

NORMATIVE ORDERS

Forschungsverbund der Goethe-Universität Frankfurt am Main

Normative Orders Working Paper

01/2020

The Normative Order of the Internet

Von Matthias C. Kettemann

Forschungsverbund „Normative Ordnungen“ der Goethe-Universität Frankfurt am Main
www.normativeorders.net

Goethe-Universität Frankfurt am Main
Max-Horkheimer-Str. 2, 60323 Frankfurt am Main

kettemann@jur.uni-frankfurt.de



This work is licensed under the Creative Commons Attribution-Non-Commercial-No Derivative Works 3.0 Germany License. To view a copy of this license, visit http://creativecommons.org/licenses/by-nc-nd/3.0/de/deed.en_GB.

I. INTRODUCTION: LAW AS A FORCE OF ORDER

Law is force of order. It reacts, usually with a necessary time delay, to technological progress. Only twelve years after Samuel Morse presented the first workable telegraph system in New York in 1838 and six years after the first completed telegraph line from Washington to Baltimore, central European states agreed on an international framework for telegraphs. It has been much more than twelve years since the technologies underlying the internet's popularity today, such as the 'World Wide Web', were invented. No international framework has emerged, even though normative approaches abound. There are norms that are applied to the internet, but the recognition of the existence of an underlying, structuring order is missing. This motivates the present study.¹

II. DIMENSIONS OF DISORDER

Every legal system (and even non-legal systems) has certain chaotic tendencies in the sense that order is (usually) artificial and chaos the state of nature. While forces of disorder within traditional legal systems are tamed by formal institutions (national law) or decentralized control (international law), no norm-producing and -enforcing institutions exist for the global internet. This is a threat to the project of ordering the internet, which is premised upon commitments to a common normative goal. Three dimensions of disorder (froth, friction, fractures) and an overarching force of disorder (fragmentation) can be identified.

Normative froth is present when a number of different norms are applicable to similar situations without clear indications that one norm is preferred. A classic example of normative froth on the internet is the internet principle hype. While early collections of principles contained clear commitments to central regulatory goals, such as information society premised upon international law, different groups of actors started to develop new principles that, rather than seeking to increase through reiteration the normative pull of existing principles, provided for variation on the normative content motivated by particular sectoral interests. In only 18 declarations, 22 issues were normatively framed, but without references to previously agreed language or sensitivity to the liquidification of commitments by their variation.

¹ This contribution is based on research conducted for the author's *Habilitation* at the Cluster of Excellence "The Emergence of Normative Order", University of Frankfurt/Main, between 2013 and 2018. For more extensive presentation of the concept of the "normative order of the Internet", with extensive footnotes, see Kettemann, *The Normative Order of the Internet. A Theory of Rule and Regulation Online* (Oxford: OUP, 2020).

Normative frictions are more serious norm conflicts that go beyond non-hierarchical coexistence of duplicative norms (froth), but do not yet cause, even in aggregate, a rift within the online order (fractures). Examples of normative friction abound as national courts often diverge in their judgments on factually similar issues, which leads to jurisdictional conflicts – as the aftermath of the foundational *LICRA v. Yahoo!*² case amply demonstrates. Issues of normative friction emerge especially when comparing and applying the normative responses by national legal orders to the challenge of regulating intermediaries. Frictions can stem from direct legal conflicts (with one judicial body ordering a different outcome than the next) or from substantial conflicts between the preferences of states and companies or individuals and companies. One example discussed in the chapter is the treatment of intermediary liability, another one the frictions regarding the rules applicable to public and private spaces in online settings. A further example would be the demands by authorities to gain access to sensitive information of customers in the framework of fighting crime with the friction lying in the company's primordial interest in keeping that information secure. Summing up, frictions emerge especially when otherwise legitimate rules produce disproportionate interferences.

