

THE RULE OF LAW(S) ON THE CROSS-BORDER INTERNET

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In the fourth installment of the FOC Working Group 2 (WG 2) blog series, WG member, Paul Fehlinger, Co-founder and Manager of the global multistakeholder policy network Internet & Jurisdiction discusses the tensions inherent in applying the rule of law to the cross-border environment of the internet. Throughout this blog series, WG members will analyse current scenarios where the application of the rule of law online fails to promote human rights online, and highlight areas where further research should be undertaken to further strengthen rule of law principles and practices. To read previous blog posts in the series, follow [this link](#).

The cross-border nature of the Internet has generated unprecedented social, political and economic benefits for humankind. But while digital connectivity and innovation can help strengthen the Rule of Law, they can also challenge its very foundations. How do we exercise the Rule of Law — a concept based on the Westphalian notion of territorial sovereignty and the nation state — in an environment which is inherently cross-border? Jurisdictional tensions are increasing in number and gravity, as has been documented by the Retrospect Database of the global multistakeholder policy network Internet & Jurisdiction since 2012. The challenge is therefore not necessarily how to establish the Rule of Law online — but how to cope with the simultaneous “rule of laws”.

What does this “rule of laws” mean in practice? The digital reality of the 21st century is that most online interactions simultaneously involve multiple jurisdictions at once — based on the locations of servers, Internet companies, users, registrars or registries. Whereas legal systems have been built to fit national boundaries, on the Internet, transitional is the new normal. And coping with this legal pluralism in the absence of appropriate cross-border frameworks and procedures is a growing challenge for developed and developing countries alike.

UNDERSTANDING THE CHALLENGES

Courts, law enforcement agencies or data protection authorities often struggle to apply existing laws in cyberspace. If Internet companies or technical operators are located on the soil of a given country, enforcing national jurisdiction can have extraterritorial impacts on Internet users in other jurisdictions.



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Conversely, if citizens of a country use Internet services located in foreign jurisdictions, states struggle how to enforce national laws.

Traditional modes of interstate legal cooperation are not adapted to these new digital realities. This naturally triggers national measures to enhance digital sovereignty. But a legal arms race — in which new laws are passed in an uncoordinated manner around the world— poses its own dangers. If these new laws simply apply traditional concepts of territoriality and separation of sovereignties to the digital environment, the global, open nature of the Internet could be threatened. The global community finds itself in a typical ‘prisoner’s dilemma’.

All this is to the detriment of Internet users — who face legal uncertainty as to what laws apply to their everyday actions and speech online. This becomes especially apparent in situations where users seek redress, or want to appeal decisions by public or private actors located in different jurisdictions.

Internet companies and technical operators also face challenges as more and more states around the world actively seek to enforce the Rule of Law online. In the absence of appropriate cross-border cooperation frameworks, private actors are receiving an increasing number of direct, transnational requests from public authorities from multiple jurisdictions regarding user data, content removals or domain suspensions.

Even very well funded legal systems and large Internet companies with vast legal and human resources struggle to handle the daily volume of cross-border issues – from both a normative and a procedural capacity point of view. Naturally, developing countries — many of which position themselves as emerging global digital innovation hubs — find it difficult to handle the rule of law in a digital environment. And startups —which drive the digital economy in developed and developing countries alike, and whose services are accessible worldwide by default — are increasingly exposed to legal requests from multiple jurisdictions.

MORE COOPERATION, OR A LESS GLOBAL INTERNET

The global community may have developed high-level human rights and Rule of Law norms, but it still lacks appropriate policy standards and cross-border frameworks for how to apply them in an operational manner on the Internet.

If we want to collectively preserve the “global and interoperable nature of the Internet” — as recognized by the [2014 Tallinn Recommendations of the Freedom Online Coalition](#) — and uphold the Rule of Law online, we need predictable, transparent and accountable mechanisms for the interactions between public authorities, Internet companies and users which are as transnational as the Internet itself. We have not yet developed the legal equivalent to the technical interoperability that ensures the functioning of the global Internet.

Establishing and maintaining the Rule of Law on the cross-border Internet demands ongoing multistakeholder cooperation—bridging the policy silos of human rights, digital economy and cybersecurity. Conferences such as the Freedom Online Conference and the [Global Internet and Jurisdiction](#)



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Conference are therefore essential opportunities for the global community to address these challenges and discuss modalities for joint action in order to catalyze the development of shared cooperation frameworks and policy standards.



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