

BOOK REVIEW

JURISDICTIONAL CHALLENGE OF THE INTERNET: TREATISE ON THEORY AND PRACTICE OF DIGITAL TURN

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Review of a book

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РЕЦЕНЗИЯ НА КНИГУ

ЮРИСДИКЦИЯ ГОСУДАРСТВА В ИНТЕРНЕТ-ЭПОХУ: ТРАКТАТ О ТЕОРИИ И ПРАКТИКЕ ЦИФРОВИЗАЦИИ В МЕЖДУНАРОДНОМ ЧАСТНОМ И ПУБЛИЧНОМ ПРАВЕ

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Friedrich Schleiermacher, the founder of the modern doctrine of hermeneutics — a philosophical theory about the ontology of understanding and the epistemology of interpretation — argued that the process of understanding a concept cannot be completed in principle. And yet, despite the movement in the eternal circle of the search for the true meaning, researchers inevitably advance in their understanding: they do not return to the point from which they have started. The process of cognition was gracefully depicted by the philosopher as a spiral (F. E. Schleiermacher, 1838, S. 30–31).

Apparently, the supporters of Friedrich Schleiermacher's theory would be satisfied and its critics would be convinced of the falsity of their counter-arguments if they chose the concepts of "jurisdiction" and "sovereignty" as the object of their analysis.

More than three centuries have passed since Jean Baden formulated the basic postulates of sovereignty of states (D. Lee, 2021), Hugo Grotius perfected them in the guiding foundations of his work *"De jure belli ac pacis libri tres"* (H. Grotius, 2001) and the leading nations of the "Western world"

adopted these principles as the basis for the Treaty of Westphalia.¹ Nevertheless, the problems of state sovereignty and the issues of defining jurisdiction did not disappear over time. On the contrary, scholars continued to develop their understanding of the concepts of “jurisdiction” and “sovereignty” in parallel with the progress of human civilization, instilling these concepts into the public consciousness. As a result, in the eyes of our contemporaries, they appear as axiomatic notions, i.e. to a certain extent self-evident concepts.

However, with the emergence of modern conditions for the existence of mankind, civil society and the state inevitably encounter different challenges. It changed many of the oldest legal institutions. The relatively young concept of state jurisdiction was no exception. All this contributed to the development of the new frontiers of this concept, deepening its meaning and completing a new round in the spiral of its study.

The main challenge of the 21st century for state jurisdiction is a new frontier in the life of mankind, namely the Internet. The creation of the international web network entailed erasure of the usual territorial boundaries of states and limitation of their jurisdiction. This problem formed the basis of Julia Hörnle's² study “Internet Jurisdiction: Law and Practice”, which is obviously a significant leap forward in understanding state sovereignty and jurisdiction.

While the problem of jurisdiction was earlier studied mainly from the standpoint of the general theory of law (jurisprudence), constitutional law, and the general part of international law, Professor Hörnle's book is a step toward exploration of the new frontiers in this area. Firstly, the author examines state sovereignty and state jurisdiction from the angle of the emergence of the recent technologies, e.g. cloud storage of data, Internet platforms, new formats of media spaces, etc. Secondly, the professor determines the task of lowering the course of the ongoing discussion from the futurological heights of theory, which results from the lack of clear understanding of jurisdiction in the context of digital law, to specific practical problems, e.g. particular cases, peculiarities of legal regulation, and current judicial practice. To achieve this task, the author limits the subject of research to relations governed by international public and international private law. Thus, Julia Hörnle chooses the interdisciplinary path of analysis of the problem, demonstrating that the issues of jurisdiction and sovereignty of a state equally arise both in relations between the subjects of international law (mainly states) and in relations complicated by a foreign element (in individuals' transnational relations). This is the first exceptional difference between Julia Hörnle's “Internet Jurisdiction: Law and Practice” and other publications on jurisdiction in the Internet era.

The second feature of this treatise follows from the first: the author demonstrates to the reader how to introduce the problems of digital law (more broadly, digitalization as such) methodologically in the context of the established doctrine of international public and private law. On this path, Professor Julia Hörnle is one of the first scholars, who takes an inquisitive reader by the hand and leads to the jurisprudence of modern times, Jurisprudence 2.0 with all its specific tasks and goals. This circumstance is especially noticeable when one observes how the author accompanies each chapter of the research with introductory provisions on a particular institution of private or public international law (legal regulation of contractual and tortious obligations with a foreign element in Europe, cyber-crime in international criminal law, etc.). Thus, the reader has the perfect opportunity

¹ To be precise, 373 years — from the date of the conclusion of the Peace of Westphalia at the end of the Thirty Years' War and 445 years — from the publication of “*Les six livres de la République*” by Jean Bodin, where the main postulates of the concept of sovereignty were expressed.

