JURISDICTION IN CYBERSPACE

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I. BACKGROUND: JURISDICTION AND TERRITORIAL BORDERS

Ever since the emergence of nation states, the exercise of judicial, prescriptive and enforcement jurisdiction has been closely-linked to the concept of territoriality and a simple (if not simplistic) syllogism reveals the reason for this nexus: the assertion of jurisdiction is an expression of state sovereignty; territoriality is an indispensable ingredient of state sovereignty; hence, jurisdiction must be closely related to, if not anchored in, territoriality. This finding, already inherent in Ulrich Huber’s Seventeenth century *De Conflictu Legum Diversarum in Diversis Imperiis*,¹ and introduced to the jurisprudence of the United States by Justice Story in a Supreme Court decision more than 180 years ago,² produced at least two rules: first, every state may exercise control over persons, things and conduct within its territory; and second, no state has such regulatory power over persons, things and conduct outside its territory.

In times when geographical space, distance and borders limited human activity, these rules were perceived as both workable and, for the most part, legitimate.³ As territorial boundaries lost in significance, however, this perception changed. With markets no longer confined to national borders and with foreign conduct affecting local interests, jurisdictional rules premised on the concept of territoriality have been increasingly criticised as providing neither workable nor fair solutions. Prompted by the need to adequately address these developments, changes did occur, such as the extension of domestic jurisdictional rules to conduct occurring in foreign locales when that activity produced local damages.

² The Apollon, 22 US (9 Wheat.), p 362, at 370 (1824): “The laws of no nation can justly extend beyond its own territories except so far as regards its own citizens.”
³ They were never absolute. See “The Case of the SS Lotus – France v Turkey”, (1927) PCIJ Reports, Series A, No. 10, in which the Permanent Court of International Justice held that a state may sanction a person’s conduct who acted abroad but produced local injury. The text is also available at: http://www.worldcourts.com/pcij/eng/decisions/1927.09.07_lotus.htm.
While this approach to include the place of effects for (prescriptive) jurisdictional purposes led to the regulation of foreign conduct, and to conflicts that such extra-territorial regulation entails, it still focuses on the construct of territory as such. Extra-territoriality understood this way is a mere corollary of the notion of territoriality in a world in which activities with cross-border impact have become common. However, not only the practical ramifications of “extra-territoriality” – which is the interference with foreign regulatory authority – have been challenged; its theoretical foundations have been called into question as well.\(^4\)

With the advent of the Internet, even more fundamental doubts arose about the wisdom of traditional jurisdictional thinking. These doubts were premised on the assumption that cyberspace is an idiosyncratic space, not susceptible to outside regulation. As a consequence, normativity would, instead, evolve within a de-centralised system of self-government, based upon a pure contract theory of law-making.\(^5\) Even observers not associated with this libertarian approach initially argued that any attempt to adapt the existing jurisdictional models to this medium would inevitably fail because the theoretical foundation itself, i.e., the territory- (state-) based concept, is inapt to capture and adequately resolve the jurisdictional questions that occur in the Internet environment.\(^6\)

Of the many jurisdictional facets of cyberlaw, which these considerations may affect, this chapter will explore three settings. It will initially examine the viability of state-based jurisdictional rules governing transnational disputes which arise out of Internet activities and which often implicate competing core political values (Section II). The inquiry will then shift to areas of law that to date have generally received less public policy attention. The focus will be on the evolution of norms through private ordering in the commercial Internet environment. It has been argued that this environment is fertile ground for the evolution of transnational legal regimes which are largely independent of state input and control.\(^7\)

\(^4\) For an insightful account of these challenges which are fuelled by scholarship within a wide range of disciplines, see Hannah L Buxbaum, “Territory, Territoriality, and the Resolution of Jurisdictional Conflict”, (2009) 57 American Journal of Comparative Law, p 631, at 632–636.


\(^7\) Thomas Schultz, “Carving up the Internet: Jurisdiction, Legal Orders, and the Private/Public International Law Interface”, (2008) 19 European Journal of International Law, p 799, at 829 et seq.