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Introduction: Internet Governance and the Resilience of the Nation State

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Newton's Third Law of Motion: Force and Counterforce

The end of the state as we know it is not in sight yet. Perhaps rather than being in decline, the nation state is propelling towards its heyday – a period of its greatest grip on the popular imagination, witnessing a sharpening of national consciousness and the hardening of national frontiers. The dramatic rise of anti-globalisation politics, the recent re-creation of border controls on innumerable frontiers across Europe, the tightening of immigration controls, the upsurge of nationalist parties on both sides of the Atlantic, the independence movements of nations within nations and the emergence and expansion of the regulatory state in the last two decades suggest that the sovereign nation state is far from being a historical period that we may now study from a comfortably detached post-Westphalian perspective.[1] The 'post-Westphalian' label is unfortunate if construed as validating the myth of Westphalia; see discussion later in the chapter. This is not to dispute that contemporary processes of globalisation have shifted power and decision-making to spheres below or beyond the sovereign nation state and that much 'governance' is located outside of 'government'.[2] Rather, the collection observes the resilience of the state within and against the processes of globalisation in the particular context of internet governance. One is not incompatible with the other; at times they have gone hand in hand, as two sides of a coin. The intense period of internationalisation in Europe during the *belle époque* – from the 1870s until the First World War – was accompanied by an equally intense period of nation state building.[3] The emergence of cyberspace as a global communication network that permeates everyday life to an unprecedented extent has not seen the nation state shrivel, but rather its reassertion and repositioning as a global and local political and legal actor within online governance, albeit not the only one and not without serious legitimacy concerns.

According to Newton's Third Law of Motion for every force there is a counterforce of equal magnitude and in the opposite direction, which in the physical realm means that all forces are interactive rather than unidirectional. Every action triggers a reaction; these are two sides of a coin, a single interaction, within which it is even irrelevant what is the action and what is the reaction. In the socio-political realm, Foucault's ideas on power and resistance invoke a similar necessary duality between social forces:

> Where there is power, there is resistance, and yet, or rather consequentially, this resistance is never in a position of exteriority in relation to power . . . [reflecting the] strictly relational character of power relationships. Their existence depends on a multiplicity of points of resistance: these play the role of adversary, target, support, or handle in power relations. These points of resistance are present everywhere in the power network . . . . Resistances do not derive from a few heterogeneous principles . . . they too are distributed in irregular fashion: the points, knots, or focuses of resistance are spread over time and space at varying densities, at time mobilizing groups of individuals in a definitive way, inflaming certain points of the body, certain moments in life, certain types of behaviour.[4]

Force and counterforce, power and resistance – this is a theme that captures some of the thinking behind this collection, both in substantive and methodological terms. Substantively, the collection seeks to unpack the relation between the internet as a global communication space (or online communities) and the Westphalian nation state (or national communities) as two oppositional and at the same time co-constituting forces in the context of internet governance – namely that national consciousness exists in opposition to a global or local Other. The internet is a force upon the state as much as the state is force or power upon the internet. By the same token, resistance to each force flows from the other. Resistance from the online community to state-based normativity manifests itself in multiple ways, often simply through the use of global platforms such as Uber, AirBnB, Facebook, Snapchat, and other social networking sites; or more confrontationally and intentionally through online delinquency, such as piracy, offensive and subversive speech or hacking; or through the deliberate evasion of state-based regulatory oversight on the dark web via strong encryption. Anonymity generally is a form of resistance to corporate or state control and explains the intense legal battles around encryption and surveillance.[5] This is not to say that these actions are politically motivated, but simply that their effect is one of resistance to state control and oversight.[6] Yet, resistance

has also flown from national communities and their norms to the apparent lawlessness and unboundedness of cyberspace; 'cyber access and use ... [is] chaotic, reinforcing global anarchy (as understood in international relations). No one is in control.'[7] This perception of the online chaos has triggered, and been used to justify, significant efforts by state regulators – both in the East and West – to reshape and remake the internet in their national image. It is the latter resistance in particular which this collection examines.

