

CYBERSPACE JURISDICTION

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Abstract

As mandated from Rio+20 Conference, it has established the UN Open Working Group on Sustainable Development Goals and collectively state that the internet shall play an important role as a mean of implementation to eradicate poverty. In relation with the World Summit on Information Society (WSIS), the global community has just finished the process by the UN system to review the progress that has been made in the implementation and follow up of the WSIS outcomes at the regional and international level as key input on the role of the information and telecommunication technologies in the Post-2015 Development Agenda. Those are some evidence on how important the internet globally nowadays. In this context, Indonesia always believe that in order to enhance the joint efforts to optimize the benefits of ICT for sustainable development, it will needs jurisdiction recognition in the internet. This position has continuously stated by all Indonesia delegation attending any international internet forum, including the Internet Governance Forum (IGF) and Seoul Conference of Cyberspace.

Nowadays, rapid changes had occurred in the internet. Level of misuse of the internet is growing. Through internet people conduct espionage operation, spreading news, pictures, recorded-tape which are not correct or not supposed to be uploaded. Some people abuse the free-status of the cyberspace to uploaded harsh content that ignores other users beliefs or national laws. The internet become unsafe and un-ethics.

Changes in strategic environment of the internet as well as emerging issues in relation with the internet are the main substance for this paper. Literature study and comparison method had been conducted to analyze the issue and to make necessary alternative recommendations to solve the issue.

In some issues like security, economic and social reasons regarding the internet and its infrastructure, the government of sovereign state needs to take some actions and therefore sovereignty and jurisdiction becomes crucial in this matter. With the lack of international arrangement in this sense, Indonesia should be not hesitate to issue unilaterally various policy and restriction to protect its interest. The Government of Indonesia have to enhance cooperation with other stakeholders and other states to ensure the protection of Indonesia interest in terms of national security and internet users in Indonesia. As for foreign relation, Indonesia should keep the "bebas aktif" policy so it can gain benefit from various parties which possess advanced capability in information technology so that not depending only to one provider.

Key Words: Cyberspace; Multistakeholders; Jurisdiction; Sovereignty; Misuse of Internet.

As we are all aware, with a mandate from Rio+20 Conference, it has established the UN Open Working Group on Sustainable Development Goals and collectively state that the internet shall play an important role as a mean of implementation to eradicate poverty. In relation with the World Summit on Information Society (WSIS), the global community has just finished the process by the UN system to review the progress that has been made in the implementation and follow up of the WSIS outcomes at the regional and international level as key input on the role of the information and telecommunication technologies in the Post-2015 Development Agenda. Those are some evidence on how important the internet globally nowadays. In this context, Indonesia always believe that in order to enhance the joint efforts to optimize the benefits of ICT for sustainable development, it will needs jurisdiction recognition in the internet. This position has continuously stated by all Indonesia delegation attending any international internet forum, including the Internet Governance Forum (IGF) and Seoul Conference of Cyberspace.

Internet Governance Forum (IGF)

The 8th Internet Governance Forum (IGF) that was held in Bali, Indonesia, from October 22 to 25, 2013. The 8th IGF was organized and funded by various groups to represent the spirit of the multistakeholder approach. The 8th IGF is aimed at enhancing Internet governance at local, regional and global levels. The organizers of the 2013 IGF wish that the multistakeholder collaboration will continue serve as a sustainable and relevant platform in the future towards transparent, accountable, professi-

onal, and egalitarian Internet governance in Indonesia and globally.

From 22 to 25 October 2013, 2,632 participants from 111 countries gathered in Bali, Indonesia, for the 8th IGF. The IGF is an annual event mandated by the United Nations as an open and inclusive forum for multistakeholder policy dialogue on Internet issues. As a neutral, non-partisan space, the IGF brings together governments, businesses, and civil society organizations to learn about emerging issues in Internet policy and to discuss about some of its toughest challenges. Although the IGF has no formal decision making capabilities, the strength of the forum lies in its power of recognition. The IGF aims to provide a neutral space for dialogue, and for issues to be brought to the attention of relevant policy makers at global, regional and national level.²

Aside from the global IGF, regional and national IGF initiatives have also been launched in at least nine regions and 19 countries. They provide a platform for Internet policy discussions around the world, and promoting participatory, democratic bottom up processes.

