

***The Declining Power of the Nation State in a World of Interconnectivity,
Transnational Orders and Cyberspace***

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Abstract

Developments of faster means of communication and transport, as well as the growth of international trade had a huge impact on the predefined conception of nation states. One observable factor of globalization is a power shift, away from national governments towards NGOs, communities or companies.

Rules applied to international trade have always been to a great extent made outside of state legislation and have been a vast area of research under the headline of the 'new lex mercatoria' or international commercial law. Creation of the internet as a platform for private actors has furthered a development which is similar to that of international commercial law: the growth of privately regulated spheres beyond the control of national governments. Examples include online dispute resolution mechanisms, the internet domain name system or digital rights management.

Cyberspace follows its own rules, governance principles and conflict resolution mechanisms, which disregard national borders and are for the most part created by private actors (communities or corporations), rather than governmental agencies.

These so called transnational legal, political and economic systems pose a serious challenge to the traditional notion of nation states. At the same time they raise questions about legitimacy, accountability and justice. This paper will address the question whether this development is desirable and what role the nation state can and should play in it.

Keywords: transnational law, transnational orders, transnational legal orders, cyberspace, justice, nation state, online dispute resolution, internet governance, new lex mercatoria

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I. Introduction

The idea of a loss of power of nation states is not a new one. In the preface to her book 'The Retreat of the State: The Diffusion of Power in the World Economy', Susan Strange writes almost twenty years ago:

"There is no great originality in the underlying assumption of this book – which is that the territorial boundaries of states no longer coincide with the extent or the limits of political authority over economy and society."¹

However, these tendencies have grown to a much larger extent due to recent technological advancements. What I am trying to accomplish here is to give an overview of how these new technologies, in particular the internet as a medium for everybody (that is the part of the internet called the World Wide Web – WWW), play a most important role in this development and have accelerated it to an extent not foreseeable roughly 20-25 years ago. This still ongoing development poses serious challenges for our current understanding of the political and legal order of the world, divided into single nation states.

II. Historical Background

In this section I will not be able to lay out a complete account of the history of either the nation state or the World Wide Web. My aim is solely to point out that one of them (the nation state) already has a longstanding tradition, whereas the other one (the WWW) is a very new phenomenon.

1. A Long History: The Nation State

The concept of nation states is in itself a highly disputed topic.² I do not want to go into this discussion and I do not want to offer a solution for it here either. For the purpose of this article it is enough to understand the nation state as a sovereign political and geographical entity with predefined borders and a more or less centralized government, which has a monopoly of administering law and order and the legitimate use of (physical) force within its boundaries. Relations among nation states are governed by independence and the principle of non-interference.³ In this sense the United States of America, Japan or Germany are nation states, whereas for example the European Union or the United Nations are not.

The history of nation states is not perfectly clear among scholars. Some put the beginning of the concept of nation states far back into middle ages Europe⁴.

¹ Strange 1996, p. ix

² See for example the discussion about the problem of defining the terms nation or state and how the terminology is often mixed up in: Croucher 2004, p. 85ff.; according to which in my approach here as well the terminology has to be considered as mixed up.

³ see for example Kissinger 2014, p. 7f., who also points out that it is a uniquely European system of its time, which spread around the world

⁴ Strayer 1970

Many associate it with the signing of the Westphalian Peace Treaty in 1648 and therefore call the system of world order today also the Westphalian system.⁵ Some trace its beginnings to the 19th century⁶ and/or put its definitive height to the time after World War 2⁷. Again I don't want to solve the dispute. For the purposes of this article it is enough to realize that in any case its history supersedes everybody who is living today and therefore its beginnings have not been witnessed by anybody who is alive anymore. My aim is solely to illustrate, that we can assume a rather longstanding history. This leads to a state of mind in which we take the world's division into single nation states for granted in our modern day world order. We are used to it and it takes a lot of imagination to imagine it otherwise, albeit the fact that in world history there were all kinds of different orderings, from city states to empires.

