Conversation with Pierre Trudel

Gemma Domènech

Pierre Trudel is the author of the work *Droit du cyberespace* (1997, edicions Thémis). He is a professor at the Public Law Research Centre (CRDP) at the University of Montreal (Canada). His areas of research and teaching include legal theory, civil liberties, basic rights in the information society, intellectual property, and information and communications law. Pierre Trudel has worked with various projects in support of the development of a free press in West Africa. He has participated as a commission member of the Estates-General on Communication in Nigeria, helping draft the press and audiovisual laws for that country.

Gemma Domènech is an associate professor in the Department of Administrative Law and Procedural Law at the University of Barcelona, where she teaches the subjects Telecommunications, Audiovisual and Internet Regulation and Community Law. A specialist in comparative law in the fields of telecommunications and the audiovisual sphere, she is a member of the technical committee of the Catalonia Broadcasting Council.

Gemma Domènech (G.D.). In your book on cyberspace law you talk about the need to redefine the concept of law, i.e., a redefinition of the regulations in cyberspace that are manifested, among other things, in a displacement of the sovereignty of the State. What do you mean by that? Is it the market that is taking over the sovereignty that currently pertains to the State?

Pierre Trudel (P.T.). The market is not replacing the State anywhere. It is just that there is a certain displacement of its own sovereignty. If sovereignty implies one's power that is not subject to anybody else's, it is clear that the new environment (cyberspace) involves a displacement of the sovereignty currently defined by the State. Users and infrastructures (the technique) are taking on a particular power that the State must bear in mind when it comes to acting in cyberspace.

G.D. You say that the real question is not such much the role of the State but rather the role of law. Why?

P.T. Because in the world of Internet there is less need for the State and more need for the law. In drawing up cyberspace law we have to have the participation of the owners of the sovereignty we mentioned before, i.e., the State, but also the users and infrastructures. Regulation of the *infostructure* involves a redefinition of the terms of reference. It involves the mutation of the parameters that construct the legitimacy of the law. Digitalisation involves the existence of a virtual space, i.e., cyberspace. And this, resulting from the network environment, is not comparable to physical space: the structures involved are defined using different criteria. Reconstructing the actions of individuals according to the physical place they are located in doesn't work in electronic environments. In some cases it would be completely impossible. In fact, for some people this is one of the advantages of the Internet. This "delocation of individuals" is what the people who define and postulate the electronic environment as a geopolitical space that is different and autonomous seek. Given all that, therefore, if

we talk about cyberspace law, what we really have to look for might be not so much what the law is but rather its role. And, in any case, what the most effective law is.

G.D. What law is effective for the Internet? What is the valid form of intervention with regard to the Net?
P.T. A networked law, i.e., law created from the concept of the sphere in which it will be applied, i.e., the Internet. It can only be law that can be adapted to the characteristics of cyberspace.

Information technologies modify legal paradigms. The forms of intervention and techniques of broadcasting the law are also modified. To the States we have to add the Net (infrastructures/techniques) and the practices of the parties that helped in its development. The challenge is to take the cyberspace context into account and review what justifies the law as well as the techniques by which it is expressed.

With the Internet, the most effective law is that which provides a solution to the obstacles and difficulties users have to face. In this new environment, users have the possibility of choosing the law that will apply to them. The challenge is to propose a predictable and valid legal framework, i.e., a law negotiated with the parties involved in the development of the Net, which is transversal and which also, obviously, can be agreed upon at the international level. It is necessary to multiply the efforts to find the mechanisms to protect basic values, which technology doesn't change, but which belong to all societies independently of the technology they use in their relationships, whether physical or virtual.

In this new space, regulations and laws cannot be conceived simply as permits and prohibitions. It is important to start from a concept of law as a set of solutions to users' needs. And in this sense, promoting and favouring the development of online arbitration mechanisms and codes of conduct.

G.D. But would these arbitration mechanisms or codes of conduct be exclusively related to self-regulation of the sector? And what is the State's role in this whole new concept of law, understanding law to be the set of regulations applied to a particular relationship. Are we talking about self-regulation or co-regulation?

P.T. Many people's perception or wish is for cyberspace to be an unregulated space, i.e., for it not to have any laws or any State. What we have to do is see if this perception can be put into reality. I don't think it can. The people who defend not regulating the Internet know that all relationships require rules and standards of use. The difference is that they believe that only the parties involved or the users are the legitimate voices for approving the standards of conduct or relationship. I would like to insist again on this point: what is needed is a modification of the concepts or perceptions, in this case, of cyberspace law. To a large extent, law is constructed from the representations we make of what is social or what is reality. The virtual environment can also modify the perceptions of the risks or "dangers" involved.

The role of the State, therefore, is justified. But the State has to change its perception of the law. It is important to conceive the law as a set of regulations that have been "approved" by all the parties involved (an interrelated Net law, including the State) and not a hierarchical law, not a set of regulations that the State imposes on society. Society (i.e., the users) and the relation technique (i.e., the networks, the infrastructures) have to participate together with the State in creating this law for regulating the Internet. By this I mean self-regulation, but also co-regulation.