The United Nation's Millennium Development Goals (MDGs), adopted by the UN General Assembly in 2000, declared a commitment among all member countries to achieve eight equitable, universal development targets by 2015. The eighth goal of the MDGs resolves to build a global partnership for development, and stated "making available the benefits of new technologies, especially information and communications" as an objective, especially in developing countries. The World Summit on Information Society (WSIS), held in Geneva in 2003 and in Tunisia in

2005, reaffirmed the global commitment towards harnessing Information and Communication Technologies (ICTs) as a crucial part of promoting the MDGs. At the 2005 WSIS, the UN Secretary General's mandate led to the creation of the IGF, and eight forums have been held since then.

In a milestone-setting 2011 report submitted by the UN Special Rapporteur on Freedom of Opinion and Expression, Frank La Rue, to the UN General Assembly, the exchange of ideas and information through the Internet is declared as a fundamental part of human rights:

"The Internet has become one of the most important vehicles by which individuals exercise their right to freedom of opinion and expression, and it can play an important role to promote human rights, democratic participation, accountability, transparency and economic development"³

The statement captures the egalitarian nature of the Internet, which provides a platform for worldwide exchange of ideas and information. The IGF is intended to provide an environment where all stakeholders can articulate their positions on Internet governance.⁴ However, in the spirit of neutrality and egalitarian of internet, the issue of jurisdiction in internet still remain high profile amongst participants. There some discussions regarding the issue that took place formally and informally at the Bali IGF.

In terms of internet as mean of international trade, the World Trade Organization has make an arrangement in how e-commerce should be conducted on line. On the 11th WTO Ministerial Meeting in 2011, the WTO members state decides that e-commerce should carry-out non-

discrimination, predictability and transparency, in order to enhance internet connectivity and access to all information and telecommunications technologies and public internet sites, for the growth of electronic commerce, with special consideration in developing countries, and particularly in least-developed country Members.

Seoul Conference

The Seoul Conference is an international forum to discuss 6 cyberspace-related issues including Economic Growth and Development, Social and Cultural Benefits, Cybersecurity, International Security, Cybercrime, and Capacity Building, under the theme of "Global Prosperity through an Open and Secure Cyberspace". Seoul was the third host of the conference on cyberspace following London (2011) and Budapest (2012), and pre-workshops per each theme were held consecutively leading up to the opening of the Conference

for in-depth discussion on each agenda. The "Capacity Building" agenda was added newly by the Republic of Korea (ROK), to discuss how to close the digital divide between developed and developing countries. During the Plenary Sessions, 40 minister/vice-minister level officials including Foreign Ministers and ICT Ministers made keynote speeches and 60 experts from home and abroad participated as speakers and discussants in 6 panel discussions. The Conference also drew the interest of participants with various events including an official dinner, hosted by the Minister of Foreign Affairs, and a luncheon hosted by the Minister of Science, ICT and Future Planning, and ICT exhibition, etc.

Government Role in the Internet⁵

Many governments are embracing multistakeholder models in order to make the Internet a better place. While this was certainly seen as a positive development, it was also underlined that a delicate balance must be struck. Governments alone cannot govern the Internet; rather they must earnestly partner with all stakeholders, on an equal basis, in the spirit of the IGF and the Tunis Agenda. The Internet belongs to no single country or entity, but should be a global and inclusive springboard for human development worldwide that launches innovation and opportunities.

Internet governance should promote international peace, sustainable development and shared understanding and cooperation. In regard to human rights, there are two types of human rights: civil and political rights; and economic, social, and cultural rights. The right to development is essential to Internet governance. Government plays significant role to achieve all those goals and that's is just another evidence on how Government ability to embrace multistakeholder approach and transform it into encouraging policy is crucial.