Normative fractures, as presented here, evidence a larger problem of rule on the internet. They refer to substantial conflicts that can lead to disorder. Among the examples discussed in this chapter we find fractures resulting from the application of international law-based rules and non-international law rules, including soft law standards. Even the GGE, which set out to *clarify* the application of international law on the internet during two cycles of analysis, fails to distinguish, in its 2015 report, between norms, rules, principles, understandings and existing commitments.

A further fracture has emerged between universal and particular (sovereignty-oriented, anti-universal) normative approaches by states. Sovereignty-oriented states, such as Russia, UAE, China, Saudi Arabia, Algeria, Sudan, and Egypt argue for more governmental control of the internet, nationalize telecommunications providers, provide for data localization laws and apply strong penalties to online dissent (or filter dissenting speech). This approach is often coupled with general references to the normative tropes of internet govern-

² Tribunal de Grande Instance Paris, *Ligue contre le racisme et l'antisémitisme et Union des étudiants juifs de France c. Yahoo! Inc. et Société Yahoo! France (LICRA v. Yahoo!)*, 22 May 2000. See also the US 'follow-up': United States Court of Appeals, Ninth Circuit, 433 F.3d 1199, *Yahoo! Inc. v. LICRA and UEJF*, January 12, 2006 (Sup. Ct. denied certiorari).

ance, including “multistakeholderism”. This shows, again, the malleability of the concept to the point where it can no longer be used to denote the effective and legitimacy-conferring integration of all relevant actors in their respective roles. Often coupled to sovereignty-oriented normative approaches to the internet are territory-based solutions, including data localization rules or profit nationalization decrees for globally active internet companies.

A substantial fracture has also emerged regarding the treatment of cyberwar in the normative order of the internet. While references to the UN Charter, being a foundational document, have been present in the normative ordering of the internet for a long time, the concrete references, in chapter VII, to the “use of force” (allowing for Chapter VII situation findings by the Security Council) and “armed attack” (triggering self-defense) have been contested. Sovereignty-oriented states, including those accused in the past of having committed offensive cyberattacks, argue against applying the Charter before attribution techniques become more reliable.³

Finally, a fracture has appeared when it comes to trust in internet integrity because of massive online surveillance practices that destabilize trust relationships. While surveillance, even secret surveillance, is necessary in a democratic society under specific circumstances, the practices of many states, including chiefly the “Five Eyes” and Germany, have been in violation of international rules. The ECtHR has shown in important judgments which obligations states have with regard to the protection of privacy. These include *Weber and Saravia v. Germany*, *Klass and Others v. Germany* (judges must review surveillance measures), *Bucur and Toma v. Romania* (Whistleblowers are to be protected), *Iordachi and others v. Moldova* (when legitimizing an interference, ‘national security’ must be interpreted narrowly) and *El-Masri v. the former Yugoslav Republic of Macedonia* (the ECHR can have extraterritorial impact; necessity to control security services).⁴

Arguing that just as societal cohesion is impacted by technological advancements, technology-related regulation itself can fragment. Indra Spiecker gen. Döhm, for instance, identifies digitalization (alongside globalization) as a key driver of fragmentation. This section has identified three key arenas of fragmentation: technical, commercial and legal.

³ Cf. Adam Segal, *The Development of Cyber Norms at the United Nations Ends in Deadlock. Now What?* Council on Foreign Relations, 29 June 2017, <https://www.cfr.org/blog/development-cyber-norms-united-nations-ends-deadlock-now-what>.

⁴ See the cases regarding the activities of the “Five Eyes” states: *Big Brother Watch and Others v. the United Kingdom* (Appl. No. 58170/13) and *Bureau of Investigative Journalism and Alice Ross v. the United Kingdom* (Appl. No. 62322/14).