2. A Short History: The Internet as a Medium for Everybody

Quite the opposite is true for the internet. Middle aged people living today, grew up without it and some (especially older people in their retirement age) still refuse to go online even now, despite all the advantages it might have. In contrast to the nation state, the history of the internet is a very short one and we as a society, still remember the days without it.⁸ The history of the internet as a means of mass communication, as a medium available to everybody, spans just a little more than 20 years. The internet as we all know and use it nowadays is connected to the development of a part of the internet called the World Wide Web (WWW). The WWW was envisioned by CERN employee Tim Berners-Lee in 1989, the first ever website went online August 6th, 1991⁹ and in 1993 CERN released the architecture of the WWW into the Public Domain, making it freely available to everybody and thereby establishing the roots of its rise to fame around the world.¹⁰

Although very brief, the WWW's history is a history of ever faster growing importance. At first it completely changed the way in which people communicate with each other. From e-mail, over online chats, all the way up to video conferences and social networks.

⁵ Kissinger 2014, p. 1ff. (2, 7)

⁶ Branch 2011, p. 5f.

⁷ Bowring 2014

⁸ On a personal note: Being myself just turned 31 at the time of presenting this paper at the ACERP 2015 conference in Osaka, I already grew up surrounded by computers, though I can still remember having a computer at home which was not hooked up to the internet. For somebody born roughly 5 to 10 years later this already is unthinkable and for anybody in his/her teenage years right now, living means living online, having computers in your pocket, which are much more powerful than the big stationary PC's ten years ago and which are constantly connected to the internet. 'Always On' is the slogan of the time, at least in developed countries.

⁹ Blum 2011; this first website is unfortunately lost, but a backup version can still be accessed from the CERN website today at: <http://info.cern.ch/hypertext/WWW/TheProject.html>

¹⁰ CERN

Then it also changed the way in which business is done. Today commercial transactions over the internet have succeeded beyond imagination. Shopping in retail stores is in the decline, whereas online sales are growing more and more. And on top of that customers nowadays combine both experiences, researching about products online, even while in a store. For example in order to compare prices or get better information about a certain product than they would get from a store employee.¹¹

International trade, made possible by the internet is easier than ever. Anybody can use a websites which compares prices for goods and services and order from the cheapest source. Ordering goods from retailers around the world is just a mouse click away. One of the biggest players (if not the biggest) in online shopping is amazon¹² and with its marketplace makes it possible for anybody to participate in (international) online trade without even running his or her own website or online shop. Items will be sent to your home, nationally mostly and internationally sometimes even without shipping costs. Even easier is the purchase of digital goods like music, movies or software, which, after the payment process is over, can just be downloaded. All this includes items or content, which may be restricted or illegal in your own country. If it is a physical item, it may still have to go through customs inspections, but if it is a digital product, this is not the case. In the latter case, there might be some self-imposed restrictions by the supplier or national restrictions like filters, but this is not the case everywhere and usually these measures are easily bypassed, even by not so skilled computer users.

All this shows, that the internet's influence on everyday life is profound. It changed the way we communicate and generally interact with each other and also the way in which the buying and selling of goods is carried out. And these are just two examples of a very complex and ever evolving interaction between cyberspace and real space.¹³

III. Transnational Legal Orders and Transnational Orders – A Clarification

In the headline for this article I use the term 'transnational orders'. What do I mean by that expression? And why do I not use the more common phrase 'transnational **legal** orders'?

When it comes to transnational legal orders outside of cyberspace, the best example would be what is commonly called the 'new lex mercatoria' or international commercial law, which has been called a 'Prime Example'¹⁴ of transnational law. Today's international commercial law uses written law like the CISG (Convention for the International Sales of Goods), which is an UN convention. But we also have a great body of customary law, which is still referred to as lex mercatoria¹⁵, a term derived from the medieval customary international commercial law.

¹¹ Bogaisky 2014

¹² E.g. amazon.com; amazon.co.uk; amazon.co.jp; amazon.de

¹³ For the distinction between cyberspace and real space see e.g. Lessig 1996; Lessig 2006, ch. 1

¹⁴ Schultz 2007, p. 154

¹⁵ For an overview of these rules see for example the Trans-Lex Principles, collected at the Center for Transnational Law (CENTRAL) at the University of Cologne: <http://www.trans-lex.org/principles/>

These rules are used in arbitration courts around the world. Rulings of these arbitration courts have then to be enforced by national courts, if the parties don't abide by them.¹⁶

When talking about transnational orders, a huge focus of the discussion has been the question whether these orderings can be described as 'legal orders' or 'law'. Some authors have argued for this notion¹⁷, some against it¹⁸.

