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Legal Systems in Transformation and Transnational Conflict Solution in Information Society

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Abstract. *Technological development has revolutionized many human activities, turning the world into a global society, an information society. In this new context, the new information and communication technologies are seen as indispensable support in all areas of human knowledge. Following this new pattern, a new legal dimension has emerged which challenges the State, its essential elements and its geographical boundaries. The public law concepts of sovereignty and jurisdiction along with the criminal law concepts of enforcement and jurisdiction have experienced remarkable changes due to the changing idea of time and space as to when and where a crime is committed. Considering the transnational character due to the globalization of the juridical process, some modifications have been made in the approach to the term sovereignty. Even though its concept and characteristics may involve many interpretations of doctrinal order, without consensus, the result of these interpretations, in many cases, come to delimit the debate which is set in a globalized juridical perspective.*

1. Introduction

The technological advances over the last twenty years, combined with impacts from the socio-economic sphere, puts us in what is called the information society. This sets a new challenge to future jurists. More than mere transformations in society, there is an on-going series of changes in the relationships established between people and companies, with undeniable echoes onto fundamental legal concepts, such as sovereignty, jurisdiction and competence. The great improvements provided by the internet result in benefits for many people and organizations by transforming personal information into a global network. Likewise, there is a really strong migration of illegal conduct onto this new platform, calling into question everybody's responsibilities, not only the State's. What is an effective manner in which to act?

The debate of possible solutions to these problems is relevant, particularly as there is a growing trend in the number of internet users – digital inclusion. It is obvious, then, that due to the increase in users, the number of incidents recorded involving criminal conduct on the internet will also increase. Cybercrime, for instance, and other criminal conduct, might cause major losses to people, organizations and the State, especially the interactions carried out on social networks, like Orkut, Facebook, Twitter, and others. Therefore, the issues to be addressed herein involve human behaviour and interconnection, not only limited to a State, but also with a transnational character. Thus, some important conceptual elements that are central points will be considered. They are terms of national criminal law, and terms of international law international criminal cooperation. Thus, the analysis of possible solutions will be made. Should the action of the Brazilian State be necessary? Are

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researchers, teachers and jurists making an effort to contribute to a systematization of the legal systems process? Should aspects of both national and international law be harmonised?

The challenge in this paper is to enable a coherent debate which can support the indication of new paths to dispute settlement, in the systematic application of fundamental legal concepts, either by the analysis of the possible use of the Budapest Convention – related to criminal conducts and other equivalent juridical instruments, or by the study of other solutions – using the New York Convention (mediation and arbitration).

2. Essential elements and changing states: From the National States to the new international juridical order

In the traditional/classical point of view, sovereignty consists of one of the essential elements of the State. Its definition and features are one of the pillars of the Modern State, achieving significant relevance in current approaches, which is easy to observe since its definition and traditional aspects have been mitigated by the construction of other recent processes, such as the conception of globalization, cyberspace, internet and international cooperation. From an evolutionary perspective, Matias [4] understands that "the Modern State was created due to the collapse and breakdown of the feudal regime, in a process which the king succeeded to submit all his lords to his undeniable authority […]," according to an internal and external vision, "in order to emancipate from the Holy Roman Empire, firstly, and then the Papacy," as taught by Azambuja.[5] But this issue only became important and was only consolidated under a doctrinal perspective in the late Middle Ages, notoriously based on the ideas of Jean Bodin.

According to Dallari,[6] the conception of sovereignty at that time was understood as the 'absolute and eternal power of a Republic, a word used for both private individuals and those who manipulated the business of state of a republic.' Furthermore, the idea of sovereignty was linked to the real power, the monarch's, which is a personal power hereditary in the monarchic States, although this thought is not shared by Bonavides and Kelsen,[7] who see sovereignty as a quality of the State Power. The recognition of sovereignty as a power of the monarchic States in Europe did not affect the plan, because, as Matias mentions, only the 'peace of Westphalia, celebrated in 1648 […].' [8] The eighteenth century brought the studies of Rosseau regarding sovereignty, as seen in the 'Social Contract.' It had great influence on the ideals of the bourgeois against the monarchs' absolutism. The exercise of ownership resided not with the government, but with society, leading to ideals of popular sovereignty. Later this would be challenged in the middle of the nineteenth century, when, in Germany, the legal personality of the State gets embodied as being the true holder of sovereignty. Although this concept is not common among many authors (see for example, Hobbes, Jellinek, Kelsen, Heller, Ranelletti e Reale).