Technical fragmentation impedes the full interoperability of the underlying internet infrastructure. Commercial fragmentation is caused by business practices constraining or preventing internet universality, such as ‘enclosures’ by companies that try to ‘lock in’ their customers by making data extraction very difficult and using single profiles across platforms. Political-legal, or governmental, fragmentation includes policies, laws and judgments that impact the internet’s universality or borderless nature by inhibiting free internet use through, e.g., filters. But even cases that increase human rights protection can lead to fragmentation by introducing specific internet sub-regimes within regional/national jurisdictions (such as through the *Delfi*, *MTE* and *Pihl* cases by the ECtHR, establishing a regime of targeted monitoring duties for certain intermediaries).⁵

Though centrifugal forces contribute to the emergence of normative redundancies, conflicts of norms and structural fractures as well as fragmentation, countervailing technical forces (the internet invariants) exist. They are the foundation of a technical defragmentation pull which the law – through the normative turn – realizes through norms.

On a different normative level, the ILC’s Fragmentation Report came to a similar conclusion, arguing that “increasing attention will have to be given to the collision of norms and regimes and the rules, methods and techniques for dealing with such collisions.”⁶ In particular, the Report counseled paying more attention to the role of the VCLT as a basis of an “International law of conflicts” and “attention to the notion and operations of ‘regimes’”.⁷

Interoperability theory and jurisdiction-based conflict-of-laws approaches provide some answers for the online order of how a law of conflicts for the internet may look like. But it is the notion and operation of regimes that is most interesting here. The report identifies three kinds of regimes, including “special sets of rules and principles on the administration of a determined problem” and “special branches of international law with their own principles, institutions and teleology”.⁸ The internet is probably too multi-faceted to be considered amenable to being administered as a “determined problem”. Rather, it could be con-

⁵ ECtHR, *Delfi AS v. Estonia* (16 June 2015), application No. 64569/09; ECtHR, *MTE and Index.hu ZRT v. Hungary* (2 February 2016), application No. 22947/13; ECtHR (3rd section), *Pihl v. Sweden* (7 February 2017), application No. 74742/14.

⁶ ILC, Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, 13 April 2006, A/CN.4/L.682249 (emphasis removed).

⁷ *Ibid.*

⁸ ILC, Fragmentation Report, 252.

sidered a regime in the sense of a special branch of (not only) international law. As shown above, the online order has its own principles and purpose (teleology); it does not yet have proper institutions beyond informal networks, non-governmental structures and ad hoc structures with a formal presence by different actors. But it could be argued that institutions are supplanted by the unique structure of normative development and decentralized enforcement, depending on the relevant norm; and that norms within the normative exercise compliance pull even without institutions.

The *Fragmentation Report* argues that a regime may function outside of treaties “in more broadly ‘cultural’ ways”.⁹ Regimes may also have non-governmental participants and “represent non-governmental interests in a fashion that might influence their interpretation and operation.” The modus operandi may be different from treaty-regimes: “[o]ften regimes operate on the basis of administrative coordination and ‘mutual supportiveness,’ the point of which is to seek regime-optimal outcomes.”¹⁰

Just as the “reversal of hierarchies is a liberating experience,”¹¹ the establishment of flexible hierarchies of norms (or orders of norms, normative orders) can be a stabilizing one and thus also a liberating experience – freeing actors from normative uncertainty. This reconstruction of a normative order necessitates an understanding of transnational theories of order and, in particular, a firm foundation in theoretical attempts to undergird an online order.

III. ENVISAGING THE NORMATIVE TURN

For Pierre Bourdieu, codification needs to be accompanied by a theory on the effects of codification.¹² Codification enables “l’instauration d’une normativité explicite, celle de la grammaire ou du droit.”¹³ Codification produces objectification and formalization, rationalization and normalization – and thus coherence control. It changes the nature of things: “un

⁹ Ibid.

¹⁰ Ibid.

