

The Diminishing State in Global Law

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1. Introduction

The conference at which this presentation is given is entitled ‘The Future of Global Law’.² This topic raises an evident challenge – that it may be difficult to discuss the future of a field, when we do not have a clear idea of its present. But the starting point of my remarks is that we should take the term ‘global law’ as less of a clearly defined category, and more of an invitation. It is an invitation to broaden our horizons, and think beyond the confines of national and international law, to be open to a wider variety of the forms of law and law-making which support and constrain exercises of power across the globe. This is, to me, a fundamentally important move, because there is a danger otherwise that forms of legal regulation are obscured by our frame of reference and our disciplinary training, which may be as specialist public or private international lawyers or may take some other shape. But in opening up our eyes to wider forms of regulation, we should also be aware of the danger, which perhaps has a tendency to permeate some of the literature on global law, that we confuse *analytical* support for the idea of global law with *normative* support for global law. Our openness to the world of global law must come with the same critical eye that we should apply to all forms of law.

Although the topic of this lecture concerns ‘The Diminishing State’, the starting point of any discussion about global law is the fact that the state remains the most important actor in global law-making. At least since the Peace of Westphalia in the mid-seventeenth century, the territorial sovereign state has dominated our conception of the global order. Despite the vast variety of ways in which different political and legal and social orders are arranged around the world, from the perspective of public international law they are all assimilated to a single and

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common category, the ‘state’. It is a further fundamental principle of modern public international law that, regardless of the type of government or size of territory, population, economy or military, all states are in a formal sense equal, in that they have the same legal capacities, the same ‘sovereignty’.³

The role of international law, classically conceived, was at least principally to serve as a law of coordination of relations between sovereigns, a kind of private law between states. Although many argue that international law has also taken on some public law characteristics during the twentieth century, as discussed further below, this traditional perspective continues to influence some views on international law. Importantly, the sovereignty of states in international law does not just imply their legal identity on the international plane, their sovereign equality – it also implies a domain of sovereign authority, including particularly a protected ‘internal’ sphere.⁴ When we look at a standard map of the world, what we see are lines marking national boundaries, and countries shaded in different colours reflecting their distinct internal characteristics, including their diverse national laws. In other words, what we see when we look at a standard map of the world is *classical international law*. The division of authority over the globe into territorial sovereign states shapes our basic understanding of the world, and of law within that world – but in so doing it also potentially constrains our understanding of the world.

This idea of the state has, of course, always been to some extent more of an abstract concept than a matter of practical reality, but it has nevertheless provided much of the conceptual foundation of modern international law. What I would like to discuss today are the increasing challenges to the role of the state, coming from two directions.

The first is from above, and it is the challenge of international or supernational regulation, which is shrinking the domain of state authority. The second is from below, and it is the challenge of transnational private regulation, which is growing in practical importance, and to which state regulation is struggling to respond.

³ See classically eg Hans Kelsen, ‘The Principle of Sovereign Equality of States as a Basis for International Organization’ (1944) 53 *Yale Law Journal* 207; UN Charter, Article 2(1) (“The Organization is based on the principle of the sovereign equality of all its Members.”).

⁴ For example, the UN Charter provides, in Article 2(7), that “Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state”. The *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations* (General Assembly Resolution 2625 (XXV), 24 October 1970) further provided that “No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State.”

2. International or supernational regulation

The first challenge is perhaps the one that is more familiar to us. It reflects the fact that international law in its various aspects has expanded to cover many questions which would traditionally have been viewed as matters of state domestic discretion. There are a wide range of different issues which could be discussed here, but I would like to highlight three.

