Jurisdiction and Natural Law

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BOND UNIVERSITY
FACULTY OF LAW

Technology and Jurisdiction in Outer Space and Cyberspace Colloquium

In an increasingly competitive world, the legal concept of jurisdiction is a cornerstone in ensuring a peaceful coexistence between states. Jurisdiction delineates both rights and duties amongst states, and clear jurisdictional rules are essential for ensuring predictability for both legal and natural persons.

Yet, current rules of jurisdiction are largely opaque, unsystematic and, arguably, ill-equipped for the modern world. This is especially so in domains such as Outer Space and Cyberspace where reliance on the so-called 'territoriality principle' is difficult, or impossible.

This Colloquium seeks to take stock of some of the key jurisdictional challenges facing the international community, and private actors, in Outer Space and Cyberspace.

Details:

Date: Friday 9 August
Time: 9:30-5pm Colloquium, 5pm onwards Dinner/Networking
Location: Building 6 (Princeton Room)
Parking: PG3 or PG4 is recommended
Register: Here **Limited places available**

FRIDAY, 9 AUGUST	
Time	Activity
9:30am – 10:00am	Registration, tea/coffee
10:00am – 11:00am	**The Concept of Jurisdiction** Dan Svantesson, *Rethinking Jurisdiction* Jonathan Crowe, *Jurisdiction and Natural Law*
11:00am – 11:20am	Morning Tea
11:20am – 12:50pm	**Outer Space and Jurisdiction** (Moderator: William van Caenegem) Danielle Ireland-Piper, *Extraterritorial Criminal Jurisdiction and the Laws of Outer Space* Steven Freeland, *(Not Quite) An Area Beyond Jurisdiction? Regulating the Exploration and Use of Outer Space* Donna Lawler, *Jurisdictional Issues in Commercial Space Transactions*
12:50pm – 1:30pm	Lunch
1:30pm – 2:30pm	**Cyberspace and Jurisdiction I** (Moderator: Rita Matulionyte) Rebecca Azzopardi, *Key concerns in Cyberspace Jurisdiction* David Rolph, *Jurisdictional Issues in the Enforcement of Contempt of Court and Suppression Orders in a Networked World*
2:30pm – 2:50pm	Afternoon Tea
2:50pm – 4:20pm	**Cyberspace and Jurisdiction II** (Moderator: Rita Matulionyte) Nathan Mark, *Jurisdictional Challenges for Law Enforcement Access to E-Evidence* Monique Mann & Angela Daly, *Power, Jurisdiction, and Surveillance* Sascha-Dominik Bachmann & Cumali Aytekin, *Sovereignty and Jurisdiction in Cyberspace*
4:20pm – 4:30pm	Concluding Remarks
5:00pm onwards	Dinner (Lakeside on Campus)

PRESENTER ABSTRACTS

Rethinking Jurisdiction

Dan Svantesson, Bond University

International law on jurisdiction is a quagmire of gaps, inconsistencies and exaggerated reliance on outdated sources of law ill-equipped for modern society. The focus on the territorial vs extraterritorial dichotomy is misguided and harmful, and the territoriality principle is not appropriate as the jurisprudential foundation of jurisdiction.

This paper argues that the traditional categorisation of three types of jurisdiction needs to be amended or reconsidered. It also advances an alternative jurisprudential framework for jurisdiction – applicable for both public, and private, international law – consisting of three core principles. Further, it brings attention to a selection of novel concepts, including: 'jurisdictional interoperability', 'bite' vs. 'bark' jurisdiction, 'scope of jurisdiction', and 'lagom jurisdiction'.

Jurisdiction and Natural Law

Jonathan Crowe, Bond University

Positive law relies integrally on the notion of jurisdiction, according to which legal bodies may make decisions within their defined field of authority. This makes sense, because positive law itself is widely viewed as a product of socially recognised authorities; that being so, it is hard to see how it could exist without some prior conception of jurisdiction. Natural law theory, by contrast, holds that there are certain fundamental goods that humans are characteristically inclined to pursue and value for their own sake, and these goods give rise to rules and principles that structure human societies. Natural law, on this view, is a kind of *law*, but does it recognise the concept of jurisdiction? I will argue that it does, albeit with some important limitations. Natural law theories historically recognise the important role of social norms in coordinating collective action for the common good; these standards hold normative force for the local community. Bodies that implement and enforce this dimension of the natural law are jurisdictionally limited. However, this conception of jurisdiction applies only to salient local norms; it does not cover those aspects of the natural law that apply universally to humans by their shared nature. These universal aspects of natural law are valid everywhere and are not jurisdictionally limited. It follows, I argue, that every practical decision-maker, legal or otherwise, has jurisdiction to apply these laws; and no decision-maker has jurisdiction to deny them. There are, then, two fundamental forms of jurisdiction: the local jurisdiction involved in applying salient social norms; and the universal jurisdiction involved in applying basic human rights and duties. These forms of jurisdiction do not rely on positive law; they overflow the boundaries of human authority.

