

Opinion

SOVEREIGNTY IS DEAD! LONG LIVE SOVEREIGNTY! FROM NATION-BASED TO USER CENTRAL JURISDICTION.

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I. Nation States Losing Sovereignty

They used to be so close, the nation state and the law. The nation was primarily defined by borders, the state reigned as the sovereign within and could apply its laws. This simple and effective state of affairs changed due to various developments. One is public international law. Although the large lack of effective enforcement mechanisms still leaves sovereignty essentially within national borders, treaties do mean that a state gives up some of its power. It is true that trade, human rights, and conflicts may be managed more effectively on an international scale, but autonomous power of the countries to a treaty diminish within their own borders. This is different for the European Union which as a supranational body has more control over countries than any ordinary treaty organisation, including the United Nations, ever had.

On a more practical level globalisation challenged the nation state as the central concept of the legal system. Citizens—and businesses in particular—are powerful players in the transnational scene. The internet plays a special role in all this. First, none of the existing normative mechanisms seems fully equipped to deal with internet activities. Second, the introduction of the internet as a world-wide communication infrastructure, accessible from anywhere, by anyone, accelerated the process of globalisation. So the above two points illustrate that the internet increased the process of globalisation, and added to the complexity of the legal system.

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Recently, the cross-border use of smart devices, in particular smartphones, contributed both to globalisation and normative complexity. The question then becomes what is left for the nation state and sovereignty in the context of cross-border smart phone use. World-wide use, via a global infrastructure conflicts with local and national law, and that nation-based jurisdiction is ill-equipped to deal with an object which moves through borders of differing, national law.

II. What Law Applies Online?

The inherent cross-border nature of the internet has challenged the legal system for over two decades. Lodder & Murray discuss the legal regulation of online activity, viz. the control of content-related harms, which is a perennial problem for governments around the world.¹ Lodder mentions the outdated way of approaching jurisdiction on the internet, in particular by legal enforcement agencies: why would it matter where a server is physically located when we are dealing with online activities?² Jimenez & Lodder introduce a model in which the internet is approached as the high seas, the harbour, or a combination of the two.³ They use this model to rephrase existing case law related to internet jurisdiction. Finally, Lodder demonstrates that the classic jurisdictional model no longer works in a world where we move cross-border easily, while all the time having an unprecedented amount of very personal data in our proximity, either stored on our smart phone or accessible by using that device.⁴

A group of researchers from the research program Boundaries of Law chaired by Bert-Jan Wolthuis and Jan Willem Sap were asked to reflect on our recent publications, and what the above selection from 2013-2015 shares, is the interest in the inherent complexities of applying the law to the internet. One could also phrase it in terms of boundaries: to what extent can and should we apply national law to the internet? Lodder acknowledges that the moment you link what happens on the internet to the physical world (e.g., a server, a person), internet law originates.⁵

III. Smartphones Change Internet Use

The Internet and how we use it is in a transition phase; access is increasingly mobile and on small devices. Services are delivered via APP text to the classic

¹ A.R. Lodder & A.W. Murray, 'A primer on the law of internet communication and content: from the UK and Dutch perspective', *Dialogos de Saberes*, 2015, pp.173-188, available at: <http://ssrn.com/abstract=2616497>.

² A.R. Lodder, 'Ten Commandments of Internet Law Revisited: Basic Principles for Internet Lawyers', *Information & Communications Technology Law*, 2013-22(3), available at: <http://ssrn.com/abstract=2343486>.

³ G.W. Jiménez & A.R. Lodder, 'Analyzing approaches to internet jurisdiction based on a model of harbors and the high seas', *International Review of Law, Computers & Technology*, 2015-29(2).

⁴ A.R. Lodder, 'When 'There' Can Be Everywhere: On the Cross-Border Use of WhatsApp, Pandora, and Grindr'. *European Journal of Law and Technology*, 2014-5(2) available at: <http://ssrn.com/abstract=2532652>.