² Julia Hörnle is a Professor of Internet Law at the Centre for Commercial Law Studies at Queen Mary University of London.

to familiarize themselves with some basic ideas of international public and private law, in order to deepen the discussion of jurisdiction in the Internet space later.

Nevertheless, despite the presence of such introductory fragments, the book will undoubtedly be useful and sought-after by the most demanding experts and practitioners in the field of public and private law, because it contains a fundamentally new element of the collision of familiar institutions with the new digital reality.

The book will also be useful for the readership since it outlines almost the entire range of problems of digital law and does it in a polemical and provocative form. The author not only sets out the existing procedure for regulating the relations with international and digital elements but also raises many questions, the answers to which are yet to be found. Despite this, Julia Hörnle's book is undoubtedly a complete scientific work. Demonstrating such a positive dichotomy between the existing knowledge and future research tracks is the third feature of this work.

While conducting comparative legal research and discussing the legal experience of the European Union and the United States of America, the author always returns to English law, which is the fourth feature of this treatise. Therefore, there are a number of forecasts for functioning of particular legal institutions after Brexit in almost every chapter of the book in question. That is justified by the flagship positions of these jurisdictions in the development of digital law and the aggravation of many issues in connection with the formal legal difference between England and continental Europe.

Finally, the fifth feature of this publication is that the analysis of state jurisdiction in the Internet space in such a large-scale work is presented to the world scientific community for the first time.

Now, having formulated the theses that give a general description of the entire work, we will proceed to consider its specific parts to draw the attention of readers directly to the substantive part of the study.

All of the above general circumstances have determined the formulation of the question and the structure of the book "Internet Jurisdiction: Law and Practice" in the following manner. The book consists of an introduction, eleven chapters, and a conclusion. The first chapter declares basic principles of the subject and is devoted to determining a coordinate system of the study, highlighting the general doctrine of state jurisdiction in the context of the Internet Jurisdiction Challenge. The next five chapters are intended to describe the issues that are posed by the development of the Internet environment in public international law. The next five chapters are dedicated to the issues of private international law.

The set of chapters on public international law opens with a theoretical and fundamental one, "Head in the Clouds: The Clash Between Territorial Sovereignty, Jurisdiction, and the Territorial Detachment of the Internet". In this chapter, the author attempts to define the concept of "jurisdiction" from the perspective of public international, private international, criminal, and administrative law. The interrelation and correlation of the concepts of jurisdiction and sovereignty are established, in order to then demonstrate the transformations that are caused by the direction to globalization, i.e. changes in the role of law and the state. The author seeks to take a critical look at the dependence of state sovereignty on its territory and identify the objective grounds for deconstructing such a connection, analyzing cases of precedent importance that have been developed by courts in the 20th and 21st centuries as well as legal acts of the UK, the USA, and the European Union. The author convincingly demonstrates the trend of expanding the extraterritorial hand of the Leviathan, both in the common law system (including the United States) and on the continent.

Despite the desire to expand its influence regardless of the borders, the modern state does not always have enough mobility in comparison with transnational corporations for implementation of

its regulation in various jurisdictions. The state is in an especially uncomfortable position when it tries to expand the mechanism of its coercion in the Internet environment. Numerous users are outside the zone of access of state coercion: it is often impossible to enforce a court decision or decision of an administrative body against them. That is why the state has to abandon total control of the Internet space in favor of pinpoint control of individual gatekeepers — Internet intermediaries who regulate user behavior on the basis of their internal policies. Thus, the state has the opportunity to exercise indirect, decentralized control over the people's behavior using the services of leading media companies, thanks to the power to bring such corporations to legal liability and apply various restrictions on them. In the chapter "The Jurisdictional Challenge Answered — Enforcement through Gatekeepers on the Internet", the readership can observe which Internet intermediaries it is advisable to control by the state and learn about comparative legal experience of different states in regulating Internet gatekeepers' activity.

The next chapter "Criminal Jurisdiction — Concurrent Jurisdiction, Sovereignty, and the Urgent Requirement for Coordination" was co-authored by Julia Hörnle with Elif Mendos Kuskonmaz. The problem of conflict of jurisdictions in determining the extraterritoriality of sovereignty becomes especially acute in investigation of crimes, during court proceedings and execution of convictions. The chapter examines the basic principles of international law that allow to solve this problem when defining criminal jurisdiction — the principles of international comity, reasonableness, and *ne bis in idem*. The authors analyze which model of state jurisdiction is the most optimal for assigning responsibility for committing cyber-crimes, simultaneously defining the scope of this concept. The relevant rules of the European Union were chosen as an empirical basis.

