The holy trinity of legal fictions undermining the application of law to the global internet

Dan J B Svantesson
Bond University, dan_svantesson@bond.edu.au

Follow this and additional works at: http://epublications.bond.edu.au/law_pubs

Part of the International Law Commons, Internet Law Commons, and the Jurisprudence Commons

Recommended Citation


This Journal Article is brought to you by the Faculty of Law at ePublications@bond. It has been accepted for inclusion in Law Faculty Publications by an authorized administrator of ePublications@bond. For more information, please contact Bond University's Repository Coordinator.
The holy trinity of legal fictions undermining the application of law to the global Internet

Dan Svantesson*

ABSTRACT

The clash between the borderless Internet and the geographically structured legal landscape is almost universally adopted as the starting point for discussions of Internet jurisdiction issues. This clash is important, but to fully appreciate its implications we need to proceed far into the territory of jurisprudence. Here, I draw attention to how three presumptions that underpin all legal systems are stretched beyond their legitimate boundaries where domestic law is applied to the Internet in an extraterritorial manner. The consequences of this are severe and must influence such application of the law. I propose that the goal we should aim at is what can be described as jurisdictional interoperability between the various domestic legal systems that regulate our conduct online. I also show that, in its reliance on ‘morality’, natural law theory provides Internet users guidance as to which legal rules, within their respective contextual legal systems, they need to abide by.

KEYWORDS: Internet law, morality, jurisprudence, extraterritoriality, natural law theory, legal philosophy, legal theory, international law, IT law, private international law

Coercive government . . . has a standing duty to improve its own legitimacy.1

1. INTRODUCTORY REMARKS

I am afraid that most, if not all, commentators dealing with Internet jurisdiction issues (myself included) may be accused of having oversimplified the problem at hand. This is so as the starting point adopted virtually universally is that there is a clash between the borderless nature of Internet communications on the one hand, and the geographically structured legal landscape on the other hand. This clash is important, but to fully appreciate its implications we need to proceed far into the

* Department of Law, Bond University, Gold Coast, Queensland, Australia. E-mail: dasvante@bond.edu.au.

The article was completed during the author’s time as a Visiting Scholar at the Centre for Commercial Law Studies at the School of Law, Queen Mary University of London. I want to thank the colleagues there for many interesting discussions. As far as the topic of this article goes, a particular mention must be made of the fruitful discussions I had the pleasure of having with Professor Chris Reed.

territory of jurisprudence. Indeed, even leaving aside the Internet’s diminishing ‘borderlessness’, the overly simplistic nature of the universally adopted starting point is easy to demonstrate. If all legal systems were identical, it would not matter that they are geographically structured—complying with local law would mean also complying with the law in all other jurisdictions. This is clearly not so. Thus, to give at least some degree of validity to the mentioned starting point, it needs, at a minimum, to include reference also to the fact that laws vary between different legal systems; those variations are obviously a crucial component in the cause of the problems we face.

In this article, I seek to draw attention to a deeper concern that underlies the difficulties we are experiencing in trying to apply national laws to the international—indeed (virtually) global—Internet. My claim is that three presumptions—three legal fictions, adopted out of necessity, yet lacking connection to reality—that underpin all legal systems are stretched beyond their legitimate boundaries where domestic law is applied to the Internet in an extraterritorial manner. The consequences of this are severe indeed and must always be borne in mind in such application of the law.

In light of this, I propose that the goal we should aim at is what can be described as jurisdictional interoperability between the various domestic legal systems that regulate our conduct online.

I also argue that, to properly understand the nature of this challenge, we must first recognize that the law’s predominant role is to provide guiding principles allowing people to plan their lives out of court. We must also realize that Internet users are typically exposed to a great number of different legal rules from a great number of different legal systems. I suggest that together all those legal rules create what we can call a ‘contextual legal system’ for each activity of each Internet user.

Within that contextual legal system there will frequently be contradictory rules forcing the Internet user to choose which country’s laws to abide by and which country’s laws to ignore. I then show that, in its reliance on ‘morality’, natural law theory, unlike for example legal positivism, may provide Internet users guidance as to which legal rules, within their respective contextual legal systems, they need to abide by.

2. ONCE UPON A TIME . . .

Imagine the following scenario: once upon a time there was a blogger who lived in country A. He had limited interest in legal matters, and he wrote mainly about the typically mundane daily events that occurred in his life. One day, he posted a recipe for a lamb stew he had cooked that day. On the next day, despite a general awareness of the defamation laws of his own country, he made a posting falsely describing a former girlfriend living in country C as immoral, providing fabricated details about financial misdealing he alleged she had committed as well as fabricated acts of promiscuity he knew to be illegal in country C. The following day, he wrote a statement endorsing a particular hotel in country D. Pleased with the unsolicited glowing review, the hotel sent him a voucher entitling him to a free night next time he would visit the hotel. On his last day of blogging, when the company he worked for in country A failed to pay out his salary, he vented his frustration by writing an angry
blog post in which he described how he planned to blow up the company’s headquarters hoping to kill everyone working there.