First, perhaps least controversially (at least in the western world), international human rights law, and the rise of individual rights under international law which are opposable to states. In classical international law, people were only accommodated indirectly through their territorial location or through links of nationality which bound them as individual subjects to the sovereigns who formed the subjects of international law. International law was only the law between sovereign states – it could undoubtedly affect people but individuals did not have direct rights or obligations under international law. Individuals could be the subjects of diplomatic protection, a form of legal claim by their state of nationality, but the claim would be brought by the state in vindication of its own rights under the international legal order.⁵ In modern international law individuals are generally viewed as having direct rights, and they can often pursue those rights directly through international mechanisms such as the European Court of Human Rights. The increasing pluralism of subjects in international law means that the relationship between the state and its own citizens is no longer only mediated by domestic law, within the control of the state, but also by international law.⁶

A second way in which the domain of state authority is diminished from above is through the increased role of international organisations – a further form of pluralism of actors. Such organisations derive their authority from state consent, so ultimately they only have the powers that states have chosen to give them, but once consent is conferred it may be difficult to withdraw, and international organisations may take on a life of their own – they may have both legal personality and independent agency in the modern international legal order.⁷ Thus, the UN Security Council imposes obligations on all states through its emerging practice of

⁵ See eg *Mavrommatis Palestine Concessions Case* (1924) PCIJ Rep Ser A, No 2; *Barcelona Traction, Light and Power Co. Case* (Belgium v. Spain) [1970] ICJ Rep 44, [78]-[79].

⁶ See eg Kate Parlett, *The Individual in the International Legal System* (CUP, 2011).

⁷ See classically *Reparations for Injuries Suffered in the Service of the United Nations Case* (1949) ICJ Reports 174. See generally eg Roland Portmann, *Legal Personality in International Law* (CUP, 2010); Janne Elizabeth Nijman, *The Concept of International Legal Personality – An Inquiry into the History and Theory of International Law* (TMC Asser Press, 2004).

legislating with respect to threats to international peace and security, like terrorism, requiring all states to take domestic action to implement these obligations. This resembles less the conduct of an independent organisation and more the regulatory action of a public authority. Other international organisations such as the International Monetary Fund may not have a formal law-making authority, but they have economic power which they can wield to require states to adopt certain domestic measures, as the host country of this conference knows better than most. In each case the international is increasingly intervening in matters of domestic law-making.

A third context in which this occurs is through international investment law, a topic addressed by other presentations in this conference, which hybridises public and private actors and forms of legal and institutional control.⁸ Again, this ultimately derives from the consent of states, but states have in general shown quite a strong willingness to agree to investment treaties promising defined standards of treatment to foreign investors, as a means of attracting foreign capital. To put this another way, states have sold off some of their regulatory authority – or perhaps more accurately gambled some of their regulatory autonomy in exchange for possible future developmental benefits. A wide range of state regulations can be challenged on the basis of their compatibility with the requirements of international investment law, including domestic laws adopted to protect the environment, health, labour rights, or even human rights. Even more significantly, power over the enforcement of these standards is often given to private parties, both as claimants and arbitrators.

These developments are by no means uncontested. Particularly recently, states have shown a more skeptical attitude toward the benefits of international law and particularly international dispute resolution;⁹ new generations of investment treaties have sought to preserve more regulatory space for states and may question the legitimacy of privatised dispute resolution processes.¹⁰ But it remains true that the domain of state regulation has shrunk, under pressure from above.

⁸ See eg Alex Mills, 'Antinomies of Public and Private at the Foundations of International Investment Law and Arbitration' (2011) 14 *Journal of International Economic Law* 469.

⁹ See eg Campbell McLachlan, 'The assault on international adjudication and the limits of withdrawal' (2019) 68 *ICLQ* 499.

¹⁰ See eg Michael Waibel *et al* (eds), *The Backlash Against Investment Arbitration: Perceptions and Reality* (Kluwer, 2010); Malcolm Langford and Daniel Behn, 'Managing Backlash: The Evolving Investment Treaty Arbitrator?' (2018) 29 *EJIL* 551.

3. Transnational private regulation

The second and perhaps less commonly discussed challenge to the authority of the state comes from a different direction – the increased role of transnational private regulation. Recent decades have seen a very well recognised shift in *economic* power from the public sector to the private sector. It is by now a cliché to observe that many of the most powerful economic actors in the world are companies, not states. International investment law may have been set up to protect private investors from states, but in investment disputes the private party is sometimes (perhaps often) more powerful and better resourced, and state interests may appear to be at least as vulnerable as foreign investments.