In this way, sovereignty could be viewed in three ways: purely political, purely juridical and "culturists." In this sense, under a political dimension, sovereignty expresses the full effectiveness of power, or the 'incontestable power to want coercively and to settle the responsibilities.' In a purely legal conception, sovereignty is 'the power to decide ultimately about the attribution of laws, i.e. about the effectiveness of the Law.' According to the third aspect, Dallari, [9]quoting Reale, says that sovereignty is 'the power to self-organize legally and to universally make its decisions effective in its territory within the limits of the ethical purposes of coexistence.' However, in this paper, it will be relevant to consider the conception of sovereignty under the view of international law, which Matias[10] describes as 'the supremacy of the State power over its population and

[4] Matias, Eduardo Felipe Pérez. A humanidade e suas fronteiras: do Estado soberano à sociedade global. São Paulo: Paz e Terra, 2005.
[5] Azambuja , Darcy. Teoria geral do Estado. 41ª ed. São Paulo: Globo, 2001
[6] Dallari, Dalmo de Abreu. Elementos de teoria geral do Estado. 15ª ed. São Paulo: Saraiva, 1991.
[7] Kelsen , Hans. Teoria Geral do direito e do Estado. Tradução de Luis Carlos Borges. 3a ed. São Paulo: Martins Fontes: 1998 ; Bonavides, Paulo. Ciência política. São Paulo: Malheiros, 2004.
[8] supra , note 4.
[9] supra, at note 6
[10] supra at note 4

territory, and its independence from any other external authority, showing an internal character (supreme authority in a territory) and an external one (there is no subordination nor dependence, but equality).

These main attributes will be specifically linked to the idea of power, territory and international relations, which will consist of the major challenges of the national states when acting in a new global environment, with strong influence from the globalization process (under construction), the developments in technology, the new 'world order' and the emergence of new borders (internet and cyberspace), which are able to accelerate the process of creation of a new conception of sovereignty. In this twenty-first century, the new format is becoming more and more impregnated by concepts related to new international cooperation, economic integration, community law and abdication of a part of sovereignty for international organizations with supranational character, such as the International Criminal Court. Franca Filho [11]confirms that the globalization indicates, under an institutional point of view, 'the convergence of the politic-economic-legal regulation among countries' and, in an economic aspect, "an increase in the loss of Sovereignty of the authorities responsible for national economic policies, in the globalized order.'

Borges[12] says 'the evolution of the state's regulatory systems converges, with a trend, to its progressive unification […]. So, the current regional blocks – such as the European block (European Union) and the South-American block (Mercosul) – are the chrysalis of this goal.' The new parameters related to the ideal of sovereignty must be understood as natural evolution, a struggle for the insertion of the new State model in the global society, more and more interdependent in relation to other countries in a joint effort to meet the demands arising from globalization, especially economic. Thus, this new format cannot be viewed from the perspective of State losing power due to globalization and technological revolution – according to a state legal order understanding. According to Matias,[13] 'it is, in this case, the distribution of some state functions between international, transnational or supranational institutions,' whose vision of State with territory, people and government has been mitigated, particularly regarding the third element which would have been affected by a new model of governance - global governance and in a more technological perspective, the new boundaries resulting from the emergence of cyberspace and the Internet. Kelsen, [14]talking about a General Theory of State, dealing specifically with power as a third element to make the State, sees sovereignty not as element, but as a quality of this power. It is this power that, in the information society, has replaced by a more global character, specifically in the controversies and disputes involving cross-border legal disputes.