¹¹ Ibid., with references to it being “just possibly the only way in which law can be an art of the just,” as suggested by Jacques Derrida. Of course, Derrida is in line with Thomas S. Kuhn. Hierarchies are very much like ruling paradigms; Koskeniemi’s ‘flux’ is Kuhn’s ‘paradigm change’, though it will be difficult to argue that law has become just at any one point, with both hierarchies in flux and paradigms being overthrown by scientific revolutions.

¹² Soraya Nour, Bourdieus juridisches Feld: Die juristische Dimension der sozialen Emanzipation, in Buckel et al. (eds.) (2012), 179-199 (191).

¹³ Pierre Bourdieu, Habitus, code et codification, Actes de la Recherche en Sciences Sociales (1986), 40-44 (42).

changement de statut ontologique”.¹⁴ The normative order established by law, however, is not transhistorical but contingent: Lawyers, who do see this temporal and social contingency of law, are “gardiens de l’hypocrisie collective”¹⁵ though even in hypocrisy they exercise substantial social power. We can avoid this trap if we do not engage in formal codification. The normative order of the internet is not an exercise in changing the ontological status of artefact. Rather, it is a necessary construct of an approach towards ordering the interaction of normatively relevant players and the interfacing of normative layers.

Varying Bourdieu, the study on which this working paper is based posits that conceiving of and finding online order is necessary as an essential presupposition for societal interactions. Indeed, Boris Groys describes human life as a “prolonged dialogue with the world.” This dialogue is based on certain philosophical presuppositions defining its medium and form, and today “we practice our dialogue with the world primarily via the internet.” Wanting to ask the world a question, “we act as internet users”. Under the internet’s current regime, intermediaries (Groys focuses on Google) define the rules under which we can ask this question. Today, says Groys, “Google plays the role that was traditionally fulfilled by philosophy and religion. [It is] the first known philosophical machine that regulates our dialogue with the world [...]”¹⁶ By giving specific context to words searched for, Google “presupposes and codifies the radical dissolution of language into sets of individual words.” Thus, Google dissolves all discourses by turning them into the word clouds that function as collections of words beyond grammar.”¹⁷

The current state of the internet seems similar, if we supplant ‘words’ with ‘norms’ and ‘grammar’ with ‘order’. This is the argument presented here: We are faced with online norms without order; and we need order to stabilize normative expectations and to make sense of the implementation of the finality of socio-political processes collected within the rubrum of internet governance.

Just as theory orders the world, ordering itself – based on theory – is a way to make the world. Citing Nelson Goodman, Andrea Bianchi notes that “[t]heories are ways of

¹⁴ Ibid.

¹⁵ Pierre Bourdieu, *Les juristes, gardiens de l’hypocrisie collective*, in F. Chazel und J. Commaille (eds.), *Normes juridiques et régulation sociale*, Paris 1991, 95-99.

¹⁶ Boris Groys, *Google: Words beyond Grammar*, 100 Notes – 100 Thoughts, No. 46, dOCUMENTA (13) (Ostfildern: Hatje Cantz, 2012), 4-6.

¹⁷ Ibid., 7.

worldmaking”.¹⁸ Goodman, in his own *Ways of Worldmaking*, describes composition and decomposition via labels, weighting according to relevance/irrelevance or other categories, ordering, deletion and supplementation and deformation (corrections or distortions) as ‘ways’ to make the world. Deletion and supplementation are especially interesting here. Goodman sees the scientist as

“rejecting or purifying most of the entities and events of the world of ordinary things while generating quantities of filling for curves suggested by sparse data, and erecting elaborate structures on the basis of meagre observations [thus striving] to build a world conforming to his chosen concepts and obeying his universal laws.”¹⁹

We see that Goodman is critical of ordering and seems to suggest that scientists develop order for their own sake rather than for the sake of the ‘ordered’. This is a pitfall we seek to avoid. However, we can agree that the normative order of the internet is an exercise in systematization and systematic deletion.²⁰ This study tries to show how the norms within the order relate to the order as a whole and thus ‘obey’ the ‘universal laws’ posited. However, in the larger study we make the case that epistemological reasons for the adoption of a normative orders approach to regulating digitality dominate. Varying Goodman, obeying universal laws makes sense, when they impress upon us their effectivity and legitimacy.