With regard to multistakeholders platform, many governments have well established consultative processes, often mandated procedures that are part of the legislative process designed to guarantee public input. For example, the U.K. recently established a "Multistakeholder Advisory Group on Internet Governance" called MAGIG, comprised of approximately 40 representatives from across the administration that addresses Internet issues and representatives of appropriate stakeholders. It was also

noted that the regional and national IGF initiatives can also be significant policy influencers.

Cyber Security and Human Rights

Network security, through broad collaboration and public private partnerships, was said to be the best first step to address the growing issue of security. Proper legal frameworks need to be in place and cross border communication needs to be ongoing to monitor the flow of information through networks. At the Seoul Conference 2013, which Indonesia participates, that had been an understanding that governments have big responsibility in cyber-security. In carried out such role, Governments should involve other stakeholder. In this context, Governments seems to have bigger responsibility in cyber-security than other stakeholder but not clear if it is related to national jurisdiction of the internet or not.

In term s of Human Rights, global multi-stakeholder community now are on their way about many different issues and many different Human Rights, many different sorts of ideas about how to govern the Internet by recognizing Human Rights like freedom of expression, privacy, and also rising issues like access. It is almost a consensus that the world need one document that could bring all these issues together, discussions about the Internet and its future in terms of design -- interconnect with very important Human Rights issues. The UN Human Rights counsel has recognized that how many rights on-line environment is now as important as they are off-line, important recognition. Internet, not just the tubes, and the satellite connections which are very important, all the software, it's design in the fullest

sense, its access and how it's used around the world in different ways and also the means by which it's governed, substantial Human Rights and should be rights-based governance.

Net Neutrality

What is net neutrality? Net neutrality is a condition where the internet can serve all interest of its users, so the internet need to be balance and not take side. As aware, interest often conflicting and even states has a difficult role to play in balancing this conflicted interest, political, social, economic interest. Therefore for Net Neutrality, obviously, we need some kind of regulation to pay due attention to those interests and the same time prevent any confliction between them. So, there's no Net Neutrality without regulation.⁶

Net Neutrality is connected to the larger internet architecture which implies infrastructure. Larger internet infrastructure requires regulation and state roles, however state's innate tendency to try to control the information in space and society, and that's not sounds too good for net neutrality so there has to be adequate safeguards in the state's tool.

In the developed world, Net Neutrality means pro competition policy. Net Neutrality should drives competition over the delivery of an open internet service. Net Neutrality should drives competition to make that service faster, more reliable and cheaper. So, there is a way to do Net Neutrality that promotes competition through healthy exceptions for specialized services, reasonable network management. As for subsidy by the government, this is definitely very different in different environments and to some degree, the role of the

state is somewhat independent from Net Neutrality. Relating to State subsidy, it's a question of what and how much. State subsidies can take the form of tax incentives and facilitation of the cell tower siting and a host of other things all the way up to state provisioning and different solutions make sense, different environments.⁷

Internet and Jurisdiction

Current situation in the international system of the cross-border nature of internet and the Internet services and the fragmented nature of the legal system today is there are pensions between the actors. There are no understanding between each other. They are conflicting of requirements and needs and, so, the result of this situation is there are no international framework.⁸ The traditional loads of state corporation do not function well here. There are no international treaty, no harmonization of content rules, of course, but also the mutual legal assistance treaties that are used for criminal issues are not functioning, they are too slow and they do not cover issues that are not criminal. There are many situations where there is new, so-called, dual incriminations. Something is illegal in one Country but not in the other.