3. Cyberspace: new borders and legal phenomena challenges in the society of information

The understanding of the legal phenomena in the post-modern globalized world, especially those related to the Information and Communication Technologies in the Information Society, requires the establishment of a detailed study, albeit brief, on how the whole issue is related to the evolution of the historical process of humanity. Not that it is intended to discuss pure history, starting at the abacus, the Eastern world, for example, but how the first recorded criminal activities related to cyberspace were registered. Thus, the environment to be considered is cyberspace and the Internet, but connected to the real world and its effects on society, which is what matters as a research subject. Actually, there is a fine line between what cyberspace is and what the real world is today, because there is a growing interdependence between these technologies that have converged into this new world – which is called the Information Society or global society.

[11] Franca Filho , Marcílio Toscano. Introdução ao direito comunitário. São Paulo: Editora Juarez de Oliveira, 2002.
[12] Borges, José Souto Maior. Curso de direito comunitário. São Paulo: Saraiva, 2005
[13] supra at note 4
[14] supra at note 7

For Pinheiro[15]: "With cyberspace, the geography we know (physical) disappears, and a new geography, which is not material, emerges, although it is not real. Cyberspace is a place, or an imaginary place, which we can only access through a computer, yet it is connected to reality due to the use we have made recently, turning it into an intermediate space between two realities." Whatever the view held is, the relevant question will be the approach to the phenomenon studied according to the conception of informatics - computers, internet, artificial intelligence and network systems, in this context of post-modernity and global society.

The migration of the use of desktops and notebooks to smartphones enhances the view of visionary Steve Jobs; in fact, when he made the iPhone popular, he managed to place the internet and its facilities in the hands of millions of people, as a loved and desired product, not as just a simple phone anymore. The result of this technological convergence, as Friedman[16] says, is that 'there is no greater power of levelling than the idea that all the knowledge of the world is available to anyone, anytime, anywhere.' Nowadays, it is available at the touch of a finger. This is the environment where the legal phenomena occurs, challenging the XXI Century jurists.

4. Conflicts and resolution of transnational conflicts in the society of information

The advent of the information society, as well as all the available technology, has reinforced the thesis of a global society. According to Internet World Statistics in December 2011, there were a record number of 2,267,233,742 internet users which corresponds to 32.7% of the world. These users share a variety of activities, a life online. There is undoubtedly a strong interaction in social networks, electronic commerce, games, education and also provision of government services. If, at the end of the nineteenth century and early twentieth century, it was conflicts that were recorded between nations for colonial spaces, in this first decade of the twenty-first century, there is a silent struggle for the conquest and expansion of businesses and users in social networks, as seen on the map below, where the new borders, establishment of power and 'sovereignty' should be observed in a particular way, whose solutions of conflicts arising from the new era now have a legal treatment through legal instruments still under construction.

Thus, the study of the topics jurisdiction and competence related to conflict resolution (criminal and civil) seems to be relevant. Its understanding is fundamental to define who will provide the jurisdictional function. Given the transnational character of the phenomenon, the implications of which transcend the study of pure and simple words, as well as the traditional approach borrowed from the lecture hall to the terms of Constitutional Law, Procedural Law and International Law, it is necessary to think about the new way of looking at this subject again, with particular regard to these concepts. The expressions sovereignty, jurisdiction, authority and territory (power in Kelsen's view), when analysed under the dimension of cyberspace and the Internet, assume an image whose legal features are still under construction; although it is possible to reflect the indicators of these trends to constitute a challenge to the post-modern State.

In the study of legal institutions between the functions of the State, the jurisdiction finds great doctrinal disagreement to its concept. For Lima [17]the most prominent theories are synthesized by the conceptions of Chiovenda and Carnelutti, a thesis endorsed by Canotilho[18], who says that the 'problem of distinguishing the various material functions of the state (legislation, administration and jurisdiction), [...] has been, over a long time, regarded as one of the most discussed issues and relatively unfruitful of legal dogmatic.' Although the lack of a consensus can be embedded in a blurred context, it is undeniable, however, that jurisdiction, understood in a triple aspect of power, function and activity, is a form of exercise of State sovereignty, which refers to the