Now imagine that, in a small distant country B, it is an offence to promote the consumption of lamb. This law is published only in the language spoken in country B and available only in hard copies that can be viewed at particular governmental ‘law viewing stations’ distributed throughout country B. Based on the prohibition against promoting the consumption of lamb, the prosecutor in country B takes action against our blogger in the courts of country B as his blog post had been accessed by people in country B.

Adding to the blogger’s problems, the former girlfriend he defamed sues him for defamation in country C, and the prosecutor in country A brings him to court for the threats he made against his employer. Finally, to his great confusion, our blogger is called to appear before the courts in country D based on allegations of tax evasion as under the laws of country D; the voucher he received from the hotel counts as a special form of income on which he was required to pay 70 per cent of the value in tax. Links to multi-language versions of this law were provided on every website from country D. In fact, the blogger had looked at the law out of curiosity but, like most people, he failed to make sense of the convoluted and complex text full of legal jargon.

One could of course add sophistication to this scenario by introducing further nuances, but these four situations will suffice to illustrate the points I am trying to make here.

3. THE FAIRYTALE OF THE LEGALLY AWARE CITIZEN

Ignorance of the law is not a defence. Ignorantia juris non excusat, ignorantia legis neminem excusat or nemo censetur ignorare legem.

In light of the above, while some exceptions to a strict application of this principle can be found, I suspect it would be futile to argue against this principle in the context of domestic legal systems. In fact, a removal of this principle may arguably be seen to herald the collapse of the legal system.

However, regardless of the acceptance of this principle in domestic law, we must question its legitimacy where domestic law spills over into other countries: where one country gives its laws wide extraterritorial effect.

We can here return to our blogger being prosecuted in country B. Cannot his lacking awareness of a totally alien law available only in viewable hard copies in a foreign country in a foreign language amount to a legitimate defence of ignorance? If not, we are certainly setting the bar rather high in what we are requiring of people. In contrast, the other three scenarios do not arguably give rise to any complications in relation to the awareness of the existence of the law in question. Our blogger may not have been aware of the details of the laws of any country, but on balance I would argue that this legal fiction survives in any event in the three other examples.
Here it is appropriate to pause to recall the second of Harvard professor Lon Fuller’s famous eight ‘distinct routes to disaster’ in law making—the ‘failure to publicize, or at least to make available to the affected party, the rules he is expected to observe’. Many of Fuller’s claim have been criticized, but one does not need to accept everything he had to say to recognize the validity of his claims as to the importance of laws being publicized, or at least available to the affected party.

Of course Fuller’s focus here was on a domestic context. However, in our increasingly globalized world such a focus may no longer suffice. Thus, which rules are we dealing with here? Which rules is it that, under Fuller, must be made available to us? For the average Internet user posting content online, the relevant rules are all those rules that make a claim of being applicable to the Internet user’s conduct. In my experience, the rules of most legal systems contain at least some provisions with extraterritorial effect. Thus, to avoid Fuller’s second route to disaster, all such domestic legal systems would need to publicize, or at least to make available to the affected party, the rules he is expected to observe.

Some countries, like Australia, provide comprehensive free of charge legal databases such as that of the Australasian Legal Information Institute. However, first of all, not all countries do so, and secondly, for many domestic legal systems there are language barriers that to-date render legal databases inaccessible to foreigners. Perhaps it may be said that we have made remarkably little progress on the important topic of authorized translations of laws. After all, as far back as the 19th century, Jeremy Bentham called for such translations observing that they:

would prevent a stranger from falling into those faults which he might otherwise commit through ignorance of the law, and also guard him from the snares which otherwise might be laid for him by abusing his ignorance. Hence would arise security for commerce, and confidence in transactions among foreign nations. It is a proceeding called for by candour and honesty.

Finally, the costs of being globally legally aware are astronomical:

Most individuals have only a general impression of the rules of their own national law, and are likely to be completely ignorant of the multiplicity of foreign laws which claim to apply to their cyberspace activities. This is even true for online businesses with customers in multiple jurisdictions. The costs of discovering the potentially applicable laws of over 190 states, and then analysing their potential application to the business’s activities, are so great that such businesses tend only to investigate jurisdictions where they perceive themselves as potentially at risk.

6 Chris Reed, Making Laws for Cyberspace (OUP 2012) 13–14 (internal footnotes omitted).
The conclusion must be that the legal fiction of the legally aware citizen—necessary as it may be—is severely out of sync with reality, at least when it comes to the extraterritorial application of domestic laws to Internet conduct. As observed by Reed: ‘Ignorance of foreign law is not just common in cyberspace; it is inevitable.’

4. THE FAIRYTALE OF THE LEGALLY INFORMED CITIZEN

Above we approached the principle that ignorance of the law is not a defence from the perspective of the people’s awareness of the existence of laws. However, laws are often highly technical and rarely accessible to the general public—even where people are aware of a particular legal statute, for example, they may lack the ability to understand what the law actually demands of them. The blogger’s exposure to the complex tax law of country D is an example of this—here the relevant law was easily available, yet inaccessible, to our poor blogger.