Methodologically the collection tackles this by venturing onto interdisciplinary grounds, and here too there are strong tensions between different narratives and disciplinary discourses on cybergovernance, with each implicitly making claims of significance, authority and 'truth' vis-à-vis the Other (in the best academic spirit). The more-or-less 'comfortable' positivist law perspective (see Part II) is confronted with a political science critique of the 'freedom versus sovereignty' narrative in cybergovernance as being strongly tailored to US foreign policy objectives (Aronczyk and Budnitsky's chapter). This narrative underlies the human rights discourse lawyers and policy makers routinely tap into on the assumption that it expresses neutral and universal values (see Kohl and Rowland's chapter and Berger's chapter). Similarly, the human geography and political theory discussion show that the nation state is neither the most important producer of identities (Warf's chapter) nor the only regulatory voice on the internet that may be legitimised by democratic credentials (Scholte's chapter). Such perspectives cannot but rock the boat of traditional legal discussion on internet jurisdiction based on public international law within which the state remains the key legal actor at the domestic and international levels. By the same token, those legal viewpoints are instructive in highlighting the continuing regulatory legacy of the state and how they have – more or less quietly – started to share cyberspace between themselves through virtual borders, which are by no means the prerogative of China and other illiberal states. Old habits die hard. Last but not least, this collection shows that friction between alternative framings of the debate is not limited to interdisciplinary conversations, but is also the staple diet within disciplines, as it should be. The idea underpinning the broad choice of discourses within this collection is to 'explode' the narrow legal debate on internet jurisdiction and, more generally, assumptions of the state's potency or impotency and legitimacy or illegitimacy in cyberspace.

The Resilience of (State) Law – Law as the Maker and Moulder of Society

The focus of this collection on the resistance of state law to 'cyberanarchy' may appear to run counter to much internet governance literature that maps – in line with broader analysis of law and regulation in the context of globalisation – emerging regulatory patterns in response to the misfit of nation state law with cyberspace, beyond and outside the Westphalian paradigm.[8] Certainly, the misfit cannot be doubted: state laws are territorially delimited and assume the necessity of gatekeepers, and are thus out of tune in an environment that is *prima facie* global and profoundly decentralised – an end-to-end design with 'empty' pipes in between. Thus the resultant scale and scope of online interactions do not easily map onto traditional state law. As the internet undermines, in terms of practicalities and legitimacy, nation state law,[9] it also weakens the state itself. Consequently, it is argued, concepts of network governance or multi-stakeholderism, which hold currency in respect of, for example, private digital network or internet infrastructure decision-making, account more fully for emerging regulatory activity than does state-based legal discourse.[10] This perspective on internet governance is not unfair and only partly challenged here. Rather, the point made through this collection is that state regulation – much like any institutionalised legal system – is considerably more resilient than one might have expected in the light of the severity of the challenges it faces.

That resilience is facilitated by the role law plays in proactively making and moulding the social, political, economic or technological realities it encounters and within which it then operates and orders. Law is not simply a mirror image of those realities, but also produces them – thus requiring to look 'reflexively at the impact of law on law itself.'[11] This is played out online (as well as offline) at different levels. At the most obvious level, it shows through in those many instances where online interactions have already absorbed legal norms, and so there is more or less large-scale compliance embedded in online behaviour: Google Books are no longer fully accessible[12]; consent notices precede the tracking of user behaviour through cookies[13]; and online terms that govern the relationship between users and providers and users amongst themselves have absorbed many regulatory expectations. Much of law absorption occurs behind the scenes, not obvious to online participants, such as the blocking of content that may be illegal under copyright or trademark law, under child protection legislation or hate speech regulation, by a number

of intermediaries such as ISPs, search engines, social networking platforms or online marketplaces. Behind-the-scene incorporation of law not only hides the continuing regulatory impact of state-based normativity but also obscures law's effect on cyberspace and its changing nature, including its balkanisation through virtual borders (see Svantesson's chapter).[14] Those cyberborders through which 'states work to carve out their autonomy in the online world'[15] are for most intents and purposes invisible to the ordinary users whose experience of the internet continues to be relatively seamless. Only occasionally, and mainly limited to copyright, will users be presented with an actual notice that the requested content is unavailable in the user's state of residence, and (geo)blocked.[16] In any event, such law absorption shrinks the gap between the to-be-regulated social stratum and legal expectations, thus making the subsequent application of law less onerous.