The result of above condition is an increasing direct transborder request from law enforcement public authorities, Governments of all sorts, and this for three things, basically. Domain seizures, content take down and user data. However, the problem is that the current mechanism of sending that request lacks transparency and clear procedures. It is under the responsibility of the operators and the

platforms to make decisions, but the way the requests are being sent, the way they're formulated, the formation that is provided about them is not really detailed. One law enforcement in some country receives, for instance, at a platform, an Email from somebody who says I'm the law enforcement agency in country A and the address is a Yahoo account. Is a natural effect, for some developing countries, access in many of those countries have huge constraints so they are using a normal Email to send that kind of request. How do you authenticate this? And, so, in that context, it seems that some framework is needed for that very specific set of issues. Transborder requests for domain seizures, content take down and access to user data. In order to make sure the co-exist tense of different laws in those shared cyberspaces, we have stumbled upon the notion of proceed usual interfaces. So, in another words, there is no harmonization on substance, but there will be and there can be harmonization of form and procedures to establish in a form of probability between the actors in the triangle between states, the platform and operators and the users. This is extremely important, as a human rights principle and as a due process principle any restriction of an individual freedom should be based on law. That means that any request that is being sent needs to be able to make a reference to the law in that specific Country and the procedure that should be followed. Like, for instance, is it an article of the constitution that is relevant? It's a particular law regarding Internet? Are there particular laws regarding the press that are transposed for internet matters?

But also on those issues and that type of request does the national procedure require a warrant or Cody signatures or not? The sort of compulsory presence of that kind of information in a request is something that raises the bar of due process from what it is today. Today you get requests and the national basis not necessarily known.

Cyberspace had been invented as something that is not fragmented. A space that promises an unlimited opportunities for any users at any place to explore anything that the internet provides. Even when international community have numerous arrangement to fragment real-space by national jurisdiction, cyber space remains safe as the land of the free. The status as the most free space that internet possess make certain states and some internet stakeholders tried so hard to maintain that status of the internet from any challenge to fragment the internet. For developed world internet is their final means to have access to any market and to any information in the world, and they want that access undisturbed.

Nowadays, rapid changes had occurred in the internet. Level of misuse of the internet is growing. Through internet people conduct espionage operation, spreading news, pictures, recorded-tape which are not correct or not supposed to be uploaded. Some people abuse the free-status of the cyberspace to uploaded harsh content that ignores other users beliefs or national laws. The internet become unsafe and un-ethics.

The international community engaged in continuously to tackle this internet situation. Numerous multi-stakeholders forums had been held in

this context. The international community believes that multi-stakeholders approach is the correct approach to any development in internet, to discuss changes and issues relating to cyber space. As mentioned earlier, the most prominent forum is the Internet Governance Forum (IGF) by the United Nations Department of Economic and Social Affairs (UNDESA) which is an annual event where all internet stakeholders around the globe sits together to discuss issues relating to internet, including the issue of internet fragmentation. One thing that's can cause internet fragmentation is national jurisdiction.

Some states views that there is an urgent need to have national jurisdiction in the internet just like in real-space where land, sea and outer-space fragmented by national laws. This notion came from the fact that states should exercise its role to protect the interest of their people. Some states, including Indonesia, already passed law that govern the internet practices within the border. The law arrange which contents allowed to flow freely in the internet and which content doesn't enjoy the same treatment. States like Indonesia, founded the law by absorbing norms and guidelines that's lives in local communities, that demand the states to prevent certain content flows freely in the internet.

It is common understanding that the legal landscape is fragmented. We have national laws, but can it applied effectively in cyber-space. The internet, is in some sense fragmented because states are free to interfere with the technical cooperation of the network. So with or without national jurisdiction, states can actually exercise their role and sovereignty in

the internet. The consequences is, in the legal regime that grown up in the internet, it's no longer the case that everyone has access to the same thing, there are layers and permissions that could block access to certain content. The bottom line is there are different views of how's people's access to content. In this regard, states plays significant role to set up the laws to govern content access. However, this is not the original intent of the design of internet. The design was intended to be uniform in the sense that anywhere in the world, whenever we looked up a Domain Name or an address, we should receive the same information or get to the same place. The next important question will be, do the uniform treatment can be apply in nowadays internet? what about national jurisdiction which establish based on local norms?