Extraterritorial Criminal Jurisdiction and the Laws of Outer Space

Danielle Ireland-Piper, Bond University

What is the law of extraterritoriality in outer space? On Earth, judicial adjudication on exercises of extraterritoriality sets the stage for a broader debate as to the appropriate place of national courts in global governance and as to the place of international law in national courts. For this reason, the regulation of extraterritorial jurisdiction has significant implications for the rule of law and

international relations. However, what criminal law and constitutionalism is to guide the interactions of individuals in outer space? The confluence of space tourism, space exploration, private commercial interests, and the weaponisation and militarization of space means there will be new types of relationships occurring between individuals in space who are not necessarily representatives of any particular State. In that context, this article considers the law of criminal jurisdiction in space and challenges posed. In sum, I suggest that there is currently a distinction between criminal acts that might occur on a space craft and those that might occur elsewhere. I tentatively argue for the continued applicability of current jurisdictional principles at customary international law into space rather than the development of a specialist regime – for now. I also argue that despite a number of challenges, domestic courts remain, to date, an adequate forum for adjudication of criminal conduct in outer space.

(Not Quite) An Area Beyond Jurisdiction? Regulating the Exploration and Use of Outer Space

Steven Freeland, Western Sydney University

The development of technology has allowed humanity to venture far beyond areas that have historically been regulated based on our understanding of territorial jurisdiction. International and national law has therefore had to react, and adapt, to situations that challenge these traditional notions of jurisdiction. It has become increasingly necessary, for example, to consider the development and implementation of appropriate frameworks for the regulation of so-called 'Areas Beyond National Jurisdiction', in order to best provide for their accessibility, sustainability and security. Yet a conundrum arises – human endeavour in these areas often demands significant resources, risk and entrepreneurship. These are all factors that call for legal certainty for actors engaged in such activities, so as to provide greater comfort for those whose capital (both in human and material terms) are perceived to be most at stake. The legal protections are often best provided through national frameworks, giving rise to the need for the development of artificially prescribed jurisdictional regimes to operate within, and alongside, an otherwise 'no-jurisdiction' zone.

This presentation will describe the *sui generis* nature of the regulatory regime for outer space and discuss the interplay between the international law of the global commons on the one hand, and the relevant treaty-developed national jurisdictional and responsibility frameworks that apply on the other.

Jurisdictional issues in commercial space transactions

Donna Lawler, AZIMUTH Advisory Pty Ltd

Commercial transactions between parties in multiple countries already present their share of jurisdictional issues. Many commercial lawyers are familiar with the traditional forms of contracts used in the international sale and purchase of equipment and services. However, additional jurisdictional questions arise when the equipment is designed to be launched into space or the service involves the movement or operation of objects in space. How are space objects financed and repossessed? Which laws apply if damage is caused to a space object or to a person in space? What complications arise in disputes about space missions? How will we deal with unruly passengers in space? Are any solutions to these problems on the horizon? This presentation will address some of the issues that need to be considered when a transaction has an outer space dimension.

Key concerns in Cyberspace Jurisdiction

Rebecca Azzopardi, Bond University

On the 3rd of June 2019, the Internet & Jurisdiction Policy Network published its Global Status Report: Key Findings – the first of its kind. The aim of the Report is to provide a snapshot of the current ecosystem, trends and initiatives of the state of jurisdiction on the Internet. The Report is based on detailed desk research combined with pioneering data collection from over 100 key stakeholders representing states, Internet companies, technical operators, civil society, academia and international organisations.

This presentation will present the most significant findings of the Report. Overall, the Report found that the majority of key stakeholders consider that cross-border legal challenges on the Internet are becoming increasingly acute. A key concern was the complexity of the current regulatory environment online with competing interests and laws creating high levels of legal uncertainty and risks of competing assertions of jurisdiction. Existing legal concepts for jurisdiction were considered to be outdated and under stress in the online environment.

Some of the key trends identified were a growing concern over online abuses, a proliferation of new initiatives by both public and private actors and new roles for Internet intermediaries such as search engines and social media platforms. Stakeholders made strong calls for greater international coordination and coherence and for appropriate institutions, frameworks and policy standards to address cross-border legal challenges on the Internet.