[15] Pinheiro, Robert and Tsang, Simon. "Advanced Intelligent Networks", in Kenneth J. Turner, Evan H. Magill, David J. Marples, editors, Service Provision - Technologies for Next Generation Communications, New York: John Wiley & Sons Ltd, 2004.
[16] Friedman, Thomas Lauren. O mundo é plano: uma breve história do século XXI - Tradução de Cristina Serra e S Duarte. Rio de Janeiro: Objetiva, 2005.
[17] Lima, Wesley de. Uma nova abordagem da jurisdição no Processo Civil contemporâneo. In: Âmbito Jurídico, Rio Grande, 59, 30/11/2008.
[18] Canotilho , José Joaquim Gomes. Direito Constitucional. 6a Ed. Livraria Almedina: Coimbra, 1993.

essential elements required to the State and, consequently, to the idea of territory, borders, in other words, geographical areas where this judicial power is exercised, but which, 'by its own nature, shows an international aspect.'

It is this conception of jurisdiction that matters for the purpose of this study. It is mixed, consequently, not only with harmful practices of cybercrime, as the intention of the exercise of jurisdiction in certain illegal conduct finds limits in the authority of another State, both in issues of public interest and those involving private interests, generating, therefore, conflicts and impasses, such as applying the law and which law to apply. Thus, jurisdiction and competence are seen as essential elements to be used in the fight against criminal conduct in cyberspace and to provide new perspective for a joint solution through international legal cooperation. There are, from a national law perspective, albeit in a diffusive way, legal instruments capable of being applied to such instances of illegal conduct on the Internet, and which are used as a tool against harmful practices and inconveniences, when they do not constitute crimes.

This answer is partial, as Cruz[19] affirms, due to the 'extraterritorial character presented by the conducts practiced with the aid of the informatics.' It still must be considered that such criminal practices embody cross-border or transnational crimes which present new challenges to old principles and application of criminal law in time and space. According to Chawki,[20] 'there is a more international character [in cyberspace], although the information itself is governed by national law. As for the instances of transnational conflict in the specific cases of cybercrime, there is legal treatment in the national legislation of many countries over conduct on the internet. Closing this cycle, in the international scope, there is the Budapest Convention of the Council of Europe, which provides procedural legal instruments for investigation, evidence collection and treatment of crimes defined therein. The Convention was signed by 47 countries, obtaining ratification and entering into force on 32 countries, including the United States of America.

In the criminal scope, the conflict could turn out to be complaints whose focuses are privacy, e-commerce, copyright violations, family law, consumer law, and other issues. In the foreground, addressing the issue of conflicts by non-criminal aspects, large companies that operate commercially on the Internet worldwide, such as Google Inc., Facebook, eBay, Amazon.com, and others, maintain chats for conflicts resolution as a kind of "arbitration or mediation in the online conflict," at a non-judicial level. On eBay, for instance, buyer and seller may interact in pursuit of resolving the conflict with eBay's own role as an arbiter, without the need for physical presence, in other words, an online solution. In social networks maintained by Google Inc., Linden Lab (Second Life), Facebook and Twitter, for example, conflicts arise at another level. They are focused on subtraction of profiles, prejudicial conducts to honour, fake profiles, and copyright infringement, among others. There are rooms to maintain a claim or complain, which do not always work, which forces the harmed user to go to real court, seeking to maintain their right. One wonders, however, which legal system is it to apply?

The question is pertinent because the conflict may involve different legal systems. The maintainer of the service could be found in the U.S., while victim and accused are in different countries. What law should be applied? Would it be appropriate to mention the existence of a gap in the legal system, as advocated by Bobbio?[21] Or the issue should be embraced as an empty space to be filled by the magistrate, as Kelsen[22] argues, for whom the possible existence of gaps in the law would be a mere fiction? Anyway, there is no easy solution when there is disagreement between the parties, and no prospects of creating an international legal instrument that predicts a full solution in this type of controversy, although it is possible to apply the New York Convention of 1958, especially when there is no consensus between the parties who elect arbitration as a tool to resolve the conflict. If the parties do not reach a consensus, if the case does not directly involve the maintainer of Service –