We may here again connect to Fuller, and this time to the fourth of his ‘distinct routes to disaster’ in law making: ‘a failure to make rules understandable.’ Importantly, Fuller points out that: ‘[t]he need for this education [the education of citizens as to the content of the laws that apply to them] will, of course, depend upon how far the requirements of law depart from generally shared views of right and wrong.’

It is easy to agree with this, and the implications it has for the current discussion could escape no one. The laws we are exposed to when acting online are diverse and come from virtually all domestic legal systems in the world. The fact that those rules will then include concepts and principles that are different to the concepts and principles of right and wrong generally shared within our respective communities is beyond intelligent dispute. In contrast, even if our blogger could not fully understand the laws dealing with unlawful threats in country A, or defamation in country C, I see no concern with those laws being applied to his conduct, unless these laws contain principles that depart severely from generally shared views of right and wrong.

The idea that education as to the content of the laws is only needed where those laws depart from generally shared views of right and wrong has a certain first glance appeal. Thus, it may be tempting to conclude that in this we have found the real core of the issue: that, as long as laws conform to generally shared views of right and wrong, other matters like those laws being publicized and drafted in clear understandable language are of mere subordinate importance. Tempting as it may be, such a conclusion lacks merits. After all, our laws do not only regulate matters that may be referred to generally shared views of right and wrong. Whether we should pay 35 or 36 per cent tax can hardly be decided based on generally shared views of right and wrong. Similarly, such generally shared views cannot tell us whether a consumer should enjoy 14 or 15 days’ right to return products bought through a distance purchase. Neither of these decisions depends on societal norms of right and wrong—they are not norm-based lawmaking decisions. Thus, laws expressed in clear understandable language being publicized remains of fundamental importance.

7 ibid 71.
8 Fuller (n 3).
9 ibid 50.
The observation that not all lawmaking decisions are linkable to societal norms is important in the context of current discussions about how to make laws for the Internet. For example, a key argument in Reed’s interesting *Making Laws for Cyberspace* is, it seems to me, that at least those laws that are difficult to enforce must be in line with cyberspace norms to be obeyed. Perhaps it may be argued that Reed then does not give sufficient attention to the role the law plays in drawing more or less arbitrary lines in norm-neutral matters such as the question of a 35 or 36 per cent tax rate? After all, the making of laws for cyberspace also involves such line drawing in norm-neutral matters.

Returning to the matter of the importance of legally informed citizens, I hasten to acknowledge that it is utopian to call for a situation where every person is informed of every rule they are expected to follow in every legal system to which they are exposed. Indeed, Fuller goes as far as to conclude that ‘[i]t would in fact be foolish to try to educate every citizen into the full meaning of every law that might conceivably be applied to him.’ However, the fact remains that the global reach of Internet communications has placed the legal system on a route to disaster for the average Internet user. Even if it was the case, and it is not, that countries made all their laws available online, language barriers and difficulties in locating the laws (not to mention understanding them) will defeat even the Internet user keenest to abide by all applicable laws. While lacking wicked intent, the situation is somewhat akin to Caligula respecting the tradition of Roman laws being posted in a public place but ensuring that his laws ‘were in such fine print and hung so high that no one could read them.’ Unfortunately, this fact has been widely recognized yet ignored for too long.

In this discussion we may also connect to the widespread use of contracts of adhesion in e-commerce (here used in its broadest meaning). We are constantly asked to click ‘I agree’ to lengthy click-wrap agreements or are simply assumed to be bound by the terms of use through browse wrap agreements when we visit certain websites. However, the law places some restrictions on when such contracts are binding upon us. Perhaps similar restrictions should be applied in the assessment of whether we are bound by foreign extraterritorial laws seeking to control our conduct online? After all, as noted by Hart:

> The principal functions of the law as a means of social control are not to be seen in private litigation or prosecutions, which represent vital but still ancillary provisions for the failures of the system. It is to be seen in the diverse ways in which the law is used to control, to guide, and to plan life out of court.

In other words, in the normal functioning of the law, it provides us a guide by which we can plan our lives so as to avoid litigation. And for law to be able to fulfill that function, the laws must clearly be published and need to be

10 Reed (n 6).
11 See eg ibid 220.
12 Fuller (n 3), 49.
13 ibid.
understandable—this does not happen in the online scenario involving the blogger and countries B and D in our example, and it often does not happen in real online life either.

I will have reason to revisit this matter below.

5. THE FAIRYTALE OF THE CERTAINTY/PREDICTABILITY OF LAW

The third of the legal fictions takes us into disputed jurisprudential territory. Imagine a slight alteration to our example involving defamation in country C. Let us say that the law of defamation in that country was underdeveloped to the degree that it was uncertain whether there was an actionable offence of defamation. A lower court had given a judgment suggesting that there was such a cause of action, but no superior court had dealt with the question. Imagine then that the former girlfriend takes action against our blogger based on the judgment of the lower court in country C. She is successful initially, but on appeal to the superior court her action is dismissed as that court considers that there is no cause of action for defamation.