There are other creations of Westphalian law so deeply absorbed in the socio-legal fabric and consciousness that they are barely recognisable as legal products, certainly not mirrors. Most obviously, the corporation (and its web of sister corporations around the globe, economically united and yet legally disjointed) is a state-based legal construct that profoundly shapes our economic and political reality, domestically and internationally. Online it is transnational corporate actors that are the dominant players which make and structure interactivity. Although they seem to begrudge and resist state regulation, they are creatures of the state, and it is the state-based legal system that facilitates their easy reign at the global level. Also their characterisation as *private* actors, free of the constraints imposed on public bodies, is far from a natural or objective reality which law merely mirrors. Quite the reverse, it is a legal product that emerged in the nineteenth century and which, it has been argued, 'implements the liberal economic conception of private interactions as occurring in an insulated regulatory space . . . [and] seeks to establish a protected space for the functioning of the global market. Thus it has been argued that the public/private distinction operates ideologically to obscure the operation of private power in the global political market.'[17] Despite long-standing critical perspectives on this public–private sphere division in international law, its ideological heritage and effect of creating governance lacunas and thus its normative undesirability,[18] it is still deeply anchored in the legal consciousness and thus only exceptionally challenged in state legal fora, let alone disturbed.

The English case of *Richardson v. Facebook* (2015),[19] which illustrates these points, concerned defamation and privacy claims against Facebook

(and Google) for not removing an offending third-party post from their platforms. The self-represented claimant Mrs Richardson failed because, according to the court, she had failed to appreciate that the proper defendant in the action should have been Facebook Inc, the US parent company, rather than its subsidiary, Facebook UK Ltd. It was the former rather than the latter that had responsibility for the content of the site, even when the activity occurred in England. The legal personality of each corporation in a corporate group – as created *by state law* – provided a shield *under state law* against legal accountability by Facebook in this case. From Mrs Richardson's perspective, it matters little whether Facebook's name ends in Inc or Ltd, given that the provider, as known to the world and its networking community, is Facebook, the global brand. Its scattering into national units when regulatory expectations are raised by its community is an evasion technique, which the nation state facilitates and only occasionally retrospectively disallows.

Warby J also held that the claimant had not appreciated that it was 'plainly absurd' to argue that a company such as Facebook was a 'hybrid public authority' and thereby *directly* answerable under human rights law.[20] As it is a for-profit company, it acts in its own (private) interest and not in the public interest; therefore, it cannot be expected to act in the public interest.[21] Within mainstream legal analysis such assertions, presented as arguments, are employed and perpetuated without batting an eyelid. It is irrelevant that the definition is tautological and conflates the 'is' and the 'ought'. In substantive terms it is again the state that shields corporate actors from legal accountability. Under the conventional (Westphalian) human rights framework, it is the state through which human rights obligations are filtered before they may or may not reach corporate (private) actors as potential duty bearers. Indeed, the public–private division means that corporations are not *prima facie* bearers of human rights duties at all; quite the reverse, as private actors, they are their beneficiaries. They can exert human rights privileges against state 'interferences' – that is, regulation – and frequently do so successfully. For example, in the US case of *Search King Inc v. Google Technology Inc* (2003), Google successfully invoked the First Amendment free speech protection in respect of its search ranking, as expression of opinions, against a tortious interference complaint that it had manipulated its ordinary algorithm results vis-à-vis the claimant's website.[22] Equally, Facebook has been in the media limelight about its own commercial censorship decisions, not at all prompted by government demands.[23] Yet, no legal action would lie because, as a private actor, it

is free to 'censor' as it pleases, even when the market fails for various reasons and users cannot simply walk away to alternative providers. Corporate censorship would not even be classified as 'censorship', which is tied to public power and so too is a product of the Westphalian order. Thus structural ordering by the state has significant consequences for the accessibility of online content and the extent to which restrictions on that availability may be disputed or debated in a public forum, such as a court.

