoIP, IoT, etc.).
- European patent guide –
 - Granting patents to software is a rather complex issue in Europe and other regions.
 - As the European Patent Office explains, ‘under the European Patent Convention, a computer program claimed “as such” is not a patentable invention [...]. For a patent to be granted for a computer-implemented invention, a technical problem has to be solved in a novel and non-obvious manner’.

- The 8+8+8 law of 8 hours for work, 8 hours for sleep, and 8 hours for free time has to be defined; mainly for those whose work is online..
- New labour models, such as on-demand labour and independent worker models, are a more recent development to business.
- The new labor models shaped by Uber, Amazon, and other Internet companies.
- In the process, the new models have raised several questions. For example, are Uber drivers independent contractors or Uber employees?

- The other aspects of governance of the labor law is in the context of monitoring email of employees.
- Is an employer allowed to monitor employees' use of the Internet?
 - A 2007 decision of the European Court of Human Rights (ECHR) declared that the monitoring of an employee's use of e-mail or Internet at the place of work breached the employee's human right
 - A 2016 decision by the same court ruled that employers may read private communications of employees made during office hours.
- Differentiation between private life and working life when posting information online is another issues of governance.
 - Since some post information about their working environment in a personal context, it is difficult to draw a line between personal and work life.

- Intermediaries play a vital role in ensuring Internet functionality. They include ISPs (which ensure the connection between end-users), as well as providers of services such as online hosting, search engines, and social media platforms.
- Given their role in facilitating the transmission and availability of online content, intermediaries are increasingly called on to assist in the enforcement of legal rules in areas such as copyright infringement, spam, and the right to be forgotten.
- This has given rise to extensive discussions as to whether intermediaries are or should be held liable for the online content to which they facilitate access.
- At national level, ISPs are often the most direct way for governments and law enforcement agencies to enforce legal rules online
- UNESCO has explored the mediating role Internet intermediaries play between authors of content and Internet users, as well as its impact on freedom of expression and associated fundamental rights such as privacy

Types of Intermediaries

- A. Hosts of virtual worlds (e.g. Second Life)
- B. Online Market Places & Auction Houses (e.g. eBay)
- C. Search Engines (e.g. Google)
- D. Social Media Sites (e.g. Facebook)
- E. Coffee Shops (acting as ISPs)
- F. Online Game Platforms (e.g. World of Warcraft)
- G. Internet Service Providers (e.g. Swisscom)
- H. User-Generated Sites
- I. Domain Name Registries/Registrars

- In general, legal frameworks dealing with intermediary responsibility include the principle that an Internet intermediary cannot be held responsible for hosting materials that breach copyrights if it is not aware of the violation. This is, for example, the approach taken by the DMCA and the EU directives, which exempts the service provider from liability for the information transmitted or stored at the direction of the users.
- US and EU law demand that the service providers act on a ‘notice and take down’ procedure.
- Japanese law takes a more balanced approach, through the Notice-Notice-Take-Down procedure, which provides the user of the material with the right to complain about the request for removal.
- Nevertheless, recent years have witnessed an increased pressure on intermediaries to handle copyright matters, since their position of gatekeepers between end-users and Internet content places them in the best position to control access.

- Under growing official pressure, ISPs, hosting services providers, and operators of search engines and social network, becoming involved with content policy (e.g. defamatory or fraudulent content).
 - The first is to enforce government regulation
 - based on self-regulation, is for intermediaries to decide on what is appropriate content themselves.
- This runs the risk of privatising content control, with intermediaries taking over governments' responsibilities, but carries the advantage of adopting flexible approaches to keep up with the fast pace of technology. This is especially relevant in the field of child online protection.

- ISPs are commonly seen as the primary institutions involved with anti-spam initiatives. Usually, ISPs have their own initiatives for reducing spam, either through technical filtering or the introduction of anti-spam policy. An ITU report from 2006 suggested that ISPs should be liable for spam and proposed an anti-spam code of conduct, with two main provisions:
- An ISP must prohibit its users from spamming.
- An ISP must not peer with ISPs that do not accept a similar code of conduct.

Thank you