

Investigating Cyber Law and Cyber Ethics: Issues, Impacts, and Practices

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Chapter 12

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

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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 quiet 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 authority 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-

Figure 1. John Perry Barlow (from <http://wikipedia.org>, Creative Commons Attribution Share-Alike license)



ered a constitution for the Internet as it was at one point cross-posted by 40,000 websites who accepted the ethos of an ungoverned community called Cyberspace driven by a distinct order of statelessness. However, a constitution is not only a repository of values; it also has considerable legal and political consequences (Weiler, 2002). From this it can be seen that the United Kingdom's constitution, while not written, has a structure of institutions governed by a set of shared economic and legal frameworks subscribed to by all those subjects who are deemed British citizens. This suggests that while Barlow's document serves as a symbol of Internet users' wish to be untouched by State-like institutions and legal rules, the unwritten British constitution has shown there is more meaning to the term than a document that prescribes a set of common values and beliefs. Indeed, it has been argued that the British constitution is at a critical historical, political and institutional juncture in which a number of inter-linked emerging agendas are altering the relationship between parliament and the executive (Flinders, 2002). A constitution could perhaps therefore be defined as "*a common agreement between a network of actors as to how they agree to co-exist as a society*".

COMPARING THE CONSTITUTIONAL AND ADMINISTRATIVE FRAMEWORKS OF THE UNITED KINGDOM WITH CYBERSPACE

Using this definition it could perhaps be possible to consider that Cyberspace has a constitution. Actors have agreed to use common means of communicating and sharing knowledge. They have agreed that contracts govern how they interact with each site. And they have agreed that traditional financial institution can be the bridge between the vendor and the customer.

Also, there appears to be clearly commonalities between the independent websites that exist within Cyberspace and the United Kingdom and its various constitution entities and administrative procedures. These include with regard to functional issues, civil rights, and civil remedies and law enforcement.

Functional Issues

Barlow in his declaration said, "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". While it still appears to be true that there is no authority directly elected by the citizens of the world who use the Internet, referred to as 'Netizens', there are still comparisons that can be drawn between the UK's elected government and Cyberspace. The United Kingdom constitution consists of the Monarch, the Executive, Parliament, the Judiciary, and other instruments of the state such as the Civil Service, devolved bodies and tribunals. The Monarch is responsible for various tasks including settling such issues as the selection of a prime minister, the dismissal of a parliament and the operation of the judicial system (Hames & Leonard, 1998). The main difference between a monarchy and a republic is that with the former sovereignty lies with the monarch and with the latter it is shared among citizens (Bentele & Nothhaft, 2010). The

main difference between a monarchy and despotism is that in the former sovereignty is conferred above and below the monarch and in the latter it is exercised by one individual in a tyrannical manner (Long, 2010). In all cases the sovereignty lies within a particular nation state or in the case of a monarchy or republic it can be conferred to wider polity, as the UK does with the European Union for example. Based on this, 'Cyberspace' can be seen to be a web of independent communities all connected by 'the Information Superhighway'. Online communities like Wikipedia perhaps resemble a monarchy, in that its founder Jimmy Wales has conferred power to 'Administrators' and 'Editors' yet supreme authority lies with his organisation. Most independent bulletin boards can be seen to more so resemble despotism in that they are usually controlled by one man who enforces his will on the other members who wishing to use the forum, in that he can remove anyone he wishes from the forum. This supports Barlow's assertion to world governments that 'Governments derive their just powers from the consent of the governed. You have neither solicited nor received ours. We did not invite you. You do not know us, nor do you know our world.' It can therefore be seen that in terms of the 'Cyberspace' metaphor as nearly all websites have terms and conditions they are self-governing units, but of course in reality are subject to the laws of the nation state in which they are established.

The Executive in the UK is responsible for the day-to-day operation of the state, which must be achieved within the accepted laws and constitutional principles (Johnston, 1983). *Burmah Oil v Lord Advocate* [1965] A.C. 75 established that the Executive has a 'royal prerogative' over any competency which Parliament has not exercised authority over unless the Courts decide otherwise. After the judgement Parliament did exercise authority over the specifics of the case by passing the War Damage Act 1965, but other judgements on royal prerogative mean that where the state (i.e.

the Crown) has obligations by statute it cannot use royal prerogative to exercise them such as in *Attorney-General v de Keyser's Royal Hotel Ltd* [1920] A.C. 508. In Cyberspace an equivalent of 'sysop prerogative' appears to exist where the Sysop (systems operator), who is the owner of a website, has the right to decide whether a particular policy is adopted or the outcome of a particular conflict (Bishop, 2011). In the case of the WELL, its Sysop, Cliff Figallo, resisted the temptation to control (Rheingold, 2000) and instead delegated his prerogative to the members in a way resembling that of a republic. Jimmy Wales (see Figure 2), Sysop of Wikipedia, on the other hand delegated his sysop prerogative to a series of 'Administrators' who without reference to standards of consistency and precedent seen in the British constitution make decisions on an ad-hoc basis based on their individual whims.