IV. THE NORMATIVE ORDER OF THE INTERNET

1. Concept

In a recent analysis of cybersecurity norms, two authors identified a “huge void in international regulation” after the “failure” of the negotiations in the GGE. If correct, this would be troublesome, especially in light of “recent cyber-attacks with global reach”.²¹ But there is no normative void,²² even less a “huge” one. The regulatory frame regarding the internet as a whole and cybersecurity in particular, as this study shows, is flexible, elastic and scalable: we call it the *normative order of the internet*.

¹⁸ Andrea Bianchi, *International Law Theories. An Inquiry into Different Ways of Thinking* (Oxford: OUP, 2016), 16.

¹⁹ Nelson Goodman, *Ways of Worldmaking* (Indianapolis, IN: Hackett, 1978), 7 et seq. (15).

²⁰ Goodman (1978), 15: “Replacement of a so-called analog by a so-called digital system through the articulation of separate steps involves deletion; for example, to use a digital thermometer with readings in tenths of degrees is to recognize no temperature as lying between 90 and 90.1. degrees.”

²¹ Theodore Christakis and Karine Bannelier, *Reinventing Multilateral Cybersecurity Negotiation after the Failure of the UN GGE and Wannacry: The OECD Solution*, EJIL Talk, 28 February 2018, <https://www.ejiltalk.org/reinventing-multilateral-cybersecurity-negotiation-after-the-failure-of-the-un-gge-and-wannacry-the-oecd-solution>.

²² Similarly, Emilie Legris and Dimitri Walas, *Regulation of Cyberspace by International Law*, ESIL Reflection, 7 (2018) 1, <http://www.esil-sedi.eu/node/2060>.

No one would doubt that Germany's liberal and democratic basic social order, the *freiheitlich-demokratische Grundordnung*, is based on law, in particular constitutional law. The 'normative order' of Germany is a proudly and profoundly *legal* order. Yet within the German legal system, there exist norms of very different character, from non-binding norms to DIN (*Deutsche Industrienorm; German Industrial Norm*) standards that exercise normative pull through epistemic authority,²³ from laws to fundamental rights guarantees enshrined in the Fundamental Law (Grundgesetz). The existence of non-binding norms within a normative system does not detract from the latter's qualification as a *legal* system or order.

National legal systems consist primarily of formally binding norms within a Kelsenian *Stufenbau*²⁴ and only comparatively few non-binding norms. This is particularly true for countries with strong protection of the rule of law, as the principle of legality prescribes that any state action needs to be based on law. This discourages normative innovation but safeguards fundamental rights, which is a valid trade-off given the conflicting interests involved. In the normative order of the internet the inverse is observable. There are, depending on how one approaches the definition of the order, many different normative instruments present: from national laws and international regulations to transnational regulatory arrangements, the majority of which, especially in the third category, are not formally binding norms.

When introducing the concept of 'normative order', this study has referred to the approach by Forst and Günther, who see norms less in terms of legality grounded in *formality* and more in terms of *functionality*. Norms, to them, are "practical reasons to act [containing] the claim of being binding upon the addressee."²⁵ These claims are narrativized and contextualized, habituated in practices, contained in customs (implicit, instituted normativity) and conventions *as social contracts* (implicit again) or conventions *as treaties* (explicit constituted normativity). The claims of being binding are thus *not legal* in that they are premised upon a legal procedure to ensure compliance, but nevertheless exercise, through their claim to be binding, a certain compliance pull.

²³ Though some are referred to in laws and thus part, by reference, of the legal system.

