The Legal Function of the Nation-State in the Era of Globalisation and Technology: An Agenda for Research on the Resilience of the International Structure

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1. Losing control

1.1. Globalization and the diminishing relevance of the nation-state

Is it really true that nation-states and their citizens are losing control as a result of globalization and technological developments? This idea lies behind many theories explaining current trends in populism, the success of extreme right or left-wing political parties or attempts to 'take back control' such as 'Brexit' (Rodrik, 2017). Individuals may experience feelings of alienation as rules are no longer made by the people they (feel to) know and control (Giddens, 2002). Instead, they become part of 'mega' trade deals such as CETA or TTIP and unknown experts, rather than elected officials, in unknown international technical bodies decide on the quality of their food or their production standards (Ambrus, *et al.*, 2014; Kica and Wessel, 2017; Chowdhury and Wessel, 2012). And, indeed, global events seem to change our direct living conditions: refugees may end up in municipalities in EU member states as a result of events elsewhere, citizens are asked to separate their waste to prevent further global warming, and the 4th industrial revolution may challenge their job security. The direct link between global and local – 'glocal' – policies seems to make it impossible for domestic administrative structures to continue guaranteeing their well-being (Nijman, 2011). It is true that globalization is not the only source that is seen to lie behind the relative success of populism. As Rodrik (2017) argues, "Changes in technology, rise of winner-take-all markets, erosion of labor-market protections, and decline of norms restricting pay differentials all have played their part." Yet, he continues that "Nevertheless, economic history and economic theory both give us strong reasons to believe that advanced stages of globalization are prone to populist backlash."

The globalization narrative is closely connected to developments in technology. After all, it is mainly technology that allowed for easier and faster international connections. It has been observed that "the forces driving globalization could only be effectuated because they have at their disposal the global networking capacity provided by digital communication technologies and information systems, including computerized, long-haul, fast, transportation networks" (Castells, 2015; also Kiyoshi et. al. 2006; Grewal, 2008; Archibugi & Pietrobelli, 2002). Obviously, this is not necessarily a bad thing. Globalization has also helped and intensified the spread of knowledge and technology across borders and

boosted further technological development (Aslam et al., 2018). Indeed, the two (globalization and technological development) go hand in hand and reinforce one another, feeding ideas that we are only at the beginning of structural changes, including – indeed – the role of states. The nation-state is could very well be "under attack" (Lenhard, 2009:4). Public authority, as the argument goes, is no longer (merely) exercised by national governmental actors, but (increasingly) by both public and private actors outside of existing state-structures (Zürn, 2018).

While globalization and the, often connected, diminishing relevance of the nation-state have abundantly been analysed and described over the last decades by economists and political scientists in particular (Cerny, 1995; Göksel 2004) no convincing evidence has been presented from a legal perspective as to a changing international state-structure. True, insights developed in political science, public administration or international relations theory pointing to the looming 'end of the state' or to 'de-bordering' (Albert and Brock, 1996) have seen their translations in legal scholarship studying interactions between legal systems (Nijman and Nollkaemper, 2007), legal pluralism (Krisch, 2010), or in the international project on multilevel regulation that was co-headed by the PI (Føllesdal, Wessel, Wouters, 2008). The question remains, however, whether any *fundamental* or *structural* changes in the legal system occurred on the basis of the globalization and technological developments that have been analysed so extensively. To what extent did the position of states – as the traditional guarantors of democracy, legitimacy and the rule of law (at least in a European context) – really change as a result of globalization? One thing is certain, globalization and technology have not made an end to the way we structured the world in a legal, jurisdictional, sense. A map of the world still shows us the neatly defined borders and the different colours of the currently existing states and 'statehood' is still on the wish list of a number of territories around the world. Indeed, the nation-state seems to be remarkably resilient and the number of states as full members of the United Nations has even increased from 157 in 1980 to 193 today. And, the survival and proliferation of small states in particular is remarkable (Maass, 2017).