Root server is the heart of internet infrastructure. What is so called cyber-space will call a server in the real-space. The prime function of Server is data storage, and to flow the data needs other hard-ware and peripherals, including satellite and fiber optics. When all goes on-line, merely it become another space disconnected from real-space, unless you have interface to access it. The internet flows of data are now become global reality and will grow further in the future. The flows doesn't stop at the border and need no permission to enter other jurisdiction. The question now what is jurisdiction in internet?

Jurisdiction in the internet can defined by several ways. Internet jurisdiction could be mean as permission, so people who has access will hold the jurisdiction. It also can be interpreted in term of data storage, in this case the steward of the server is

the one who holds the jurisdiction. The definition of internet jurisdiction, of course, can be interpreted as national jurisdiction. This way sees borders as the main element to set up jurisdiction, although there are still technical debate on which point is the border.

In this context the multi-stakeholders approach of internet is the best way to address those above differences since it involves a wide-range of internet stakeholders. Jurisdiction could be found not only by government but it can be established through self-regulation amongst stakeholder.

In the context of permission, people who has access can make self-regulation which obeyed by the people itself. They can arrange what content which can or can't freely flows within their network and they can establish some kind of controlling system to preserve the regulation. This is can be done having in mind the borderless nature of internet, which allows people from far-away places have a secure network of their own.

Stewardship of a server now is a hot topic in any international internet forum. This issue recently came alive when on 14 March 2014, the U.S. National Telecommunications and Information Administration (NTIA) announced its intention to transition its stewardship over key Internet domain name functions to the global multistakeholder community, and called upon the *Internet Corporation for Assigned Names and Numbers* ((ICANN)) is a nonprofit organization that is responsible for the coordination of maintenance and methodology of several databases of unique identifiers related to the namespaces of the internet, and ensuring the network's stable and secure operation) to launch and

facilitate a process with the community to develop a proposal, meeting the criteria set out by the NTIA. Following the announcement, ICANN published a Process to Develop the Proposal and Next Steps on 6 June, that is the culmination of a series of community discussions and input into the process to develop a proposal to the stewardship transition to the global multistakeholder community. The document reflects the multitude of views expressed in different fora and calls for the establishment of, among other things, a Coordination Group.⁹ The bottom line is, up until today the NTIA holds a complete control and "jurisdiction" over the root server which contains all key internet domain name functions, in other word, the NTIA is monopolize the data in the internet, since all names distributed globally starts from those root server. In this context the US Government through NTIA can make regulations as what is allowed or forbidden to enter and flow freely in the ICANN internet system. Reminding how huge the power of the US Government to control internet, makes all states wants to see the stewardship transition process to be done as soon as possible. Now many server are established in the world, and whoever holds the stewardship of that server will be hold the "jurisdiction" over all data inside the server.

The last version of jurisdiction, is indeed, the jurisdiction that lies in the hand of sovereign state. In this paper, it calls national jurisdiction. This jurisdiction stops at the border, so border become crucial in this kind of jurisdiction. But is the definition of border in the internet. Unlike in the real-space which the border is easy to find, in the internet, the border is somewhat complicated. In the internet,

the border sometime mean the server, the server sometimes located outside the border of the concern state, which has their own applicable law to that certain location. This condition raise jurisdiction problem on whose jurisdiction applied to that particular "border". Unless they have an agreed arrangement, issues arise at the "border" will be difficult to solve. With no international arrangement on how to govern the internet and the fact that each state and communities in the world has un-uniform understanding on norms and ethics applied, just make solving problems at the "border" far more challenging.

Way Forward

As other states does, Indonesia has also faced many challenges to govern the internet, especially when comes to content that is not ethical and also information sovereignty. As mentioned above, internet is the one way to have undisturbed access to other states in particular in terms of market access. For some country, pornography and sex-industry for example are legitimate business, but here in Indonesia those contents are forbidden by law and by norms which grow in the community, so Government must do anything in their constitutional powers to prevent such contents into Indonesia.