What has happened in this scenario? When the former girlfriend took action there was a cause of action established by the lower court. We can call this time-point 3 (T3). However, when the matter later on is decided by the superior court (time-point 4, or T4), that court decides that, at the time the alleged offence was committed (time-point 2, or T2), there was no actionable wrong despite the fact that the conduct was contrary to the law articulated by the lower court in the previous case (time-point 1, or T1).

This raises serious issues of fairness. How can the girlfriend be unsuccessful when she takes action based on the law as it stands at T2 based on the judgment decided at T1? And what if other cases have been decided based on the notion that there is an actionable offence of defamation sometime between T1 and T4? Should such decisions be reversed in light of the superior court’s decision?

Here we can leave these issues of fairness aside. What is interesting is that at T3 when the girlfriend took legal action she, and indeed our blogger, had no way of knowing with certainty what the superior court at T4 would say that the law was at T2. Thus, at T2, the blogger had no way of knowing the law with certainty. Indeed, what he could know of it (ie the law as outlined in the judgment of the lower court) would turn out to be overruled by the superior court.

Some will say that what we have here is an example of retroactive application of the law (by the way, another of Fuller’s ‘distinct routes to disaster’).

I argue that this—the law being underdeterminate—is a particularly serious concern in the context of laws being applied to online conduct. After all, in no other context are we typically exposed to so many different laws, and the application of law

---

15 Fuller (n 3).
to technology is riddled with examples of difficult choices having to be made by the courts when they apply the law to the novel Internet environment—I suggest that in no other area of law is it as common that the law’s operation is uncertain as in relation to technology law. This further undermines the idea that we can tailor our conduct so as to comply with applicable laws, which in turn undermines many extraterritorial claims of jurisdiction over Internet conduct.

6. A SAD, BUT INEVITABLE, CONCLUSION
The above should have illustrated that, in the context of domestic laws with an extra-territorial effect affecting online conduct, these three legal fictions—as sacred as they may be for a functioning of, and respect for, the legal system—may get stretched beyond the limits of reasonableness. The scenario involving a prohibition against the promotion of lamb consumption is an example of this. At the other end of the spectrum, in the domestic setting, as in the matter of the blogger’s threat to his employer, we can quite comfortably work with at least the two first legal fictions, and probably need to accept the third as well. From the other scenarios occupying some sort of middle ground we can learn to identify factors that may guide us when we consider whether it is reasonable to apply the law of one country to the Internet conduct of a person from another country. At a minimum, the examples should bring attention to the following considerations:

(i) To what extent was the law being applied communicated to persons like the person against whom the law is being applied?
(ii) To what extent was the law being applied understandable to persons like the person against whom the law is being applied?
(iii) To what extent is the law being applied consistent with generally shared views of right and wrong?
(iv) To what extent is the law being applied consistent with the laws of the offender’s country?
(v) To what extent was the law being applied certain and predictable?
(vi) To what extent is there a connection between the country where the action is being taken and the conduct of the offender?

It seems to me that where a scenario is scoring low on all, or some, of these parameters, we may be witnessing an illegitimate expansion of domestic laws onto Cyberspace.

In writing the above, I have not failed to recognize how it undermines the fundamentals of the legal system—a system that despite its warts and blemishes, corruption and distortions, is aimed at creating order where there otherwise may be none. Thus, despite the logical conclusion reached if we follow the reasoning above in its full course, I am not advocating that we revert to a pre-law caveman landscape. I am not seeking to create total anarchy. I am not even a worshipper at the altar of cyber libertarianism.17

17 Reed provides a neat summary of the cyber libertarian school of thoughts: (n 6) 5–8.
However, as courts and legislators increasingly make claim to regulate online conduct, they must never forget the fairytale-like fiction the legitimacy of their rules rely upon when extended too far into Cyberspace.

And here we can usefully reconnect to Hart’s statement discussed above. As was noted, Hart points to what I elsewhere have called ‘the dual role of law’; that is, the law both provides the framework for litigation and law enforcement, and gives guidance necessary for us to organize our lives out of court. The emphasis on law as a tool to ‘control, to guide, and to plan life out of court’ is of particular interest in the context of the application of law to Internet conduct. Imagine, for example, that you post a comment on your Facebook site. What guidance does the law then offer you so as to make it possible for you to plan your life out of court?