This paper aims to lay the basis for 'countertrend' research. Its underlying hypothesis is that nation-states are here to stay as they form the building blocks of the global legal system and usually coincide with national legal systems. With this legal set-up of the international structure in mind, a legal approach is indeed more helpful to 'demystify' certain dimension of globalization than one focussing on social or political changes or perceptions. After all, "Law tends to be more resistant to change than its political environment" (Krisch, 2016). While the 'perceived' truth largely seems to dominate the debate on globalization and its consequences, we actually still don't know exactly to what extent (if at all) states are increasingly bypassed or (literally) over-ruled by being part of systems and institutions of global rule-making. The whole idea of norms entering our domestic legal system without a role for a (democratically elected) doorman, sits uneasily with mainstream jurisdictional thinking. Distinctive ('sovereign') state jurisdictions exist because of their exclusive role in making, implementing and enforcing rules (Ryngaert, 2015). To solve the theoretical conundrum of being sovereign and subject to international rules and institutions at the same time, notions like 'transfer' or 'pooling' of sovereignty

have been invented (Keohane and Hoffmann, 1991), while recognising that 'consenting' to this is a sovereign act in itself.

1.2 A resilient state structure?

While the trend in conceptual scholarship on legal governance indeed seems to be dominated by an increased intention for non-state actors and different forms of 'post-national' rule-making (Noortmann et al., 2015; see further below), it must be acknowledged that the state has remained central in some other disciplines. Thus, in international relations (IR) theory, for (neo-)realists the state has remained the starting point of their analyses of 'interest' and 'power'. Indeed, in IR theory in particular, it is not universally accepted that the role of the nation-state has changed in the globalised world (e.g., Evans 1997; Strange 1997; Ohmae 1995; Hobsbawm 1990; Gellner 1983; Lenhard, 2009). Holton (2011) argues that nation-states are still the most important of the actors in the global sphere, despite the influence of supranational organizations. Hirst and Thompson (1996) note that while decisions are often passed on to multinational bodies, it falls to individual countries to make decisions within this framework. They even suggest that the enhanced "possibilities of national and international governance" have actually strengthened the state (see also Gilpin, 2000). And, more recently, despite his critical study on sovereignty and states, Bartelson (2014:84) concluded that "the symbolic form of sovereignty remains the blueprint by providing the territorial and legal framework within which governmentalisation can be undertaken and legitimised." But, perhaps the "golden age of state control" is even a myth in itself (Thomson and Krasner, 1989). At the same time, also in marxist and neo-Gramscian studies, the (capitalist) state has continued to be at the centre of attention (Cox, 1981, 1987; Friedman 1999; Robinson, 2005). And, obviously, in many sociological studies of the welfare state, the role of the state has remained central (Brady *et al.*, 2005; Mishra, 1999; Yeates, 2001).

States, however, are also legal constructions and it is fair to underline that their key role in law-making has been acknowledged by some. As held by Block-Lieb and Halliday (2017), in contrast to 'trade and markets', "Law and politics overwhelmingly remain dominated by the nation-state. Laws, legal institutions, and legal occupations primarily are creations of sovereign states." And, with regard to the role of states in international organizations it was argued that "[a]lthough the separate personality of an international organization establishes the will of the organization as a whole", this does not mean that the various 'member State wills' that led to it lose their relevance" (Barros and Ryngaert, 2014; also Condorelli and Cassese, 2012; Alvarez, 2012).

The present paper should mainly be read as a research proposal. Its claim is that a major and innovative contribution to understanding the (current and future) role of nation-states in the era of globalization and technology is needed to explain the resilience of the state from two different perspectives. The first perspective would answer *to what extent, how, and in which areas in particular, nation-states have maintained their key role in global rule-making.* The second perspective deals with the question *to what extent, how, and in which areas in particular, nation-states have maintained their role as constitutional gate-keepers in implementing norms enacted in the global legal order.*

Existing literature has abundantly revealed 'links' between norms in different legal orders or influences of one legal system on another. Indeed, earlier research led by the author clearly hints at *interactions* between legal orders (Føllesdal, Wessel and Wouters, 2008), and the role of non-state actors and informal processes and outcomes (Pauwelyn, Wessel, and Wouters, 2012, 2014). Yet, this has not led to further investigations into the question to what extent state structures are actually by-passed in this process, also keeping in mind (both classic and new) theories on the sources of law and on law-making competences and the role of state actors and (domestic) procedures in finalising the norms.