⁵ A.R. Lodder, 'Ten Commandments of Internet Law Revisited: Basic Principles for Internet Lawyers', *Information & Communications Technology Law*, 2013-22(3) available at: <http://ssrn.com/abstract=2343486>.

websites still in use, primarily on desk top computers. In a society where users access the internet globally by the same device, the application of law based on territory tends to lead to arbitrary results. For instance, if a Dutch smartphone user wants to gamble online via the Ladbrokes App while he is in London he can do so, but not if he is at home because the Dutch Supreme Court has ordered Ladbrokes to block Dutch IP addresses.⁶ Does different application of the law makes sense when the same device is used, by the same user, but at difference places? Alternatively, why would the Englishman in Amsterdam be forced to use a VPN since otherwise he cannot use his Ladbrokes App? Or, why should it make a legal difference if a Spotify, Facebook or Booking.com app is downloaded in China, USA or the EU, all from the same App store? Why would data streams being (silently) communicated from a smartphone differ between the US, Chinese and Dutch citizens while in Amsterdam? Why would the credit card of a Polish tourist prevent the download of a Dutch app? What legal norms apply to the Dutch smartphone user, ordering a ticket while in Istanbul, from a New York concert promoter, for a concert in Hong Kong?

IV. Nation Based Jurisdiction Model: Obsolete?

The above questions relate to the nation state based jurisdiction model. We are continuously communicating with our smart device either knowingly or without us knowing. We move cross-border easily, while all the time having an unprecedented amount of often very personal data in our proximity, either stored on our smartphone or accessible by using that device. Sticking to the jurisdiction solely based on physical location leads to application of different legal regimes during a car or train trip, and in the not so near future the same will apply to plane trips. The fact that people travel and pass various jurisdictions is not new, but what is new is that the same App, is used on the same device, by the same user, but with different law being applied even in case of uninterrupted App use.

The Internet has been a catalyst for globalisation. Despite law firms creating mega practices in dozens of countries, law is still primarily local and linked to nation states. Even in international law the focus basically is on treaties and legal practice between nation states. This is clearly phrased by Michaels, 'legal thought has so far reacted to globalisation not with a true paradigm shift but instead by more and more inapt attempts to adapt the methodological nationalism that has provided its paradigm for the last two hundred years or so.'⁷

Internet communication is characterised as end to end communication, because all communication starts and ends at so-called end-points. This is in itself not different from classic telecommunication, e.g., in a telephone conversation both the calling party and called party are at end points of the communication line. However, the end-to-end principle does also reflect that basically application specific functions are located at the end point and not at some intermediary provider. Unlike telephony, in case of internet communication much of the code is

⁶ A. Kaburakis, 'European Union Law, Gambling, and Sport Betting - European Court of Justice, Member States Case Law, and Policy', *Sports Betting: Law & Policy*, Heidelberg, 201, pp. 27 - 97

⁷ R. Michaels, 'Globalisation and Law: Law Beyond the State'. *Law and Social Theory*. Oxford, 2013 pp. 1 - 18

run on your particular device or controlled from there. As a consequence, it can be argued that much of the activity of an internet user actually takes place on its own device. This also applies to apps used on a smartphone. In the classic jurisdiction model the physical location of the device used for internet access, one of the end points, is a way of establishing jurisdiction.

The classic jurisdictional model (in)directly links the law of a nation state to physical territory. Since the 1990s internet use has caused cracks to this jurisdiction model. Cloud computing further challenges the application of law on the internet. As long as data can be accessed users normally neither care nor know where their data is, but data can be stored anywhere, and might even be stored in different countries at the same time. At the other end-point of internet communication, we use smart devices like our phone anytime, anyplace.

V. Globalisation and law

Work on globalisation and law⁸ focuses on human rights,⁹ international crimes,¹⁰ and international investment law,¹¹ but hardly on the internet. The internet is not mentioned in the seminal Halliday & Osinsky,¹² and even Bethlehem's 'End of Geography: The Changing Nature of the International System and the Challenge to International Law' it is only sidelong mentioned.¹³ The reply to this paper by Koller does not even mention internet once.