Civil Rights

Jenny Preece, in her influential book, 'Online Communities: Designing for Usability and Supporting Sociability', sets out what users should expect online communities to provide in terms of policies and practices that should mean that users are both able to use the online community and be sociable within it (Preece, 2001). These 'Netizen rights' to a supportive environment of freedom of expression, were also advocated by Barlow in his declaration, which stated:

"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. Your legal concepts of property, expression, identity, movement, and context do not apply to us. They are all based on matter, and there is no matter here" (Preece, 2001).

Figure 2. Jimmy Wales (from <http://wikipedia.org>, Creative Commons Attribution Share-Alike license)



This concept of Netizen rights resembles the civil rights that exist in democratic societies, where they may only be partially codified, as in the case of the British constitution. One recent attempt to codify and enforce civil rights was the Human Rights Act 1998 introduced by the New Labour Government that came to power in 1997. Since 1998, the impact of the Human Rights Act has reached far beyond constitutional matters, into statutory interpretation, counter-terrorism legislation, general criminal law and the horizontal effect of rights in private law disputes (Townsend, 2009). The Act also opened up a number of potential points of conflict with regards to the rights of people to use the Internet and online communities that are part of it. For instance it gives effect to Article 11 of the convention, which while not being interpreted as imposing an obligation on associations or organisations to admit everyone wishing to join, says people do have a right to apply to join them in order to further the expression of their views and practices as set out in *Associated Society of Locomotive Engineers & Firemen v United Kingdom* (ECHR, App no 11002/05). An organization is an undertaking within the meaning of the EU Treaty, and the term undertaking has

a broad meaning in EU Law, which can include someone who hosts a bulletin board. This means that someone should have a human right to be able to apply to join an online community, but they have no right to be a member if the administrators choose not to accept them. This case suggests that Barlow's suggestion that the government should have no say in the make-up of Cyberspace may be partly implemented, as the Human Rights Act means that the government has no right to impede 'sysop prerogative' in relation to whether or not someone is allowed to be a member of their website. Sysop prerogative does appear to be limited with regards to snooping on their member's emails on the grounds of privacy. However this can be restored through contract law, where for instance employers can assume the consent of employees for the reading of their e-mails (Taylor, Haggerty & Gresty, 2009).

All this suggests that there is a distance between what the users of an online community expect the sysop to allow and what is actually enforceable through properly developed policy systems. This could perhaps be called the 'Preece Gap' after Jenny Preece who in Preece (2001) advocated online communities with policies that promoted good usability and sociability. An example where the Preece Gap may be wider exists in the case of the Café Moms website. A mother dedicated to raising her children may join the website and later be dismayed to find her membership suspended and accounted deleted after failing to log-in for a specific amount of time. The mother may naturally feel betrayed by a site designed to support her is using their sysop prerogative to decide who can and can't be a member and the terms on which that membership is governed. Facebook may be an example of a low Preece Gap, as its ease of use enables people to easily connect with each other, and most of the sysop prerogative over which content stays and goes has been delegated to those affected by it.

Civil Remedies and Law Enforcement

It has been backed up through case law that the UK Parliament has complete authority over its own affairs and the Courts cannot rule over whether it has followed its own procedures, as shown in *R. v Graham-Campbell, Ex p. Herbert* (HC, 1935). It has also been shown that the UK Parliament has the right to legislate in any area, even where it has little or no power to enforce it beyond its own Courts, as demonstrated by the passing of the Hijacking Act 1967, which applied to non-UK Nationals in non-UK territories. Barlow (1996) declared to world governments that he wanted the same authority for Cyberspace;

“You claim there are problems among us that you need to solve. You use this claim as an excuse to invade our precincts. Many of these problems don’t exist. Where there are real conflicts, where there are wrongs, we will identify them and address them by our means. We are forming our own Social Contract. This governance will arise according to the conditions of our world, not yours. Our world is different”.