From a methodological point of view, one might argue that a study on states is biased. A focus on the function of states in globalization would run the risk of merely highlighting the importance of states in global and regional law-making processes, while perhaps neglecting the role of non-state actors and processes. It would only be fair to admit this bias and the acronym chosen for this project only testifies to that idea.

It is believed that to 'disrupt' the current debate on globalization and the effects on individuals, a counter-intuitive study on the continued (or perhaps even increasing) importance of nation-states as organizational and structuring units to channel *all* rule-making is necessary. Results of this study would aim to mitigate the overwhelming attention for the negative effects of globalization and technological developments in terms of effects on legal norms, while acknowledging that the outcome of the research may very well end up supporting some current popular notions.

2. Governance *beyond* the state

2.1 The exercise of authority across national borders

For reasons briefly outlined above, it is necessary to produce legal *factual* evidence of the role of the state (and its constitutional principles) in (the implementation of) international law-making. To analyse the processes through which global norms are being made and implemented, a legal approach is believed to be essential as it will reveal the ways in which states are by-passed and the incapabilities of principles of democracy, legitimacy and the rule of law to function.

A focus on legal rules and processes offers a very factual analysis. It is acknowledged that concerns about the effects of globalization (and hence the legitimacy of global decision-making) are not necessarily based on facts. Studies on globalization and legitimacy reveal that *perceptions* of individuals play a large role in whether they embrace or contest global norm-setting (Rodrik, 2017; Giddens, 2002). Factual evidence will therefore not necessarily change opinions, but at least we will know what we are talking about and whether a changed role of states calls for a structural adaptation of the processes that currently aim to guarantee democracy, legitimacy and the rule of law.

At the same time, many economists, sociologists and political scientists (including IR theorists) have pointed to the influence of globalization on the role of the nation-state. Thus Cerny (1995), for instance, suggests an erosion of the ability of the state to provide all three main kinds of public good: regulatory, productive/distributive, and redistributive. And, even the defence of its population (perhaps *the* rationale of the state) has largely been

removed in some cases from the hands of individual nations, which rely instead on multilateral agreements (Held, 1998; Held and McGrew, 1998). Some, taking another perspective, have argued that in this situation we should not look for solutions *beyond* the state, but *within* the state as the latter has become 'dysfunctional' in tackling "the most perilous challenges of our time – climate change, terrorism, poverty, and trafficking of drugs, guns, and people" (Barber, 2013). Governance by cities rather than by states would be the solution.

A major source of concern seems to be that rules are no longer made by state organs that are controlled and understood by citizens, but by global bodies we have never heard of. The examples are well-known: ICANN sets the rules on the internet, the Codex Alimentarius Commission defines our food safety, decisions on pharmaceuticals are taken by the International Conference on the Harmonization of Technical Requirements for Registration of Pharmaceuticals for Human Use (ICH), and almost all technical standards of products we use on a daily basis are set by the ISO. In addition to that, rules often find their basis in complex international agreements that are far less accessible, transparent and comprehensible than national rules. Governance by states thus seems to be gradually replaced by global governance. From a sociological perspective, Giddens illustrated how consequences of globalization ('risk consciousness' and 'detraditionalisation'), undermine the ability of institutions such as the nation state – but also the family and religion – to provide us with a sense of security and stability (Giddens, 2002), but also how Europe's role is the world affected the social model in many EU member states (Giddens, 2006). Some, even see globalization policies as an intentional exercise to 'dismantle', or at least 'minimise' the state to attain the 'market utopia' that is the ultimate aim of neoliberalism (Beck, 2015).