Internet jurisdiction is characterised by two opposite strands: Post sees cyberspace as a place with its own norms,¹⁴ Goldsmith & Wustress see the relevance of the nation based model.¹⁵ A wide series of authors chose either side or intermediate positions; Jiménez & Lodder propose a model that helps to illustrate the core of the internet jurisdiction arguments.¹⁶ Not targeted at internet, Berman offers a profound analysis in between nationalism and universalism: 'simply assuming that territorial boundaries and nation-state communities are somehow the natural and inevitable bases for a system of jurisdictional rules is not an option.'¹⁷ An original approach is Ryngaert & Zoetekouw: 'constructed communities that are nation-

⁸ W.E.E. Twining, *General Jurisprudence—Understanding Law from a Global Perspective*. Cambridge, 2009.

⁹ J. Raz, 'Human Rights in the Emerging World Order', *Transnational Legal Theory*, 2009.

¹⁰ L.E. Nagle, 'Selling Souls: The Effect of Globalisation on Human Trafficking and Forced Servitude'. *Wisconsin International Law Journal*, 2008, pp. 131-162.

¹¹ Y. Radi, *International Investment Law and Development: A History of Two Concepts*. Grotius Centre Working Paper 2015/045, 2014, pp. 1-21.

¹² T.C. Halliday & P. Osinsky, 'Globalisation and Law'. *Annu.Rev.Sociol.*, 2006, pp. 447-470.

¹³ D. Bethlehem, 'The End of Geography: The Changing Nature of the International System and the Challenge to International Law', *The European Journal of International Law*, 2014-25(1), pp. 9-24.

¹⁴ D.G. Post, *Notes on the State of Cyberspace*. Oxford, 2009.

¹⁵ J. Goldsmith & T. Wu, *Who Controls the Internet?* Oxford, 2008.

¹⁶ G.W. Jiménez & A.R. Lodder, 'Analyzing approaches to internet jurisdiction based on a model of harbors and the high seas', *International Review of Law, Computers & Technology*, 2015-29(2).

¹⁷ P.S. Berman, *Global Legal Pluralism: A Jurisprudence of Law Beyond Border*, Cambridge, 2012.

states, are emerging, coalescing around technological corporations and digital platforms, which sometimes rival the nation-state in power and influence.¹⁸

An important reason for internet regulation complexity is that laws and regulations have been created on the assumption that activities are geographically bound and consequently, location is the criterion for determining jurisdiction. The nation state, both for national and international law the main actor as it comes to drafting and enforcing norms, does not match well with the cross-border nature of the internet. Kohl indicated that due to jurisdiction difficulties ‘there have been some calls to abandon the territorially based system of regulation.’¹⁹

VI. Towards an Alternative Jurisdiction Model

Cross-border smartphone use is a prominent exponent of a globalised world that basically still recognises jurisdiction based on territory. It is time to think of alternatives. The best solution would be to have global norms, but this seems unrealistic in most areas. Since this is just a short opinion piece I cannot present a final answer. For future research, my suggestion would be to elaborate on an approach in which no longer states are central, but users/citizens are. Question that could be worked on are amongst others:

- Should the norms of the app store be leading?
- Should the norms of the app developer, that is the service provider, be applied?
- Should the law of the nationality of the user be applicable?
- Should it be the law where the user is physically located the moment he installs the app?
- Should it be the law depending on where the user is whenever he uses the app?

Nation states should accept the fact that we live in globalised world, and their control can no longer be as broad as it used to be. Ultimately the users should have control over what they can and cannot do with their smartphone, and maybe even more importantly, what others are allowed to do with their data.

¹⁸ C. Ryngaert, & M. Zoetekouw, *The End of Territory? The Re-Emergence of Community as a Principle of Jurisdictional Order in the Internet Era*, 2014, available at: ssrn.com/abstract=2523354.

¹⁹ U. Kohl, *Jurisdiction and the Internet: Regulatory Competence over Online Activity*, Cambridge, 2010.