My aim here is not to try to answer this question (although if I had to, I would be in line with Schultz), but rather to follow the approach that it doesn't matter for our purposes at hand, which is to demonstrate a decline in power of classic rule making bodies, i.e. nation states. I want to suggest that no matter how one is to label these developments, the phenomenon stays the same and deserves the same level of attention. If one is to give it the label of law or if one wants to reserve the term 'law' for rules/regulations made by nation states, in the end doesn't really matter. It doesn't change the facts about there being transnational regulatory orders, which are not made by nation states, but by private actors and which regulate vast areas of human life. These have been and continue growing in scope and importance and they are outside the effective reach of national legal orders. It does not mean, that national legal orders do not apply in these contexts, it only means that in practice recourse to national legal systems usually just does not happen.

I deliberately choose the title of this presentation 'transnational orders and cyberspace' and not 'transnational legal orders' as you would often find, because I want to point out that the qualification of something as law or not, is not necessarily relevant when looking at the implications these development have in the real world.¹⁹

IV. Transnational Orders in Cyberspace and their Effect on Nation States

Schultz demonstrates two important examples, which illustrate how recourse to national courts usually is out of question. First, rulings that settle disputes about domain names made by the Internet Corporation for Assigned Names and Numbers (ICANN). The outcomes will be enforced immediately by ICANN itself.

¹⁶ Schultz 2007, p. 154

¹⁷ Schultz 2007, who convincingly argues that in cyberspace more so than in real space, there exist private legal systems, due to the fact that unlike their real world counterparts, they have their own enforcement methods

¹⁸ Roberts 2005; Shapiro 1998, who argues that cyberspace is not a separate place but rather an extension of real space and therefore bound by the same laws (contract, criminal and other), which are in power equally in both worlds

¹⁹ This of course does not imply that it is not an interesting and important question in itself and especially in the broader context of legal theory. If you think about the nature of law, the discussion about international law, transnational law and cyberspace law can illuminate a lot about legal theory (see Schultz 2007, Lessig 1999 and of course fundamentally important Hart 1961)

These rulings can be challenged in national courts, but are in fact only challenged in less than one percent of all cases.²⁰

Second, ebay's dispute resolution mechanism, which works quite similar to arbitration procedures, just over the internet. First a standard procedure is initiated, which is computer mediated. If that does not solve the issue, a real mediator intervenes. Immediate enforcement lies in negative ratings of one or the other party, which in an online marketplace where reputation is most important, forces parties to comply.²¹

Lessig points out other interesting examples. He describes trusted systems, which in order to protect intellectual property, work much better and go much further than national intellectual property law. Technological advances cancel out fair use regulations and protect digital content like music, movies, articles, books and so on better than they would be protected in the real world.²² Today this is called Digital Rights Management (DRM) and is part of every computer user's world.

He further describes contracts between users and Internet Service Providers (ISPs). If a user does not abide by the contract terms (no matter how hideous they might be) the ISPs can enforce them immediately by just cutting the user off from the internet.²³ A real world equivalent would be a house owner, who cuts a tenant off from water, gas and electricity if he does not pay his rent, without getting a court order that allows the owner to do so.

Lastly Lessig talks about Spam Filters as a kind of internet 'vigilantism'. Spam, seen as a crime in the internet world, is tackled by private people through Spam Filters, which effectively cancel out unwanted mail, in a way that would not be possible in real space and in that sense infringe on free speech.²⁴ Building on the Spam Filter idea one could also easily imagine ISPs to filter content, which can be reached through their networks (a problem recently more and more discussed under the label 'net neutrality').

In all these examples the road into national courts is not blocked, people just usually don't go that way. The reasons for the reluctance to bother national courts with these cases are speculative, numerous and diverse. Maybe it is too costly for the parties to engage in actual litigation²⁵, maybe they are from remote corners of the earth, where courts are not readily available, maybe their knowledge about the possibility to reach out to traditional law enforcement is too limited or they fear that the private rules, rulings or contracts are binding on them. Or, maybe the private rules, as well as dispute resolutions mechanism are not only effective, but also recognized by the participants as the proper governing regulations and therefore rulings based on them are simply accepted by the affected parties.