Indeed, governance beyond, or even *without*, the state has become one of the central legal, regulatory and normative problems of our time. A recent – and for our project helpful – definition of 'global governance' refers to "the exercise of authority across national borders as well as consented norms and rules beyond the nation state, both of them justified with reference to common goods or transnational problems." (Zürn, 2018). Indeed, the exercise of public authority beyond the state is at the core of the notion of global governance and of the problems related to it (Lake, 2017; Von Bogdandy at al., 2010; Wessel, 2011). Over the years, academic studies and reports have pointed to this change in our global system. The classic idea that international law is composed of "rules emanating from the free will of states" (as argued in 1927 by the International Court of Permanent Justice) has been challenged on the basis of a proliferation and changing function of international institutions, which not only led to more international rules but also to a more direct impact of these rules on individuals.

2.2 *The transformation of international law and the 'Frankenstein problem'*

International law, traditionally, was a law *between* states and it is now believed to have become a law *within* states, with those states losing control on what to accept or not (if you want to play along, you will have to accept the rules of the game) and leaving individuals and companies largely out of the system of checks and balances.

Where the origin of inter*national* law may be found in agreements between nation-states (underlying the (in)famous non-hierarchical or 'flat' structure of the international legal order, the creation of international organizations (and above all their further development) seems to highlight the 'public' or 'vertical' dimension of the international legal order (Wessel, 2015b). The proliferation and law-making functions of many international organizations made us aware of the existence of – perhaps not the emergence of a world government (Trachtman, 2013) – but at least of global governance in which states have allegedly lost (some of) their sovereignty to what is sometimes normatively framed as a 'world community' (Koskenniemi, 2012; for a critical view).

Over the past years many scholars pointed to the emergence of new actors and the law-making functions of international organizations, and the emergence of an 'institutional global normative web' (Wessel, 2015a) may indeed have partly changed the nature of international law through the creation of a level of governance where the interests of nation-states are still visible and effective, but where these interests are more frequently embedded in and restraint by an interconnectivity of norms set by different formal and informal international institutions. Some textbooks do take this dimension into account in explaining the structure of international law. Thus, Klabbers points to the fact that "many of the rules are shaped not just between states but also involve representatives of international organizations (such as the UN), or civil society organizations (such as Greenpeace) and Brownlie acknowledges the idea that "international law underwent a profound process of expansion […] inter alia including the creation of international organizations of universal membership […]" (Klabbers, 2013; Crawford, 2012: 6). Moreover, these days, the study of 'international law-making' expressly includes law-making by international organizations and other bodies (Brölmann and Radi, 2015; Liivoja and Petman, 2014; Boyle and Chinkin, 2007).

The fact that international institutions (and hence not states) define our daily lives is a key part of the globalization debate. Traditionally, law-making is not seen as a key-function of international organizations (not even of the United Nations; Schachter, 2007:3). The reason is that most international organizations have not been granted the power to issue binding decisions as states were believed not to have transferred any sovereignty. Nevertheless, these days it is undisputed that many organizations do 'exercise sovereign powers' (Sarooshi, 2005) in the sense that they not only contribute to law-making by providing a framework for negotiation, but also take decisions that bind their member states. Indeed, the current debates on international law-making to a certain extent mirror the 'governance' debates in other academic disciplines. In that respect Koppell (2010:77-78) pointed to the fact that we can indeed use the term governance for the different normative activities as many of the international bodies are "actively engaged in attempts to order the behaviour of other actors on a global scale". Even without a global government we see "normative, rule-creating, and rule supervisory activities" as indications of global governance. For lawyers, 'governance' becomes relevant in particular whenever it involves legal rules or at least normative utterances with an effect on the legal order.

Indeed, international organizations and other global bodies have found their place in global governance, and are even considered 'autonomous actors', following an agenda that is no longer fully defined by their Member States, which has caused the latter to devote

much of their time and energy to responding to what has been termed the 'Frankenstein problem' (Klabbers, 2009; Guzman, 2013).