Another examples is religious sensitive content. In Indonesia, Muslims are majority, although is more a moderate kind of Muslims, but when it comes to symbols of the Religion, they usually get together and become nasty. A cartoon of Prophet Muhammad SAW, made Indonesia Muslims went furious and demand in instant for Government actions. Demonstrations went on in many times for days, suddenly this peaceful

nations becomes a nations of anger. Government needs to take some actions to solve this issue, sovereignty and jurisdiction becomes crucial in this matter.

In security context, the sovereignty and jurisdiction of information technology including internet is indeed crucial. Indonesia experienced unpleasant experience when the President and other high-rank Indonesia official were the victims of espionage operation. This espionage operation also covers communications made by those high-rank officials through emails and other internet based communications. The operations can carried out more easily since all those communications, especially through internet, used servers and infrastructure made by others or located and under stewardship of other state. The logic behind it, is the one who made an equipment or act as the guardian of a device will surely have better understanding than others, so they can do anything about those equipment and device as their wish. Thus, any measures applied by other people can be easily break-down by the founder or by the guardian since they holds all the key and technology of them. This situation revoke the issue of security in the context of sovereignty and jurisdiction as well as technology mastery. This can lead to factual event, for example, when Indonesian US made fighter-jet engaged with another US made fighter-jet own by US Navy above Indonesia territory. At the event, the Indonesia fighter jet cannot locked the target but the US fighter-jet can locked the Indonesian fighter-jet and looks like a sitting duck, although the type and the technology is the same between those jets. What happen?

The US advanced industry made the Indonesian jet, so they really know how to master the information technology in the jet. The information technology in the jet is also connected to US server and the US Government is the guardian of that particular server, so they build the jet, they know what to do to shut it down, that's what happen even though it's a Indonesian jets bought by state fund from Indonesian tax payers.

Economic reasons also significant in this regard. As all aware, the information technology both application and infrastructure only mastered by view developed states. At the same time an appeal to overcome digital divide is grows strongly. The world now see the benefit of internet and everybody want all benefit that internet offers. So bottom line is, the internet is now more become basic need of people in the world, including people in developing and least developed countries. Therefore, states in all over the world has continuously develop internet infrastructures and applications in order to establish access to internet for its people. Developing world does not have any capacity and capability to provide the internet infrastructure and applications by themselves, they do not have the technology, therefore import from the developed countries is the only option for them. Importation sounds like a normal day to day activity, until the import country become too depend on importation to meet their needs. This situation can occur as a result from rapid innovation and development in information technology, so fast that for country that does not have capacity become not capable to pursue and the gap is more and more wider. This is simply a marketing strategy for having no competition in the information

technology by the developed worlds. The impact is simple, import is getting bigger and make a burden in other country budget. In this matter, capacity building and transfer of technology is crucial to make information technology dependence from developing world to the developed side. The unbalance fashion in information technology capability in the world should be address promptly, and Indonesia is amongst those in front-line to fight for this issue.

For Indonesia, cyber-ethics and cyber-jurisdiction as well as cyber-sovereignty are crucial. With the lack of international arrangement in this sense, Indonesia should be not hesitate to issue unilaterally various policy and restriction to protect its interest. Having in mind the three kind of Jurisdiction, Indonesia should have an arrangement in those three jurisdictions. The Government have to enhance cooperation with other stakeholders and other states to ensure the protection of Indonesia interest in terms of national security and internet users in Indonesia. The Government should more active to gather all stakeholders not just to empower the multistakeholders approach but also to have more national agent to protect its national interest, the ID-IGF is the correct place to start that effort. Indonesia also should be more pro-local in information technology, the Government should issue policy that can establish more flexibility and space as well as to protect local creativity and innovation and enhance local capability in order to have better local information technology capacity and put an end to import dependence. As for foreign relation, Indonesia should keep the "bebas aktif" policy so

it can gain benefit from various parties which posses advanced capability in information technology so that not depending only to one provider.

The legal development of the internet governance should be

properly address and handle in the future. As reflected in Rio+20 outcome document, the internet is part of the future we all want to shape, and Indonesia should be more active in this regard, starts from now.



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