Jurisdictional Issues in the Enforcement of Contempt of Court and Suppression Orders in a Networked World

David Rolph, University of Sydney

The power to punish for contempt of court originates in the court's inherent jurisdiction and allows a court to protect against interferences with the administration of justice. The principles of contempt of court developed at a time when the challenges to the administration of justice were local. At common law, the prevailing view is that a superior court has no power to make a suppression order binding against the world at large. Increasingly, legislatures are conferring powers on courts to make suppression or non-publication orders or are enacting that certain types of matters relating to court proceedings cannot be published, again to protect the administration of justice. There are territorial limitations to the prohibitions on publication legislatures sanction. Yet, challenges to these prohibitions may now also be extraterritorial as well as local. The enforcement of contempt of court and suppression and non-publication orders may not be well-adapted to the prevalence and pervasiveness of online communications. This paper considers the difficult jurisdictional issues raised by the enforcement of contempt of court and suppression and non-publication orders in respect of online publications. In particular, it considers the territorial and extraterritorial operations of the relevant legal principles of contempt of court and suppression and non-publication orders. It examines the vexed concept of 'publication' for the purposes of these areas of law. It also canvasses the problems presented by international reporting of high-profile criminal cases, using the George Pell trial as a case-study.

Turning the Lights Back On – Australia's Response to 'Going Dark'

Nathan Mark, Bond University & James Cook University

The term 'Going Dark' has been traced back to the Federal Bureau of Investigation's 2011 Cyber activity alert – *Going dark: law enforcement problems in lawful surveillance*. In the alert, the term is used to refer to the increasing problem faced by governments and law enforcement organisations around the world; known and unknown threat organisations have turned to encrypted electronic services to mask their communications and activities. Encrypted telecommunications services have quite simply, limited the ability of intelligence and law enforcement organisations to lawfully access and leverage data and information in support of security operations and investigations. It has been reported that over 50 percent of communications intercepted by the Australian Security Intelligence Organisation ("ASIO") and, over 90 percent of data intercepted by the Australian Federal Police ("AFP"), is now encrypted. In response, Australia enacted the *Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018* (Cth) ("the Act").

Focussing on the jurisdictional issues involved, Nathan will highlight the enactment and impact of the legislation in four parts. Part 1 will consider the state based security narrative relied upon to justify and pass the Act. Part 2 will address the theoretical operation of the Act with specific emphasis on the powers compelling industry access, enhanced computer access warrant powers, and the assistance powers granted to ASIO and other security and law enforcement organisations. Part 3 will outline a number of concerns associated with the practical application and administration of the Act. Part 4 will present potential avenues for law reform.

Power, Jurisdiction, and Surveillance

Monique Mann & Angela Daly, Queensland University of Technology & Chinese University of Hong Kong

The rise of digital technology has major implications for how states and corporations wield coercive regulatory power through the transnational administration of justice. Increases in data transmitted and stored by public and private actors across jurisdictions raise crucial questions about how individual rights and freedoms can be protected in an era of seemingly ubiquitous transnational surveillance. The expanded development and application of domestic and international law to address behaviour in digital spaces, includes existing law applied to online activities, and new law to cover a growing range of internet-specific conduct. A pertinent site of state and corporate power in the digital realm involves attempts to develop and enforce domestic laws, especially criminal laws, transnationally. These processes generally occur outside existing domestic legislative frameworks, and raises questions about how national sovereignty, extraterritoriality and state and corporate interests are expanding at the expense of individual rights and freedoms in digital societies. In this context, this presentation overviews the forthcoming special issue on 'Power, Jurisdiction, and Surveillance', to be published open access by the *Internet Policy Review* in early 2020, co-edited by Dr Monique Mann and Dr Angela Daly.

Sovereignty and Jurisdiction in Cyberspace

Sascha-Dominik Bachmann & Cumali Aytekin, Bournemouth University

This presentation discusses as the best legislative approach to regulate cyberspace the introduction of an international Cyber Security Convention. The form and regulatory content of this future convention follows an analogy of the UN Convention of the Law of the Seas in order to define sovereignty and how to establish jurisdiction over malicious cyber activities. It then will argue that cybercrimes are, in essence, international crimes giving raise to international criminal responsibility. In order to establish such another analogous approach is sought: by using the example of the core crime of torture and its international convention against torture the use of domestic jurisdictional fora for the prosecution of such malicious cyber activities and cyber crimes should be sought. It then moves to the question of competing domestic jurisdictional authority and uses the example of complementary of the Rome Statute and the just mentioned torture convention to find a 'shared responsibility' approach. The final part of the presentation is dedicated to a proposal of how to achieve the effective implementation of a future convention on cyber activities arguing that a voluntary membership organization should be created which then would apply the rules of the future convention to its member states and that states outside the convention would then would fall outside the eventual protection of this instrument hence making the membership something of an common interest issue (comparable the SWIFT payment institution). This presentation is a summary of work undertaken which is being turned into an article for a major US journal.