²⁴ Hans Kelsen, *Reine Rechtslehre* (1934), 21 (Matthias Jestaedt, ed., *Reine Rechtslehre. Studienausgabe der 1. Auflage 1934*) (Tübingen: Mohr Siebeck 2008), 33.

²⁵ Rainer Forst and Klaus Günther, *Die Herausbildung normativer Ordnungen. Zur Idee eines interdisziplinären Forschungsprogramms*, in Rainer Forst and Klaus Günther (eds.), *Die Herausbildung normativer Ordnungen. Interdisziplinäre Perspektiven* (Frankfurt/New York: Campus, 2011), 11-30 (16).

But norms in the context of this study are *legal* in the sense that they shape and frame the *legal* space (*Rechtsraum*), contribute to ensuring *legal* peace (*Rechtsfrieden*), provide for a *law* of collision (*Kollisionsrecht*) between applicable regimes and are treated by and large as *legal* norms or at least *legality* heuristics which ease decisionary burdens.

Taken together, the norms constituting the normative order of the internet (those *normatively* relevant for the internet and digitality in a *materially* relevant way) form a multi-layered legal order. This does not mean that they are centrally *ordered* or *hierarchically* layered. A normative order is a “complex of norms and values with which the fundamental structure of a society (or the structure of international, supranational or transnational relationships) is legitimated, in particular the exercise of political authority and the distribution of basic goods.”²⁶ These are key *legal* functions. At the same time, the normative order of the internet is more than a purely legal order as it relies on norms and processes that cannot easily be conceptualized in the language, logic and legitimacy structures of traditional legal systems.

The order extends to regulating and legitimating (or providing the normative tools for contestation of) the exercise of private or public authority and the distribution of basic goods in relation to the use and development of the internet by multiple actors, including internet access and access to internet content. It enshrines a *rule of norms*, the set of norms and normative expectations that shape the use and development of the internet, which lead to a *rule of law*.

The measure of *legality* of the normative order cannot be the “political constitution” (of states), against which it would fall short (but so does the international *legal* order). Rather the normative yardstick must be the normative order of the internet’s *Eigenverfassung*,²⁷ as instituted by practices, and auto- and hetero-constituted. Norms from the third category (transnational regulatory arrangements, internet standards ...) may not be *legal norms* in traditional national or international legal approaches (they are the *tertium*), but they can be considered to have some or most of the qualities of legal norms (*Rechtsnormqualität*) if

²⁶ Forst and Günther (2011), 15: “Unter ‘normativer Ordnung’ verstehen wir den Komplex von Normen und Werten, mit denen die Grundstruktur einer Gesellschaft (beziehungsweise die Struktur inter- bzw. supra- oder transnationaler Verhältnisse) legitimiert wird, namentlich die Ausübung politischer Autorität und die Verteilung von elementaren Lebens- und Grundgütern“ (translation by the author).

²⁷ Gunther Teubner, *Globale Zivilverfassungen: Alternativen zur staatszentrierten Verfassungstheorie*, 63 *ZaÖRV* (2003), 1-28 (22).

they meet internal, regime-specific transnationalized and objective human rights-based checks and balances as to their production, content and application.²⁸

2. Conditions of Legitimacy

We have hypothesized that the normative order of the internet is a legitimate order. Internationally, the integration of all actors in norm-setting processes proceduralizes legitimacy. Nationally, as will be discussed in the next chapter, existing procedures to legitimize non-legal norms can be applied *mutatis mutandis* with the same result. Returning to the international level, we can find that a substantial part of the norms making up the normative order of the internet are norms of international law. Therefore, Louis Henkin's finding that "almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time"²⁹ is relevant for assessing the conditions of legitimacy of the normative order of the internet. Indeed, legitimacy is closely tied to rule-confirming behavior. Without a sense of obligation (which might be grounded in the epistemic superiority of a normative approach), rule-confirming behavior remains sporadic and erratic.