²⁰ Schultz 2007, p. 157ff. (159)

²¹ Schultz 2007, p. 159ff. (162)

²² Lessig 1999, p. 522ff. (528)

²³ Lessig 1999, p. 528ff.

²⁴ Lessig 1999, p. 543ff.

²⁵ Schultz 2007, p. 185

No matter what the causes, these regulation schemes exist around the world. They are able to enforce themselves and since the advent of the internet, they start to affect everybody. Concerning the *lex mercatoria*, one could argue that it affects only a small number of specialists, i.e. merchants in international trade. These actors might be so specialized, that they embrace these private rulings and do not necessarily want to take recourse to national courts. On top of that, arbitration rulings are still relying on national courts for their enforcement.²⁶

Nowadays, everybody who uses the internet is subject to these new private orderings and has to deal with them one way or another. As we leave the realm of specialists, who best know for themselves what steps to take, now we face a situation in which the nation state has come to compete with transnational orders. Situations arise where normal people, who may be looking for protection from their governments, are facing these private orders and are lost as to their actual rights and possibilities under national laws.

V. How the Nation States (could) fight back

Some claim that cyberspace cannot be regulated.²⁷ Lessig argues this claim is false and only the current underlying architecture of cyberspace is opposed to control. But this architecture is just one out of numerous possible architectures and governments could legislate cyberspace indirectly by forcing its players to change the architecture in specific ways.²⁸

This assumption is definitely correct to a certain extent and if one takes a look at the development since his article has been published in 1999, there have been numerous interferences by government in this architecture²⁹ and in some ways or, better said, some parts of the world, national governments have a very strong power over the internet³⁰.

But in general, I support the claim of Johnson and Post, already put forward in 1997, that “the rise of an electronic medium that disregards geographical boundaries throws the law into disarray by creating entirely new phenomena [...] that cannot be governed, satisfactorily, by any current **territorially** based sovereign.”³¹ This still holds true today and supports my claim that although it might be possible, as Lessig states, to alter the architecture of the Internet and ISP's could in theory be forced to change it, it would be impossible for any one nation state alone to undertake this task.

²⁶ As Schultz 2007, p. 154 points out: „The *lex mercatoria* can therefore only have the contents that national courts allow it to have.“, (*highlighting* in the original)

²⁷ Lessig 1999, p. 505, who states the argument, but himself argues to the contrary

²⁸ Lessig 1999, p. 505ff., particularly p. 514ff.

²⁹ For a detailed description see Goldsmith/Wu 2006, Part 2 ‘Government Strikes Back’, p. 47ff.; one of the more recent examples would be legislation tackling net neutrality, see for example <https://www.whitehouse.gov/net-neutrality>

³⁰ Just think about the ‘Great Firewall’ of China or filtering of content in other areas of the world

³¹ Johnson/Post 1997, p. 1375, **highlighting** by me

Only if national governments would work together under a united body, effective regulation of cyberspace might be possible. This of course assumes they are able to find a common ground, which is rather unlikely.³² Or, each state alone could go the way of Iran and try to establish a 'national' internet.³³ This might technologically be possible and for strong despotic governments a viable option. But it would not be an option in a free society and even in these countries it would lead to severe economic difficulties if, due to these restrictions, companies could not participate in cross-border trade anymore.

So, assuming that it is technologically possible to do so, fighting these developments would be a challenging task for national governments. The options are very limited and on top of that, the question has to be raised, whether we want national governments to fight the privatization of cyberspace rule at all.

VI. Should Nation States fight back?

When we look at examples like the Great Firewall of China or internet restrictions in other countries, which basically are just attempts by governments to restrict free speech³⁴ and we also see what political power the internet holds for dissidents in restricted societies³⁵, we might think that it is overall a positive development to have an online world which is beyond governments reach.