[19] Cruz, Daniella da Rocha. Criminalidade informática: tipificação penal das condutas ilícitas realizadas com cartões de crédito. Rio de Janeiro: Forense, 2006
[20] Chawki, Mohamed. WAHAB, Mohamed S. Abdel. Identity Theft in Cyberspace: Issues and Solutions. Lex Electronica, vol.11 n°1 (Printemps / Spring 2006).
[21] Bobbio, Norberto. Teoria do Ordenamento Jurídico. Brasília: UnB, 1999.
[22] Kelsen, Hans. Teoria Geral do direito e do Estado. Tradução de Luis Carlos Borges. 3a ed. São Paulo: Martins Fontes: 1998

Google Inc., Linden Lab (Second Life), Facebook and Twitter, for instance, the solution goes to the courts - common justice of first instance in the Brazilian case.

The Superior Court of Justice, situated in Brasilia, deemed a conflict involving both a Brazilian and a Spanish company that hired a Brazilian to perform samba concerts in Spain. After terminating the contract, the Brazilian was surprised by images of her on the company websites which, according to her, was not part of the contract. Action was filed in regular courts of Rio de Janeiro, and the company was convicted in the Court of Rio de Janeiro, in two instances. The Spanish company appealed to the Superior Court, whose rapporteur Minister Luis Felipe Salomão [23]said '[...] there is still no international legislation regulating the activities in cyberspace. For this reason, according to him, citizens harmed by information contained in their websites or relationships held in virtual environments cannot have the right of access to justice restrained.'

Although cyberspace, the Internet and all resources have established new paradigms for the law by designing a 'borderless world', there was no subversion of the feasibility of recognition of the jurisdiction and competence to resolve conflicts – in the perspective of the Brazilian courts. Thus, for the Minister Luis Felipe Salomão, there cannot be the feeling that the "internet is a free zone, through which everything would be permitted, whose acts would not be able to be penalized.' However, it should be noted that the Brazilian example only reinforces possible inferences to individual cases, and it could not be seen as a general rule.

5. Conclusion

This study addressed how new technologies have impacted relationships established among people, organizations and governments. Likewise, these interactions guided the information society – global village, with evident reflections in law concepts and essential elements. Traditional concepts such as sovereignty, territory and borders and, consequently, the understanding of jurisdiction and competence turn out to be seen in a different way – the need for integration into the real world and its dependence on an international law cooperation system (since they suffered changes in their traditional aspects in relation to internet and cyberspace). A great number of the new juridical phenomena migrated from the real world to the large network. Although, they still belong to a real facts-based human world, under the law. These facts, which are consolidated as criminal phenomena, such as cybercrime, are a real threat. As well as this, relations established among people, private and public organizations are increasing, such as the e-commerce, interaction in relationship networks, educational experiences, which show increasing numbers and rates. These developments, in many ways, may cause serious harm to people and to the State.

Subtraction of identities, racism and on line xenophobia, paedophilia, card cloning and cyber terrorism are criminal conduct added to other conduct which undermine the integrity, confidentiality and security of legal relations, representing threats which require a joint effort.

In the criminal field, the effort of the European Union, by the establishment of the Budapest Convention against cybercrime should be highlighted. In the non-criminal field, there is the feasibility of using the New York Convention, especially when the parties choose arbitration as a way of resolving a conflict. However, these actions have shown only a softening against the threats of cybercrime, or a challenge, when parties do not accept the arbitration as a way of resolving the conflict in a non-criminal dispute. There is hope for a solution by the harmonization of international legal instruments with measures to be implemented under the national law, but other procedural issues find legal obstacles related to the jurisdiction and competence to act across borders, an environment where conflicts are observed more intensely, reaching more than one jurisdiction. The effort of all nations should be added to the major humanity challenges. The international juridical cooperation is put as an indicator of the opportunity to all countries to get united in the mission of reducing and solving conflicts which result in damage to society. Conflicts of jurisdiction between countries, in the juridical disputes issue, cannot be solved only by the traditional analysis of the concept of sovereignty, State power and jurisdiction, because this

[23] http://www.plg.eu.com/ftp/newsletters/ipnewsletterwinter2011.pdf

idea was overhauled by the new law which was established before the technological advances, requiring then, the combined efforts in a cooperative way.

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