The first issue here is, of course, which law we are talking about. In most instances, it seems beyond intelligent dispute that you will have to take account of the guidance provided by the law of the country you are in at the time you make the posting. But that is, of course, not the end of the matter. You may also need to consider the guidance provided by the law of the country in which you are habitually residing and the law of your country of citizenship, in case you make the posting outside those countries. And, Facebook being based in California means you need to consider US law. We are here already talking of three, potentially very different, legal systems supplying guidance. But then, under the law of many, not to say most, countries, focus may be placed on where content is read. This means that you will also need to take account of the laws of all the countries in which your Facebook ‘friends’ are found and, less predictably, the laws of all the countries in which your Facebook friends may be located when reading your posting, as well as the laws of all the countries in which re-posted versions of your posting may be read.\(^{18}\) It goes without saying that the number of additional legal systems to be considered grows with the number, and geographical diversity, of your Facebook friends, and in light of the mobility of people, may never be fully ascertained at the time of posting. As if this was not complicated enough, we must also bear in mind that content placed on Facebook will be stored in ‘the cloud’, and while we as users may not necessarily be able to find out where our content is stored, we may be legally obligated to consider the laws of the country in which the content is stored. Finally, content posted on Facebook may, depending on both your Facebook settings and on how Facebook treats those settings, be available to third parties and you may then need to also let the laws of the locations of those third-parties guide your conduct. This legal situation, of extraordinary complexity, is what 1.32 billion\(^{19}\) Facebook users expose themselves to on a daily basis. And of course, a similar reasoning could be applied to

---

18 Through the so-called geo-location technologies, some Internet users may be able to control the geographical reach of their actions. (Dan Svantesson, ‘Geo-Location Technologies and Other Means of Placing Borders on the “Borderless” Internet’ (2004) XXIII John Marshall Law School Journal of Computer and Information Law 101–39. However, that does not work, for example, for Facebook (while Facebook utilizes geo-location technologies, there is no mechanism for users to rely on such technologies to control the geographical distribution of their postings). As we move away from individuals using their own websites to communicate to social networks and apps, the relevance of individual use of geo-location diminishes.

19 Mark Prigg, ‘Facebook Now Has 1.32 billion Users, with 30% Only Using It on Their Mobile - and the Average American Spends 40 Minutes a DAY on the Site’ Daily Mail Australia (online) (24 July 2014)
users of other social media platforms such as LinkedIn with its 300 million\textsuperscript{20} users, and Google+ with its 1.15 billion\textsuperscript{21} registered users.

7. IDENTIFYING THE RELEVANT ‘CONTEXTUAL LEGAL SYSTEM’

From the above it is clear that Internet users are exposed to a complex matrix of legal systems. Thus, to speak of their legal system in a meaningful manner, I have suggested that we need to introduce the concept of a ‘contextual legal system’, by which I refer to the system of legal rules from all sources that purport to apply to the conduct of the person in question in the setting they are acting. When we choose to drive over the speed limit, our contextual legal system is typically that of the country in which we are driving, and if we, in country A, post a letter to someone in country B defaming someone in country C, our contextual legal system may be made up of the relevant aspects of the laws of at least countries A, B and C.

Where this reasoning is accepted, it is clear that the contextual legal system faced by Internet users is made up of parts of the laws of many different countries. It should, therefore, surprise no one that our contextual legal system in such a situation typically will contain legal rules overlapping and clashing with other legal rules. Indeed, in such a contextual legal system, we are likely to see instances of legal rules directly contradicting each other leaving the Internet user with the perilous exercise of selecting which law to comply with and which law to ignore.

Importantly, contradictions are particularly common if we, as I suggest we should do, reject notions such as that expressed by Justice Souter when he stated that: ‘[n]o conflict exists, . . . “where a person subject to regulation by two states can comply with the laws of both”.’\textsuperscript{22}

Assertions such as that made by Justice Souter have particular relevance in that they lend support to the idea of dealing with contradictory standards by enforcing the strictest of those standards. However, as I have expressed elsewhere,\textsuperscript{23} I object to this duties-focused approach. Essentially what Justice Souter and others are saying is that we should only focus on the duties imposed by law. If the duties do not conflict, the laws do not conflict. In my view, this is a too simplistic perspective as it completely neglects the importance of the rights that laws provide.\textsuperscript{24}


\textsuperscript{21} Irfan Ahmad, ‘Google+: Behind the Numbers’ SocialMediaToday (13 February 2014) <http://www.sociamediatoday.com/content/google-behind-numbers-infographic>.


\textsuperscript{24} Importantly, the correlative relationship between rights and duties we may be accustomed to from a domestic law setting does not necessarily survive when transplanted into a cross-border environment; that is, rights provided under one country’s legal system may not necessarily create corresponding duties under other legal systems.
I argue that in assessing whether two (or more) laws are in conflict we need to take account of both the duties and the rights those laws provide for. In other words, even where the duties do not clash, the rights of one country may clash with the duties of another country.

The difference can be illustrated by way of an example I have used on several occasions. Imagine that the laws of state A specifically provide for a right of religious freedom, whereas the laws of state B specifically impose a duty of adherence to Norse pagan faith. Where a person, for one reason or another, finds him/herself bound to comply with both the laws of state A and those of state B, there is no conflict in the view of the reasoning put forward by Justice Souter and others—such a person can comply with the law of both states by adhering to Norse pagan faith. In contrast, from the perspective I advocate here, there is a conflict since the right provided by the law of state A cannot be freely exercised while at the same time complying with the duty imposed by the law of state B (except of course by those who voluntarily chose to exercise their right to worship Odin, Thor, Freja, etc.).