But, as described above, these examples also have to face a number of counter examples, in which the private sector is the one that undermines values of free speech or traditional values of justice, like fair use. Lessig rightfully points out, that blacklisting certain systems in order to tackle spam on the internet "...is a kind of internet vigilantism – it is an example of private people taking the law into their own hands."³⁶ The conclusion is not confined to this specific example. In other cases as well, private entities are taking the law into their own hands, yes even change the content of the law to their advantage (e.g. when it comes to DRM, see above). Government interference in these cases might lead to a strengthening of publicly shared values, which otherwise get lost in a for profit private form of regulation.

The situation therefore is two sided. In restrictive societies, an unregulated internet might lead to more freedom and justice, in a free society it might alter traditional notions of freedom and justice to the worse.³⁷

³² take for example just different viewpoints of (religiously) conservative countries and progressive countries on tackling pornography and what constitutes as such

³³ Tajdin 2013

³⁴ Take for example Turkey which regularly blocks sites like youtube or social networks like twitter, Tuysuz/Watson 2014; Akkoc 2015

³⁵ Take the Arab Spring as an example, where the protests which helped to overthrow governments in Egypt and Tunesia were to a great extend inspired and/or organized by social media debates, O'Donnell 2011

³⁶ Lessig 1999, p. 544

³⁷ Shapiro 1998, p. 19

In some cases, the internet's self-government might alter traditional public values only in its own sphere. This means that maybe online other values prevail than in the physical world. Can we allow this? In other words, can we allow not only a plurality of laws or rule systems, but also a plurality of values? On top of transnational orders, should we allow transnational value systems? And if we agree on the necessity for national governments to interfere in the process, how far do we want it to go? Do we want a completely state regulated internet? Do we want a multinationally regulated internet?

To answer these question one also has to take into account the background of this development of private regulation. In terms of ICANN, ebay and other online dispute resolution mechanism (ODR), one can easily make the point that they arose out of the necessity of the internet community to have a fast and functional way of dealing with disputes. But what if these ODRs, like other forms of alternative dispute resolution (ADR) lead to a compromise of justice?³⁸

In my assumption, nation states have certain responsibilities towards their citizens. Among these are the provision of ways to settle disputes, the installment of a body of rules which govern disputes among people and the provision of a way of enforcement of rulings on these disputes. Also they are responsible to secure peoples freedoms and administer justice. This, together with the monopoly of force, makes states directly responsible. Also, the nation states are liable to their citizens. That means they have to attend to people's needs for dispute resolution. Lastly they are legitimized, ideally by democratic processes.

But even non-democratic states (ideally) have the aforementioned responsibilities. Shifting the drafting and enforcement of regulations to private entities lifts these responsibilities from the state and turns it over into private hands. But private entities do not share the same amount of responsibility nor liability towards the governed people. They are responsible only to their shareholders.³⁹ This shift, if not tackled by the states, results in a reduction of power for nation states and an increase in power for the private sector. Therefore we face a serious challenge, namely if nation states, especially democratically organized ones, are allowed to stand by and watch or if they have to intervene at one point? In the latter case, at what point?

VII. Conclusion

This short article deals with a great many different and highly disputed issues. In terms of the nation state and transnational legal orders I have not offered a solution to these issues and have not even tried to do so. Accordingly I expect some readers to already dismiss the premises of my paper. But, assuming that the premises are established (and in order to do so I strongly point to the given references), the points made are worth considering.

³⁸ Roberts 2005, p. 23 downer part, footnote 119, 120

³⁹ This leaves aside the question of non-profit online communities, which make rules for themselves.

Here the question has to be formulated the other way round. If communities represent a large amount of people, can we consider them to be democratic entities and do we have to consider changing real space regulation according to the rules which arose in these communities?

Do we want this development to go further? Do we want private actors, which are responsible to nobody or only to their shareholders, rather than governments, which are responsible to their people, to be the ones regulating our (digital) lives?

As I have shown, the answer cannot be simply one or the other. In some cases private regulation functions very well and is accepted by users (e.g. ICANN's and ebay's dispute resolution mechanisms). In other cases the implications are more frightening and undermine user's traditional freedoms and generally traditional notions of justice and fairness (e.g. DRM and fair use). Is it possible to keep the good parts of private orderings on the web and get rid of the bad ones? Or are both too interconnected to be dealt with separately? All these questions are unresolved and have to be investigated further. But in any case, the task at hand cannot be dealt with by individual national governments, but only in an international context.

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