It is no coincidence that in *Richardson* the characterisation of Facebook as a 'national' and 'private' legal creature was challenged by a self-represented claimant, that is, someone whose views on justice are not fully institutionalised by state law, which explains her 'plainly absurd' focus on substance over form. Warby J commented on Mrs Richardson: 'She is clearly an intelligent woman. She has been able to grapple coherently, even if not always compellingly, with the challenges of the relevant procedural and substantive law.'[24] Mrs Richardson's core failure was that she brought an external perspective on law, one less steeped in, and restricted by, law's self-generating existence and legitimacy. So the judge's 'argument' that a corporate body is not public because it acts in its private interests (and thus ought not to be made to act in the public interest) is entirely self-referential from an external perspective on law, but perfectly reasonable from an internal law perspective. Tamanaha captures the circular existential dependency of law on its recognition as law when he states: 'Law is a "folk concept", that is, law is what people within social groups have come to see and label as "law".'[25] In *Richardson* the judge perpetuated, as he arguably must, the folk tale of state law by holding that human rights duties can only attach to those bodies as (traditionally) recognised as attaching to them, namely agencies of public power or state agencies. Recognising Facebook as a quasi-public body would have amounted to recognising (and thereby creating) 'legal' or public powers in bodies such as Facebook. For an insider, such as a national judge, such recognition would be extraordinary. This then explains why law, as embedded through past legal practice, does not easily change or transform, even in radically changed socio-economic circumstances, and especially not on matters that go to the heart of what is recognised as law properly so called, namely who is making, judging and enforcing it.

Yet, such explanation only holds water so far. *Richardson* itself shows that there may be challenges to what is or is not accepted as law and its internal coherence. The internet regularly generates clashes between state law and normative expectations by online communities. Such clashes

tend to arise because of a lack of obvious comparability between online and offline activity, which make for difficult transfers of legal expectations. For example, is an offensive comment to a political story on an online news service comparable to the same comment made in a pub? This mismatch may give rise to resistance to state law and challenges to its legitimacy through, for example, non-compliance,[26] as mentioned earlier. For the claimant in *Richardson* this was not an option, so she had to choose the formal avenue of court proceedings. Through her eyes, Facebook's closest offline predecessors – sharing a comparable dominance in mass communication and resultant influence in the production of public opinion[27] – may have been TV companies, such as the BBC, which in fact has 'public service' obligations and is, despite its global reach, accountable under local law for local programmes, regardless of where the editing decisions have been made. At the same time, Facebook and the BBC are indeed very different in terms of content, content providers, purpose, and so on, and this shows the difficulties of trying to analogise from the past and the reason why the internet creates confused and conflicting normative expectations. Importantly, whatever the particular judicial decision, through each one of them, (state) law reasserts itself, albeit renewed, and makes and remoulds regulatory expectations in its old image. Having said that, and as noted earlier, much interaction of law and social practice does not reach the court room and is resolved on the ground, often in much less affirmative ways.

For the purposes of this collection and the online governance debate more generally, the aforementioned cases underline that the state and its legal machinery impact cyberspace not only, or even mainly, through negative proscriptions that make themselves felt as censorship on communications or restrictions on trading, but also more widely and proactively through creating the wider socio-legal environment consisting of actors, property, markets and harm,[28] all of which are essential for our understanding and participation in that world. Furthermore, Westphalian normativity is also behind formulation of legal aspirations, such as human rights language and, more critically, the framework to enforce those aspirations *against the state* as well as *through the state* against individuals and corporate actors. Paradoxically, in a cyberworld where the state is ineffective and de-legitimised as the 'supplier of effective governance',[29] human rights are robbed of their object and enforcer. All this should help to contextualise online governance arguments about the weakening of the Westphalian nation state and its (partial) replacement with alternative forms and understandings of governance: different

forms of self-regulation or civil regulation, including multi-stakeholder codes,[30] online dispute resolution and technical regulation as, for example, in the cases of the IETF and ICANN and its Uniform Dispute Resolution Procedure.[31] Although the latter developments make inroads into the Westphalia paradigm, it remains deeply present and enmeshed within our social consciousness and socio-legal frameworks and activities, offline as well as online.