In light of this, we may draw two distinct conclusions of great importance. First, it is clear that contradictory rules—that under this view includes clashes between rights of one country with duties of another country—are common indeed. Secondly, it shows that calls for compliance with the strictest rules, as a solution to the problem of conflicting laws, are misguided.

Through the above, we have established that: (i) Internet users are exposed to a great number of laws; that is, their contextual legal systems are typically made up of a complex matrix of legal rules from multiple legal systems, and (ii) particularly where we accept as contradictions instances where the duties of one country's law clash with rights given by another country's law, the legal rules within their contextual legal systems frequently overlap, clash and contradict each other.

The question is then: what tools are available to Internet users in deciding which legal rules to abide by and which legal rules to ignore? Here I will focus on how some form of natural law theory may come to the Internet users' aid. However, first a few observations will be made about the inadequacy of our, at the moment, dominant legal philosophy—that is, legal positivism—in the context of an Internet user seeking to decide by which legal rules to abide.

Legal positivism exists in many versions separated by more, or often less, subtle differences. Thus, much will be left unsaid in this short piece about positivism though. I will restrict myself to observing that, for example, no Kelsian Grundnorm and no Hartian ‘rule of recognition’ will significantly assist us in distinguishing between foreign law we need to abide by and foreign law we may opt to not abide by. Given that such a choice is a necessity for Internet users faced by contradictory

25 See, eg, Svantesson, ‘Between a Rock and a Hard Place’, above n 23.
27 In Making Laws for Cyberspace, Reed has sought to draw upon Hart’s rule of recognition to frame what he refers to as a ‘subject rule of recognition’. However, in contrast to Hart’s rule of recognition, what Reed proposes is a rule of recognition addressed to cyberspace actors themselves. This difference probably brings Reed’s approach outside the comfort zone of most traditionalist legal positivists: Reed (n 6) 85–88.
legal rules within their contextual legal systems, the failure of legal positivism is a serious one indeed.

It seems to me that we best equipped to get out of this quagmire and regain firm ground through natural law theory—by admitting morality as the guiding principle we can give to Internet users a tool to help decide which legal rules, in their respective contextual legal systems, to abide by and which legal rules to ignore. Thus, the discussion below is focused on natural law theory.

However, I hasten to acknowledge that other may well prefer to seek the answer in more ‘modern’ legal theories such as the so-called legal pluralism. In the simplest of terms, where one recognizes legal pluralism, the guiding principle I will seek in natural law theory may perhaps be found in the normative rules provided by non-state law. That option will not be explored further here.

8. NATURAL LAW THEORY TO THE RESCUE?
In embracing natural law theory as our saviour, we need not seek refuge in some mysterious metaphysical reasoning to justify this approach. All we need to do is to ask what alternatives there are. I have found none and would, thus, in the interest of advancing this area of law, like to challenge my fellow scholars to put forward a superior alternative.

Thus, how can natural law theory help us? Like others before me, I suggest that a natural starting point may be found by turning to the writings of Lon L Fuller. As noted, Fuller identified eight ‘distinct routes to disaster’ in lawmaking and used them to highlight an ‘inner morality of law’:

- The first and most obvious lies in a failure to achieve rules at all, so that every issue must be decided on an ad hoc basis. The other routes are: (2) a failure to publicize, or at least to make available to the affected party, the rules he is expected to observe; (3) the abuse of retroactive legislation, which not only cannot itself guide action, but undercuts the integrity of rules prospective in

---

28 At best, it could be argued that, like in the context of international law, Hart’s rule of recognition is to be seen as focused on ‘consent’ when we are dealing with whether a particular Internet user must abide by a particular legal rule. In more detail, it may be argued that by acting in a particular manner Internet users impliedly consent to abiding by the laws of a foreign state. Thus, consent may be advanced as the jurisprudential underpinning of jurisdictional rules such as the familiar ‘minimum contact’ test in US law: ‘[D]ue process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend “traditional notions of fair play and substantial justice”: International Shoe Co v Washington (1945) 326 US 310. Paraphrasing what Dworkin has stated recently in the context of international law, the ‘master interpretive question’ must then be: what is it most reasonable to assume that that Internet user, whose consent made the law in question applicable, understood that she was consenting to? (Dworkin (n 1) 7). The answer to that question would in most instances be that the Internet user in fact had no understanding or expectation as to what was being consented to, not least as the laws of one country too rarely are accessible to persons from other countries. Thus, it is difficult indeed to maintain that there was any consent, as any realistic conception of consent must include that genuine consent must be sufficiently informed. In light of the above, we may turn to paraphrasing Dworkin also for our conclusion: ‘If the theory that consent is the ultimate basis of [the extraterritorial claims online] were persuasive, then we would quickly come to an interpretive dead end on such questions’: (Dworkin (n 1) 8).