This is almost essentially what has happened in cyberspace with its network of self-governing websites. In most cases in the UK the right of the state to investigate a misdemeanours is exercised by the police, where there is ‘reasonable suspicion’ a crime has been committed *Hough v Chief Constable of Staffordshire* as found in [2001] EWCA Civ 39. Individual website’s policies differ on investigatory powers. For instance eBay’s says:

“The eBay Investigations team tries to resolve reported cases of inappropriate trading behaviour. We will consider the circumstances of an alleged offence and the user’s trading record before taking action. Disciplinary action may range from a formal warning up to indefinite suspension of a user’s account. However, to be fair to all members, if a complaint cannot be proven with certainty, eBay will not take action” (eBay, 2010).

The British constitution gives UK subjects the right to challenge the powers exercised by the state through judicial review, where after an application for permission they may be entitled to a hearing. This has been reflected in similar ways in some online communities in Cyberspace. Wikipedia for instance allows for a referendum on removing articles from the site called AfD (Articles for Deletion), which calls on someone exercising sysop prerogative to make a decision on whether to keep the article or remove them. Sysop prerogative in this context appears to resemble judicial procedures where it has to be decided whether the claims are ‘held’ to be true or ‘dismissed’ as false so that the status quo is maintained. The remedies of judicial review in UK law are more complex and include prerogative orders, which are ‘quashing’, ‘prohibiting’ and ‘mandatory orders’ as well as declarations and injunctions, the latter two not being based on prerogative. Social networking site Facebook has come under a barrage of attacks for changing its terms and conditions and members have sought to regain the initiative by challenging them through the media and threatening to get state authorities to enforce human rights laws against them (Mesure & Griggs, 2007). This suggests that despite the self-governing nature of websites in Cyberspace there will always be recourse to state institutions.

The prerogative orders available under judicial review resemble the exercise of sysop prerogative by some websites in Cyberspace. A quashing order is used to quash the decisions of emanations of the state at an inferior level of authority where they act illegally, irrationally, or procedurally improperly, or where they interpret the law incorrectly. This happens regularly in Cyberspace, where the sysop of a website will overrule their moderators on a contentious issue by exercising their sysop prerogative. A prohibiting order is used by a superior court to restrain an inferior authority, such as a government minister, from acting outside their authority. Such actions are seen on websites like

Wikipedia, where those persons who are exercising sysop prerogative will instruct editors not to edit an article where there is a dispute, such as by trying to enforce the 'three-revert-rule'. In a mandatory order the court instructs an inferior authority to perform a particular duty ascribed to them. It is not possible as a result to instruct the Crown, as the Crown is not commandable, but it is possible to instruct it against a servant of the Crown who has an independent public duty to perform a specific action, such as a local authority being required to fulfil its obligations to people with special educational needs who need access to specialist equipment and services.

Most online communities have only themselves to blame for the need for recourse to the state due poor behaviour management and lack internal complaints and dispute resolution procedures. Many have enshrined in their set-up the opportunity for its users to be anonymous and therefore unaccountable for their actions, in keeping with the claim of Barlow (1996) that identity is not an issue in Cyberspace. This has not always been the case, as Rheingold (2000) points out that the WELL had a requirement that users identify themselves by their real names, making it one of the most civil online communities in Cyberspace. In online communities where anonymity has been used the uncontrolled abuse typical of Cyberspace's pariahs, the Snerts (Bishop, 2009), goes on without limits. (Carr-Gregg, 2006) reported on the case of Robert, 17, who using World of Warcraft, a virtual world that was based on anonymity, developed psychiatric problems including suicidal ideation. Since then the makers of World of Warcraft announced that they would "remove the veil of anonymity typical to online dialogue" with a view to creating "a more positive environment that promotes constructive criticism", as well as giving gamers the chance to get to know who their virtual opponents are in real life (Armstrong, 2010).

TOWARDS A PROFESSIONALISED SOCIETY AND INTERNET OMBUDSMAN

It is not entirely necessary to remove anonymity from Cyberspace in order to reduce rogue behaviour, as with the correct disciplinary procedures users may be less willing to act inappropriately. However, it may be no error that World of Warcraft should seek to aspire to the civil nature of the WELL by removing the ability of users to hide their true identities. However, there is still no guarantee that 'flames' such as aggressive and threatening comments posted by Snerts and E-Vengers can be avoided (Bishop, 2009).