Reconstituted Power Dynamics: Individuals, Corporate Actors and States

In many ways *Richardson* is a very ordinary case which in its banality captures the symbiotic relationship of the state and the corporation within which the latter is often protected from the regulatory expectations of the online communities they create. There is also national law on intellectual property, trade secrets and contracts, as well as commercial, company and competition law, which in combination with international trade agreements, generally works in the corporate interest, offline as well as online. Of course, this is not a one-sided bargain, there are also pay-offs for the state in this relationship.[32]

Furthermore, corporate actors have not always been shielded from responsibility as shown by the aggressive extra-territorial regulatory assertions made by states over global online players for political or economic reasons. In relation to the latter, it is the conflicting interests between local and global economic players which make the line of protective regulation more ambiguous and twisted. Given that the information economy is fuelled by big data and powerful network effects, companies 'like Amazon and Google will continue to soar. Unlike the situation in the industrial age, however, their competitive advantage will not rest on physical scale. . . . Scale still matters, but it has shifted. What counts is scale in data.'[33] These companies have squeezed medium-sized local competitors out of the online landscape.[34] Such economic competition has manifested itself in heated disputes involving online platforms, such as eBay or Google, that financially gain from the misuse of trademarks held by 'old world' industries and brands in the EU, such as *Google France SARL and Google Inc. v. Louis Vuitton Malletier SA* (2010)[35] *L'Oréal SA and Others v. eBay International AG and Others* (2011).[36] Similarly, the right to be forgotten, as contested in *Google Inc v. Agencia Española de Protección de Datos, Mario Costeja González* (2014),[37] is only partly about dignity and online privacy, and largely about the

economic value of data that has caused wrangling between online and offline, local and global actors (see Kohl and Rowland's chapter). Finally, economic competition between local and global online players has also occurred, in a very direct way, in the highly lucrative context of gambling, where protectionist regulatory stances by states against foreign online providers have come into conflict with free trade commitments (see Hurt's chapter).

These disputes explain the hostile narratives by corporate actors about the state's irrelevance and/or illegitimacy in cyberspace, despite its key role in underwriting the existence and wealth of corporations. For example, corporate antagonism towards the state shines through *The New Digital Age* (2013) by Google's Eric Schmidt and Jared Cohen:

> The Internet is the largest experiment involving anarchy in history. Hundreds of millions of people are, each minute, creating and consuming an untold amount of digital content in *an online world that is not truly bound by terrestrial laws.* This new capacity for free expression and free movement of information has generated the rich virtual landscape we know today. Think of all the websites you've ever visited, all the e-mails you've sent and stories you've read online, all the facts you've learned and fictions you've encountered and debunked. . . . Consider too what the lack of top-down control allows: the online scams, the bullying campaigns, the hate-group websites and the terrorist chat room. This is the Internet, the world's largest ungoverned space. . . . Never before in history have so many people, from so many places, had so much power at their fingertips.[38]

According to the authors, first and foremost, it is users that hold power in cyberspace, which is a space within which states neither govern nor are they entitled to do so. And this is not going to change fundamentally in the future: despite various attempts by states to impose their policies on cyberspace, the virtual domain will remain separate from the physical sphere and 'the virtual world will enable escape from the repression of state control.'[39]

As a broad proposition, the empowerment of the individual through the internet cannot be doubted and its effect has been shown on many occasions,[40] most dramatically by the role of social media during the 'Arab Spring' – even if it was far less effective in the post-revolutionary state-building phase.[41] The ability of the individual to bypass traditional gatekeepers of mass communication – via peer-to-peer online networks – for economic purposes (e.g. music or video piracy) or social production (e.g. Wikipedia) is well documented.[42] Cyberspace has also enabled the