29 See eg Reed (n 6) 180–82.
effect, since it puts them under the threat of retrospective change; (4) a failure
to make rules understandable; (5) the enactment of contradictory rules or
(6) rules that require conduct beyond the powers of the affected party;
(7) introducing such frequent changes in the rules that the subject cannot ori-
ent his action by them; and finally, (8) a failure of congruence between the
rules as announced and their actual administration.30

As also has been emphasized, Fuller is discussing these matters from the perspec-
tive of a domestic legal system. However, I think Internet users can apply them to
their respective contextual legal systems. Interestingly, Fuller described laws failing in
relation to this inner morality as ‘something that is not properly called a legal system
at all’.31 Thus, for Internet users, legal rules that severely fail to conform to these
principles of inner morality may be the first to be ignored in the contextual legal
system.

Further, much greater care should be taken so as to avoid extraterritorial applica-
tion of rules that, where applied in an extraterritorial manner require conduct beyond
the powers of the affected party (see Fuller’s sixth point). A rule that is contradicting
other rules in the contextual legal system is just one example of this (see Fuller’s fifth
point).

On a practical level, much progress towards achieving these goals can be made,
for example, by adopting a ‘layered approach’ under which only certain legal rules
are given extraterritorial application while others are not.32 The negative conse-
quences of blunt and unsophisticated rules delineating the geographical scope of
application of a law is perhaps best illustrated by the European Union’s much-
debated current, and proposed, data protection framework. Elsewhere,33 I have sug-
gested that, instead of having one rule determining the extraterritorial applicability of
the entire Directive34/Regulation,35 different standards of extraterritoriality may be
applied to different types of rules. For example, while certain abuse prevention rules
may be given broad extraterritorial application, rules requiring onerous administra-
tive undertakings ought to have a lesser, or no, extraterritorial reach. Where this
structure is adopted the laws that do have extraterritorial reach are fewer and more
typically rules that would be found in many other legal systems anyhow; they would
then not come as any surprise to those exposed to those legal rules.

What other moral principles, if any, should we add to those presented by Fuller?
We may here pause to consider the implications of Fuller having approach his inner

30 Fuller (n 3).
31 ibid.
International Data Privacy Law 278–86.
3(4) International Data Privacy Law 278–86.).
Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of
35 Commission, ‘Proposal for a Regulation of the European Parliament and of the Council on the
Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of
morality of law from the perceptive of a domestic legal system rather than the type of contextual legal system we above have identified as the appropriate lens through which to analyse the position of a user of social media or other Internet resources. I argue that the different perspective we take here can justify the introduction of additional principles to the inner morality of law. Yet, I hasten to add that it is not my aim, in this short article, to exhaustively speculate as to what addition principles of morality may appropriately be added to Fuller’s eight. Rather the modest, but important contribution, I am aiming for is to bring attention to: (i) the fact that Internet users are forced to make difficult choices as to which laws they consider; (ii) the fact that more research is needed on this topic; and (iii) that natural law seems a fruitful area for such research.

I cannot here consider in appropriate detail what additional trials and tribulations Fuller may have put his ‘antihero’ king Rex through had his allegory taken account of lawmaking for the Internet. I will, however, provide one example. Perhaps Rex would have proclaimed that all content on the Internet that can be accessed in his kingdom must conform to the laws of his kingdom. Had he done so, which is in effect what some jurisdictions have done, we may have been able to identify a ninth inner morality of law: that is, the failure to ensure an appropriate nexus between the conduct being regulated and the state seeking to regulate it. I suspect we may well be able to find a 10th, a 11th and a 12th principle to add. For example, perhaps we need to include some reference to established human rights law?

9. FINAL REMARKS AND THE PATH AHEAD

When one examines how the laws of various countries have sought to address the complications stemming from what I above describe as the illegitimate expansion of domestic laws onto Cyberspace, one finds great consistency in approach. Most, if not all, legal systems seek to address the problem by adopting connection criteria, often in some way focused on predictability, between the conduct and the jurisdiction in question. Examples of this abound: consider eg the US minimum contact test and the European Union (EU) centre of interests test.

The described approach is both natural and commendable. However, it does by no means represent a complete solution, and further steps are necessary. Much more can be achieved with the rules of jurisdiction and choice of law we use. For example, elsewhere, I have argued that instead of using one single rule governing when a particular statute is applicable in an extraterritorial manner, we could use a more

36 Fuller (n 3) 33.
37 For example, in the mid-90s, the Advocate-General’s office of Minnesota issued a statement that ‘[p]ersons outside of Minnesota who transmit information via the Internet knowing that information will be disseminated in Minnesota are subject to jurisdiction in Minnesota courts for violations of state criminal and civil laws’ (Memorandum of Minnesota Attorney General as reproduced in: Bernadette Jew, ‘Cyber Jurisdiction – Emerging Issues & Conflict of Law when Overseas Courts Challenge your Web’ (1998) Computers and Law 23.
38 This is, of course, related to rules that require conduct beyond the powers of the affected party. Yet, it also goes further than that. A similar example can be found in Reed (n 6) 182.
40 edate Advertising GmbH v X and Olivier Martinez and Robert Martinez v MGN Limited (2011) C-509/09 and C-161/10, respectively.
sophisticated ‘layered approach’ where different connection barriers apply to differ-
ent substantive rule in the statute based on how onerous those rules are.41 As men-
tioned, the proposed EU Data Protection Regulation42 is an example of a law that
would benefit greatly from such an approach. Indeed, in certain limited cases, we
may even need to consider introducing an international law doctrine of selective legal
compliance limiting which laws apply to certain parties so as to avoid a situation
where they are obliged to comply with all the laws around the world. I have written
on these matters elsewhere and will not repeat those discussions here.43