Now a second and less commonly recognised shift is taking place: a shift in *regulatory* power from public to private. Private entities are gaining regulatory capacities which challenge the traditional regulatory monopoly of states. There are many examples of this, but I would like to mention four by way of illustration.

First, where *private* legal relationships cross borders, traditionally public and private international law rules have worked to allocate authority between states, to coordinate coexisting sovereigns.¹¹ With the widespread adoption of party autonomy in private international law, many parties are free to choose which law or court has authority over them – part of the coordinating function of international law has, in effect, been privatised.¹² Private commercial actors are free to contract out of the contract law of the places in which they do business, and they are also free to contract out of national courts altogether in favour of private commercial arbitration. Choosing arbitration also opens up the possibility of opting out of national law, in favour of the *lex mercatoria* – a privatised private law.¹³

Second, one of the most important ways in which some states are able to regulate international activity is through control over currencies. The effectiveness of US sanctions over Iran is, for example, to some extent dependent on the international reach of the US dollar, but part of the strength of those sanctions is because of that reach.¹⁴ One interesting recent reaction from Iran has been to begin development of a cybocurrency to try to put its trading activities beyond US

¹¹ See generally eg Alex Mills, *The Confluence of Public and Private International Law* (Cambridge University Press, 2009).

¹² See further Alex Mills, *Party Autonomy in Private International Law* (Cambridge University Press, 2018).

¹³ See *ibid*, Chapter 10.

¹⁴ See eg Joshua P Zoffer, 'The Dollar and the United States' Exorbitant Power to Sanction' (2019) 113 *AJIL Unbound* 152.

control.¹⁵ Although the proposal is for a state-backed cybercurrency (and the efforts have not been uncontested), it highlights the issue – that cybercurrencies in general are almost by design extremely difficult for states to regulate. Bitcoin, for example, relies on a highly distributed blockchain ledger which is very resistant to unilateral modification, including by individual states. This key security feature of at least some cybercurrencies means that they are resistant not only to hacking, but also to national regulation. Bitcoin mining has potentially become another source of revenue and tradeable currency for Iran which is difficult – perhaps impossible – for the US to police.¹⁶ Recently Facebook has announced plans to develop a further privatised international currency, the ‘Libra’, in conjunction with other transnational corporations – a proposal which has provoked alarm among state financial regulators.¹⁷ Money itself, which has always been a way in which governments can indirectly exercise regulatory control (as well as manage state economic affairs), is potentially being privatised.

A third example, which is rather less dramatic but nevertheless important for the academic world, comes from the emergence of international essay mills, churning out essays on demand for unscrupulous university students from around the world. This is an issue that has attracted some recent attention in the United Kingdom, including from the UK government. What is striking here is that the government response in March 2019 was not to try to regulate this activity itself, because it realises that it cannot do so effectively, but to call upon Paypal to ban essay-writing firms from selling essays to UK university students.¹⁸ And in April 2019, Paypal indeed announced that it would impose such a ban, based on rules that it would develop itself.¹⁹ This is a striking illustration of the struggle for states to regulate cross-border activities in the internet age, particularly compared with the power that can be wielded by transnational private actors themselves. The state appears almost paralysed in the face of globalised economic activity, reduced to begging private actors for assistance.

¹⁵ See eg <https://www.coindesk.com/gold-backed-cryptocurrency-launched-by-iranian-banks-report> (‘Gold-Backed Cryptocurrency Launched by Iranian Banks: Report’, 5 February 2019).

¹⁶ See eg <https://www.nytimes.com/2019/01/29/world/middleeast/bitcoin-iran-sanctions.html> (‘How Bitcoin Could Help Iran Undermine U.S. Sanctions’, 29 January 2019).

¹⁷ See eg <https://www.bbc.co.uk/news/business-49090753> (‘Libra: Could Facebook’s new currency be stopped in its tracks?’, 13 August 2019).

¹⁸ See eg <https://www.bbc.co.uk/news/education-47629043> (‘Paypal urged to block essay firm cheats’, 20 March 2019).