States have created all kinds of global entities and endowed them with rule-making functions, and the idea is that these entities can no longer be fully controlled. The fact that this problem has become more visible and recognised by individual citizens, may indeed tell us something on the changing structure of international law. And this changing structure has led "many individuals across the globe and, critically, in Western democracies, voice their dissatisfaction with international institutions, which reflect worldviews that these individuals see as out of kilter with their reality; which have procedures that they find obscure; and which impose solutions that they deem unfair. On their part, international institutions seem to have provided ammunition to this discontent, and may have acted in ways that jeopardise each other's legitimacy". (Brölmann et al., 2018)

Realizing that there is a whole world of international cooperation beyond the boundaries that were defined for states, international lawyers started to show an increased interest in attempting to describe and even explain normative processes that traditionally sit uneasy with traditional notions of law (or perhaps a *renewed* interest, considering the fact that ancient legal approaches clearly included non-state actors and informality – think of the *lex mercatoria*, which functioned as the international law of commerce throughout medieval Europe; Milner 2002). To name just a few (key) examples: Slaughter drew our attention to 'transgovernmental regulatory networks' (Slaughter, 2004); Kingsbury and others pointed to an emerging 'global administrative law' (Kingsbury, Krisch, and Stewart, 2005); Alvarez noted that more and more technocratic international bodies "appear to be engaging in legislative or regulatory activity" (Alvarez, 2005); von Bogdandy and others argued that international public authority may have different sources (Von Bogdandy, Wolfrum, Von Bernstorff, Dann, and Goldmann, 2010); the project on 'Private Transnational Regulatory Regimes' draws attention to transnational private actors (Cafaggi, 2012); global economic law-making was empirically researched (Block-Lieb and Halliday, 2017), many of this was part of the project on 'The Architecture of Postnational Rulemaking' (University of Amsterdam, 2013); and our own project introduced us to 'informal international law-making' (Pauwelyn, Wessel and Wouters (2012). A side-effect was that the study of international institutional law moved from a very descriptive (and admittedly, occasionally not too exciting) analysis of the set-up of the various existing international organizations, their organs and decision-making procedures, to a more conceptual analysis of the changing role of international institutions in global governance (Virzo and Ìngravallo, 2015). Lawyers started to focus on many different forms, actors and processes in the formation of international norms. As we have seen above, to political scientists and international relations theorists, the existence of 'transnational' normative processes did not come as a surprise and, in a way, always formed part of their 'reality of global governance' (Koppell, 2010). And for many decades already the link between globalization and democracy (Held, 1991) and the rule of law has been analysed.

2.3 In search of global constitutionalism

What many of the legal approaches have in common is a search for 'constitutionalism' at the global level, as constitutional values are perceived to be more difficult to guarantee at

the national level. Studies introducing international constitutional law (De Wet, 2006, 2012), or international administrative law (Kingsbury, Krisch, and Stewart, 2005; Cassese, 2016) are mainly interested in finding ways to transfer national constitutional values and ideas to the global system, in order to guarantee that citizens continue to be protected by the rule of law in the 'post-national' era. As clearly phrased by Peters (2009: 397): "the gradual emergence of constitutionalist features in international law" is expected to "compensate for globalization-induced constitutionalist deficits on the national level". Also, different views on state jurisdiction (such as 'pluralism') have been advanced as an answer to what is seen as "a fundamental transformation in law" (Krisch, 2010). And, other key-notions that we would usually connect to statehood, such as 'citizenship' have been put into perspective by not only 'European citizenship' (Kochenov, 2017), or 'supranational citizenship' (Strumia, 2013), but even by a 'global citizenship' that would no longer take state boundaries as its starting point (Globalcit, 2018), but that would be based on technological or digital identities. The latter notion is increasingly being discussed on the basis of the idea that technological advances will change the way we think of communities and identities, membership and belonging, borders and boundaries: a digital citizenship that would no longer be related to the nation-state (Orgad, 2018). Most of these approaches seem to accept that the state is no longer able to provide for legal certainty and other constitutional principles. It is time to reset this debate.