A more specific study of the issue of criminal jurisdiction is contained in the chapter "Jurisdiction of the Criminal Courts in Cybercrime Cases in Germany and England", which analyzes the domestic rules of the respective legal systems.

Specialists in criminal procedure law will be keenly interested in the chapter "Digital Investigations in the Cloud — Criminal Enforcement Cooperation", which describes the investigative steps to collect evidence based on computer data and data posted in the cloud, as well as during the exchange of data in the modern communication services (Facebook, Twitter, WhatsApp, Skype, Snapchat, Instagram, TikTok, etc.). The author considers international cooperation in digital investigation, the forms of which can be found upon a closer examination of the chapter. The chapter also analyzes the possibility of expanding the jurisdiction of administrative bodies to investigate crimes related to computer data. In this regard, the author could not but touch upon the issue of national localization of databases that can be used in the process of commissioning a criminal act.

A logical continuation of the study is dedicated to the protection of personal data in the context of collisions arising between the regulatory bodies of different states, which monitor the observance of administrative laws and conventions in this area. The author supposes that the choice of the applicable law to resolve a dispute merges with the determination of the competent court. Considerable attention is paid to the analysis of the provisions regarding the new General Data Protection Regulation (GDPR) and the practice of the European Court of Justice in this part. Given the erasure of territorial boundaries on the use of personal data, we are confident that the chapter "Data Protection Regulation and Jurisdiction" will be of interest to a universally wide range of readers.

The private international law section of the study is opened by the chapter "Civil and Commercial Cases in the EU: Jurisdiction, Recognition, and Enforcement, Applicable Law — Brussels Regulation, Rome I and II Regulations" written by Julia Hörnle and Ioannis Revolidis. It examines the general provisions of European private international law and its adaptation to address the issues of the

new digital reality. This section of the book could be designated as an introduction to the issue of private international law for people who are just starting to immerse in the problem of jurisdiction in digital law.

After considering the basic principles of European private international law in terms of regulation of contractual and non-contractual obligations, determination of the competence of a court to consider a dispute, and enforceability of a foreign court decision, a reader is then invited to look at the regulation of these issues in the US conflicts of law. The chapter “Conflicts of Law and Internet Jurisdiction in the US” specifically pays attention to judicial practice related to the emergence of new issues of the Internet regulation. An analysis of institutions of private international law in the United States and Europe in terms of the Internet will allow the reader to fundamentally deepen their knowledge of private international law under these jurisdictions, as well as to understand the nature of relations on the Internet that create the need for the construction of special principles and rules.

This desire is especially noticeable in consumer law since most commercial transactions are carried out via the Internet with ordinary consumers as counterparties. Besides, this necessitates taking into account their interests and the specifics of relations when formulating rules, including private international law. These circumstances are detailed in the chapter “Consumer Protection and Jurisdiction”.

Another side of the consumers’ behavior on the Internet is the building of personal non-property relationships in the media space. The need to protect data and the ability to establish defamation of one’s personality also require a new understanding in connection with the emergence of the Internet environment. The chapter “Conflicts of Law in Privacy, Data Protection, and Defamation Disputes: German and English Law” sets out the main trends in this area of regulation. While earlier in the chapter “Data Protection Regulation and Jurisdiction” the author intended to consider the public (administrative) aspects of personal data protection, the currently observed section examines the concepts of such protection based on the experience of England and Germany.

The set of chapters on private law ends with a chapter devoted to the regulation of another intangible asset of individuals and organizations – intellectual property. Moreover, due attention is paid to both registered intellectual rights (trademarks, patents, design rights) and unregistered rights (copyright) under the law of the European Union and the UK. Particular attention is paid to the regulation of domain names due to their undefined legal status.

In conclusion, Julia Hörnle formulates the main problems posed by the current jurisdictional challenge and possible ways to resolve them. The break of the link between sovereignty and territory requires introduction of new connecting factors. At the same time, decentralized gatekeepers of the Internet and quasi-legal systems demand a revision of the classic postulates of the Westphalian state. There is no doubt that the fundamental and comprehensive study of jurisdiction in the era of digitalization and the rapid development of the Internet, undertaken by Professor Julia Hörnle, opens a new page in the three-hundred-year history of the analysis of state jurisdiction and sovereignty, bringing them to the optimal level of the digital paradigm of legal development. This study is recommended for students, young researchers and specialists in the field of theory of law, international law, international criminal and private international law, as well as practicing lawyers in the respective fields.

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