¹⁹ See eg <https://www.bbc.co.uk/news/education-47800531> (‘PayPal to reject essay-writing firms’, 3 April 2019).

And the fourth example I want to discuss is a broader and more fundamentally important demonstration of this. One of the issues that many states are struggling with around the world is the regulation of speech online, including both hate speech and fake speech. And one of the problems is that, in practice, state regulation is not very effective. Regulators are not agile enough, and going to court is too slow and expensive. In practice, whether a particular form of speech is permitted or not is actually being determined by *private* actors who control the key modern technologies of communication like Twitter and Facebook. And these organisations are not making those decisions on the basis of national law, but on the basis of their own private standards. The regulation of speech on Facebook, a community of 2 billion people, is in practice not really governed by state law, but by the community standards of Facebook, which are a self-consciously private equivalent of state law.²⁰ Organisations like Facebook do not seem particularly keen to take on this regulatory role, and many of them have called for increased governmental regulation and cooperation to relieve them of this burden,²¹ but nevertheless it is private organisations who are in practice performing traditional state regulatory functions, whether through people hired to scrutinise material and respond to complaints, or through algorithms. And just to make the point even clearer, Facebook is currently in the process of creating an independent body to review its own Content Decisions, which will have the power to review and reverse decisions made by Facebook itself. Facebook is calling this its Oversight Board, but almost everyone else is calling it the Supreme Court of Facebook.²² A private court, applying privatised private law, to regulate free speech around the world – with no state or state law in sight.

4. Conclusions

The impact of all these developments is significant, and cumulatively they suggest a diminishing role for the state in the world of global law, squeezed from above and below. Undoubtedly some of these developments are good things – it is hard to see how climate change can be addressed without law that goes beyond the state, and the national regulation of free

²⁰ See further eg Alex Mills, ‘The law applicable to cross-border defamation on social media: whose law governs free speech in ‘Facebookistan’?’ (2015) 7 *Journal of Media Law* 1.

²¹ See eg <https://www.bbc.co.uk/news/world-us-canada-47762091> (‘Mark Zuckerberg asks governments to help control internet content’, 30 March 2019).

²² See most recently <https://www.bbc.co.uk/news/technology-49735795> (‘Facebook unveils its plan for oversight board’, 17 September 2019).

speech in many states leaves a great deal to be desired, to say the least. But there can sometimes be a tendency for lawyers interested in law beyond the state to celebrate these developments a little too quickly.

The state is not just the main way in which regulatory *power* has traditionally been organised in international relations. It is also the main way in which *accountability* has been organised, the main way in which power has been *constrained*. The best methods for ensuring that regulatory power is exercised in the collective public interest have been developed in the context of the state, and I am conscious that I say this in a city and a state that knows a thing or two about democracy.

Of course this is also a time when democracy is facing its own crisis, and in which state sovereignty has become a rallying cry for shallow populists, often pursuing self-interest masquerading as national interest. But the mechanisms we have for reviewing and constraining the exercise of regulatory power by the UN Security Council, or the International Monetary Fund,²³ or by investment tribunals,²⁴ or by Facebook, are at least generally much weaker than those of parliamentary democracy backed up by robust courts operating in the service of the rule of law. While Facebook's Mark Zuckerberg calls for greater state regulation of online activity, he remains largely impervious to the demands of national parliaments for scrutiny of Facebook's own regulatory measures.²⁵ The state may well be diminishing as a force in global law, but it would be at least premature to *celebrate* this without thinking seriously about how we can develop new forms of accountability to control the exercise of these new forms of regulatory power.

²³ But note the work of the global administrative law project, which looks at the (potential) role of public law principles in constraining the exercise of power by international organisations. See eg <https://www.iilj.org/gal/>.

²⁴ But note that reform proposals currently being discussed under the auspices of UNCITRAL include changes to the appointment and regulation of tribunal members: see https://uncitral.un.org/en/working_groups/3/investor-state.

²⁵ See eg <https://www.parliament.uk/business/committees/committees-a-z/commons-select/digital-culture-media-and-sport-committee/news/facebook-letter2-17-19/>.