Indeed, at the dawn of the Worldwide Web and realisation of Cyberspace, Johnson (1994) spoke out the conflicts in Cyberspace, which while not 'fist-fights', would need to be resolved. Two years before Barlow's constitution-like declaration he said:

"Suppose we created a new portion of the "law of cyberspace" to deal with the means by which disputes arising in this new domain could be authoritatively settled. Such a doctrine would map nicely against the topics covered by our existing jurisprudence -- but might incorporate novel rules. It would govern such matters as (1) when a formal dispute is to be viewed as having been initiated; (2) what "jurisdiction" (e.g., local sysop or international arbitration panel), is entitled to resolve particular types of disputes; (3) who may argue a case; (4) what kinds of evidence will be accepted; (5) what sources of law will be consulted; (6) what procedures provide the equivalent of due process; (7) what appeals are available; (8) what types of "persons" will be permitted to appear and seek rights in their own name; (9) what time limits will bar actions; and (10) what means are available to enforce final decisions" Johnson (1994).

Many of these questions have now been answered as (Manjikian, 2010) points out. In the British Constitution it has been established since the Middle Ages that keeping the peace is reserved by royal prerogative, as was made clear by the judiciary in *R. v Secretary of State for the Home Department Ex P. Northumbria Police Authority* [1989] 1 Q.B. 26. At present 'sysop prerogative' gives online community managers the right to decide whether or not they involve themselves with or seek to resolve a dispute between its users. Bishop (2009) draws attention to the practice of some systems operators cancelling the accounts of those in a dispute, in a similar way to other practices in the Middle Ages where those involved in a dispute could be sentenced without trial. Where a public authority in the UK is involved things are slightly different, however. Shipton (2010) reported on a case involving a Welsh councillor who posted such flames in e-mails to one of his constituents. The key difference between Cllr Paul Baccara and the many anonymous rogues that plague Cyberspace is that he was held accountable for his actions. The model used in Wales of a complainant being able to bring a complaint to the organisation that represents the accused, with the option of going to an Ombudsman is one that should be seen as best practice for disputes involving Cyberspace. If everyone in the UK had to be member of a professional body and sign-up to a code of conduct and practice it would be possible for them to be the second point if one of their members acts inappropriately online, because the complaint is not handled properly by the website the questionable action occurred on. The next point of call could be an Ombudsman. In the case of actions involving councillors, as was highlighted in Shipton (2010), is handled by the Public Services Ombudsman, though online disputes could also be handled by the Office of Communications Ombudsman if the complaint is against the website, something which may become more common if the practices set out in the *Digital Economy Act 2010* are to be built on by successive governments (Bishop, 2010b).

CONCLUSION

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. 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 a virtual space that crossed frontiers. While 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, there are still questions on the authority of the state in regulating behaviour in online communities.

This paper has discussed the constitutional and administrative arrangements of the United Kingdom and how these contrast with 'Cyberspace', as portrayed by Barlow (1996). From this a number of similarities and differences have been drawn. It is apparent that like in the British constitution there is royal prerogative, in online communities there is 'sysop prerogative'. The former governs powers held by the UK Monarch which have been delegated to ministers for which not Act of Parliament has taken the powers away from the monarch. In the case of the latter it is all the powers which an online community systems operator (i.e. 'sysop') has as a result of not having them taken away by statute or given away by contract.

It can be seen that in online communities such as Wikipedia where sysop prerogative is assigned to faceless enforcers who impose their will on a anonymous group of posters then there will be an eventual downturn in the number of members of the community, as those driven by recognition and community become marginalised by those who cloak their self-interest in a pseudonymous deceptive identities. This could perhaps be called the 'Jimbo effect', after Jimmy "Jimbo" Wales, and contrasted with the 'Figallo effect', named after Cliff Figallo, the sysop of the WELL. It

the WELL authority has been delegated to the members whose actual identities are used, making the community grown organically with trust and comradeship among the members. It could be argued that the sysops of World of Warcraft are trying to give their community the Figallo effect as a result of them suffering the Jimbo effect with members hiding their behind their fictitious identities.

Limitations and Directions for Future Research

This chapter has explored a range of existing principles that make up the constitutional and administrative arrangements of the United Kingdom as compared to those envisaged in Cyberspace by John Perry Barlow in 1996. There is currently a shortfall in the amount of research looking at how existing constitutional law, such as that relating to human and civil rights apply to contemporary concepts such as Network Neutrality. This chapter can go some way to understanding the constitutional arrangements that exist in the UK and the basis on which such policies can exist within the current legal framework without massive changes needed to primary legislation.

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