This is where we are now and globalization has not only changed the study of the world and the way in which norms are made, but also challenged the role, rationale and legitimacy of states and the state-structure. More importantly, perhaps, it changed the way in which citizens perceive the role of 'their' governments. In the many studies that are, partly, mentioned above, this is a given: states no longer play the role they had and are therefore no longer able to protect their citizens and to guarantee the (constitutional) values that form its own basis and secure citizens' influence. This is also what the research agenda presented in the present paper aims to challenge; indeed 'upstream' and perhaps counterintuitive, to highlight the indispensable role of the nation-state and to demystify globalization by producing different scenarios for a future world order.

3. Conclusion: developing a new research agenda

Globalisation had a severe impact on the way many academic disciplines turned away from 'the state' as their main focus of analysis; legal scholarship is no exception and over the years the main new research programmes focussed on transnationalism, global constitutionalism, or global administrative law. In short: governance beyond the state.

At the same time it has remained unclear to what extent states have indeed lost their central role, at least as the key building blocks of the international legal system. As indicated in this paper, statehood has not lost its popularity and the number of states has even increased. In law-making states remain essential players, as they also are in providing for legal security and stability, both externally and internally (at least in most cases). What is needed is new research on what exactly happened to states and in which cases they have remained essential also in a legal sense. In other words, what is needed is empirical findings

to reveal what can perhaps be described as 'the dark side of the moon': an invisible, but very present state structure.

I see four possible areas – and four different academic sub-disciplines – in which the role of states needs to be clarified:

1: the role of states in selected formal international organizations

We do not have enough (empirical) legal evidence of the role and function of states (or governmental actors more generally) in international institutions (international organizations and other bodies) that are active in the fields with an impact on individuals. On the basis of previous research it is assumed that migration, the environment, food safety, health, trade and ICT will be suitable candidates to find this evidence. The main area of research would be *the law of international organizations*.

2: the role of states in selected informal international institutions

While research over the years (e.g. Pauwelyn, Wessel and Wouters, 2012) pointed to the diminishing role and function of states (or governmental actors more generally) in informal international institutions, it also made clear that states have not completely left the international stage, even in this type of bodies. There is need to become more precise on their role in transnational, regulatory and other informal bodies that are active in rule-making. This will allow for a distinction to be made between frameworks in which states have traditionally been active actors and frameworks that are largely set-up by non-governmental actors in a more transnational setting. Research on this topic should mainly take place in the context of the discipline of *transnational law and regulation*.

3: the role of states in international agreements

Apart from focusing on decisions-making in international *institutions*, there is a need to assess international *agreements* concluded between states and the influence these states have on the final outcome of this process. New research is needed to analyse the role of states in multilateral treaty making, using process-tracing methods and interpretation of legally traceable state influence. Following up on earlier research by the present author (Pauwelyn, Wessel and Wouters, 2014) – this research should test the assumption that the decline of the relevance of states is partly due to the fact that simply less formal international agreements are being concluded, hinting at a diminishing governmental international cooperation (and more autonomous nation-states?). The research would mainly take place in the context of the discipline of *international (treaty) law*.

4: implementation of international norms in domestic legal orders

Research on this topic should aim to take a fresh look at how states implement adopted international norms in their national legal order. A focus should be on specific policy areas and specific instruments to make a new and important contribution to the way in which states 'transfer' their international obligations in their domestic legal order and to what extent they 'lose control' by having to set-aside national (constitutional) values. This research would largely connect to the discipline of *(international and national) constitutional law* and would use established (and if necessary adapted) 'rule of law' criteria and produce a systematic overview of issue areas, types of international obligations, and domestic impact in terms of the (constitutional) functioning of national institutions in a globalized, technology driven, world.

(Re-)clarifying the role of states seems essential in an era in which this role has increasingly become unclear for citizens that have been (and will be) confronted with an unprecedented pace of globalisation and new technological developments that are believed to affect the legitimacy of the emerging governance structures beyond the state. Legal scholarship has a task to contribute to on the basis of what it is good at: providing clarity about rule-makers, competences and legal certainty.

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