I also think it necessary that we generally seek to restrict the spill-over effects of
domestic judgments in the online context. Thus, jurisdictional claims should be
based on what I have elsewhere termed market sovereignty44—jurisdiction delineation
by reference to the effective reach of the market destroying measures that can be
taken—and where the court orders certain content to be removed, the order should
in normal circumstances be limited to content within the country where the court
sits.45 In addition, as was hinted at above, a better communication of laws online
would help give back some legitimacy to the two first of the legal fictions discussed.

I opened this article by pointing to a sin committed by most if not all commen-
tators in the field of Internet jurisdiction. Let me now finish by pointing to a second
such sin. Most commentators (again, myself included) have at some stage reached
the conclusion that the best, if not only, path ahead is to work towards an interna-
tional agreement addressing the jurisdictional complications that plague the online
environment. Such conclusions are not reached out of naivety; most commentators
stress the considerable obstacles that stand in the path of this Holy Grail. However,
the reality is unfortunately that if this is the best proposal we manage to come up
with, we are failing. Indeed, such suggestions, due to their slim prospects of success,
are simply not good enough.

We must abandon hope of giant leaps taking us to our goal and accept that the
road ahead instead will be travelled by thousands of small steps. Like the Internet is
a successful network of networks, the solution to the jurisdictional issues online will
be found in what we can see as a legal system of legal systems—a system in which our
domestic legal systems operate smoothly together with a minimum of inconsistencies
and clashes.

Currently, the interaction between different domestic legal systems seeking to
regulate our conduct online does not work smoothly; as can be expected, there are
considerable inconsistencies and, indeed, outright clashes. Rights given under one
legal system frequently clash with duties imposed by other legal systems. And occa-
sionally the duties imposed by one legal system clash with the duties imposed by

42 General Data Protection Regulation (n 35).
43 See Svantesson, ‘Between a Rock and a Hard Place’, above n 23.
44 See Dan Svantesson, ‘The Extraterritoriality of EU Data Privacy Law - Its Theoretical Justification and Its
45 This will, of course, depend to a degree on the type of content the order relates to. For example, where
the court order relates to child offence materials, there is no problem with the court requiring the removal
to be global.
another legal system leaving the subjects with the precarious decision of which legal system’s duties to ignore.

Our aim should be to create jurisdictional interoperability between the different domestic legal systems to the greatest degree possible. No doubt, aiming for smooth perfection is to set the bar too high. However, by identifying any uniting features (of which there are many), and in seeking to iron out inconsistencies and clashes, between domestic legal systems, both in substantive and procedural rules, much can be achieved.

Public international law is only one piece of the puzzle here, and while we need to make progress on that arena too, the most important work will be done in making changes to the various domestic legal systems so that they can operate more smoothly within the foreshadowed system of legal systems.

Importantly, this means that rather than sitting back waiting for a miraculous international agreement addressing all the jurisdictional concerns online, we can all get involved—law reformers, courts, legislators, lawyers, legal academics and law students—in identifying uniting features and in chipping away at the inconsistencies, contradictions and clashes that hinder interoperability between the various legal systems that govern our conduct online.

Getting such work underway, we stand the chance to one day reach a level of jurisdictional interoperability allowing us to ‘live happily ever after’.

Through the above, I have also sought to draw attention to the fact that only morality can guide the decision of what laws Internet users exposed to a complex matrix of overlapping, clashing and contradictory legal rules ought to abide by. I showed that making such a choice, as perilous as it may be, is a necessity and that our mainstream legal philosophy—legal positivism—does not come to our aid.

I suggested that we may take the eight principles of Fuller’s inner morality of law as our starting point. But I also stressed that this is a topic ripe for further research and emphasized that at least one additional such principle is justified for our purposes where the principles are applied in relation to Internet conduct governed by a contextual legal system.

However, the aim here is not merely to highlight the virtues of natural law theory. There are important practical consequences flowing from the reasoning above. The observation that, as a result of Internet users being exposed to a contextual legal system with contradicting legal rules, they are forced to chose which legal rules they comply with lends support to the ‘international law doctrine of selective legal compliance’ I have proposed elsewhere:46 that is, the thesis that certain actors, such as globally active Internet intermediaries, ought to enjoy protection shielding them from having to comply with all the laws from around the world that prima facie apply to them. Indeed, the amended inner morality of law presented above may represent one way in which to delineate the scope of such a doctrine.

---

46 Svantesson, ‘Between a Rock and a Hard Place’, above n 23.