G.D. And how would this co-regulation work? How would the parties involved adopt the regulations? Does it involve changing the 'spaces' where the regulations are approved?
P.T. .No, not at all. What would change is the influence and scope of each of the actions in adopting the regulations. In fact, it is already happening, even if we can't see it. Let me explain. Regulations adopted by States increasingly tend to establish the results they want to get. The laws determine what has to happen and leave it up to the parties to organise, and operating regulations are eventually approved in order to reach the goal imposed by the law. The users are the ones who define what has to occur.

G.D. You talk about different centres of normativity on the Internet and their necessary interrelationship. I understand that a centre of normativity would mean 'a party with the ability to approve regulation standards for the Internet', i.e., to approve Internet law. What are they?
P.T.I think there are three centres of normativity: the State,

the users and the technique. With regard to the first, I think I have already insisted too much on its role. With regard to the second, users are the origin of what we call e-lex, i.e., law that results from contractual practices and uses of the Internet. It is a type of anational organisation that establishes the regulations Internet users should follow, independently of the laws approved by the States. With regard to the third centre of normativity, this would be the regulation that arises from the technique. The technique allows and forbids certain things. Therefore, although it is not a regulation, it has the same effect. The interrelationship between the three centres of normativity contributes to creating cyberspace law.

G.D. Is this interrelationship necessary to make cyberspace law an effective and thus legitimate law?
P.T. Yes. We have already said that the law has to be effective and therefore able to be adapted to the medium to be regulated. When I talk about this interrelation, I am referring to the fact that if the Net has links, the law to apply also has to be built up from links and interfaces. Each of the parties involved with the Internet has to manage its own responsibilities.

G.D. Let's look at the specific spheres in which this law would have to be applied and, in particular, the area of the broadcasting sector. Is the existing broadcasting law adaptable to the new broadcast environment? I am referring to regulations such as the ones relating to election polls, the screen time given to politicians, political pluralism, the establishment of scheduling times to protect minors, length limits on advertising, etc. You believe we can adapt a law that applies in an environment of public communication to an environment considered to be private communication, even though the Internet is also a public communication space. It's a complex question, isn't it?
P.T. Yes, it's a complex question. Even more so if, as we have seen during the course of our conversation, the discussions are still, despite everything, in too much of a 'philosophical' stage, i.e., about the very concept of law.
It would be hard to answer your question until we've resolved the question about what Internet law is, independently of the particular sphere to be regulated. To give you an example, where I come from, Canada, the broadcasting regulatory authority, the CRTC (Canadian Radio-television and Telecommunications Commission), decided to promote the development of the Internet and exempt television and radio services broadcast online from the application of the regulations applicable to these same services provided offline (the conventional media or services). The question therefore was not whether the current broadcasting law was applicable, but rather whether it was the priority.

G.D. And what was the legitimacy in that case?
P.T. The effectiveness of the regulation. The need to develop the Net and the information society prevailed. Furthermore, the exempt activities were marginal and it was important to promote experimentation. The argument was that if we want Canadian content on the Internet we can't regulate at the beginning, we have to see how these services would be produced, what they would be like. We could then see how to adopt the regulations to apply. In any case, criminal law is also applicable. Offenders would be pursued under the law. It is important to also bear in mind that it is not a conventional broadcaster. Can it be easily identified? What is the place of establishment? What is the applicable regulation? These were the questions raised. There is still another factor to take into account: the phenomenon of the personalisation of users, who become both player and consumer, and of the services, wouldn't that be private communication? To be honest, in the current stage of the development of the Internet, and of the considerations about it, the debate is still open. We will have to see how Internet usage develops.

G.D. So in other words, the important thing is to promote the development of the Internet and then you can look at the law to apply?
P.T. Exactly. If there is no use, there is no social reality to regulate and so it would be better not to have a new law to apply. We have to anticipate other types of measures. We need to opt for other concepts and perceptions of society and law to be able to begin to create one from scratch.

G.D. The Catalonia Broadcasting Council, together with other broadcasting authorities and the Telecommunications Market Commission (the telecommunications regulatory

authority in Spain) have created an Internet Quality Agency (IQUA) with the purpose of promoting the development of the Internet, based on guaranting its quality and acting as a platform of expression and collaboration among the different parties that operate online. Do you think we can talk about Internet quality? Can it be defined? And, in any case, who has the authority/legitimacy for guaranteeing it?

P.T. Obviously, I think this is a very good initiative. I have always maintained that it is better to improve content than suppress it.

Defining quality: I think that's the wrong question. It leads us into a field of eternal discussion, which is a trap. Guaranteeing quality involves promoting the improvement of things, and that is good. More dialogue: it's not about quantity, it's about quality.

Promoting dialogue is the way of guaranteeing a horziontal, negotiated regulation compatible with the new legal concept we are defending. Finding the law that can organise this dialogue has to begin from the need to conciliate apparently divergent ideas and perceptions, i.e., conciliating a non-hierarchical concept and freedom of expression. We are talking about a difficult type of regulation, because it can't be absolutist. But it can be realistic.