This sense of obligation is tied to the perceived legitimacy of a norm.³⁰ Thomas M. Franck defined legitimacy as a property of a rule or institution (or, it could be added, an order) "which itself exerts a pull towards compliance on those addressed normatively because those addressed believe that the rule or institution has come into being and operates in accordance with generally accepted principles of right process."³¹ *Right process* is one way of formulating demands regarding the processes related to the genesis of norms. Franck argued further that a single norm's legitimacy (and thus compliance pull) depends on its determinacy (ascertainable normative content), symbolic validation through an authority figure/institution and coherence with, and adherence to, a broader system of rules.³² A variation of these criteria will be useful to assess the legitimacy of online order norms.

²⁸ and Thomas Vesting: *Die Medien des Rechts: Computernetzwerke* (Weilerswist: Velbrück Wissenschaft, 2015), 144.

²⁹ Louis Henkin, *How Nations Behave*, 2nd ed. (New York: Columbia University Press, 1979), 47 (emphasis omitted). For empirical studies confirming Henkin's dictum, see Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 *Yale Law Journal* (1996-1997), 2599-2659, note 2.

³⁰ Thomas M. Franck, *The Power of Legitimacy Among Nations* (Oxford: Oxford University Press, 1990). For a more recent interpretation, see Thomas M. Franck, *The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium*, 100 *AJIL* (2006), 88.

³¹ Thomas M. Franck, *The Power of Legitimacy Among Nations* (Oxford: Oxford University Press, 1990), 24.

³² Cf. Thomas M. Franck, *Fairness in the International Legal and Institutional System*, 240 *Recueil des Cours de l'Academie de Droit International* (1993) Vol. III, 26.

The level of normativity of a normative order varies. The normativity of a norm – and of a normative order – is one of its properties. It is related to, and dependent on, its legitimacy.³³ It is impossible to make a general claim regarding the legitimacy of norms of the normative order of the internet. Depending on their character (international legal norms, national legal norms, norms forming part of the transnational regulatory arrangements), they are already situated within established legitimacy structures that do not need to be fundamentally revisited for the internet. Just consider: When applying international law's well-established non-intervention principle to online settings, there is no obvious need for providing a theory of the principle's (customary law rule's) legitimacy. Similarly, national laws providing for certain obligations for intermediaries, such as the German *Netzwerkdurchsetzungsgesetz*, may be flawed, but their legitimacy as laws is not *prima facie* in question. Only in cases of substantial violation of core principles of the normative order of the internet (such as minimum consultation levels with all relevant actors) will the legitimacy of norms of national or international law have to be revisited for the purposes of their position within the normative order of the internet.

This is not so for order-specific norms, such as internet governance principles, and for the order itself. Their legitimacy needs to be demonstrated. Norms belonging to the normative order of the internet are those having a (1) *material* (non-trivial) and a (2) *normative* (not merely factual) connection to the internet as a network of networks. Based on Franck's criteria for the legitimacy of norms, these norms need to be *formally* and *materially legitimated*. Formal legitimation is achieved through symbolic validation through norm emergence in a multi-stakeholder process.

For a norm to be *materially legitimated*, it needs to

- be *determinate* enough for its purpose (thus allowing for non-binding instruments),
- *cohere* with the core principles of the normative order of the internet,
- be *consonant* with the order's values as expressed in its principles and
- *adhere* systematically to the normative order as a whole.

Thus, formally, legitimacy within the normative order of the internet is proceduralized (this is the input and throughput dimension of legitimacy). The norms emerging from these processes are often epistemically good normative solutions. This is the output dimension of legitimacy.

³³ Cf. Peter Koller, *Theorie des Rechts. Eine Einführung*, 2nd ed. (Vienna: Böhlau, 1997).

3. The Order Explained

The normative order of the internet encompasses norm-generative processes and includes, through its processes, normatively relevant action by all actors. These actors develop normative expectations, which are debated, contested and realized on the basis of shared principles within the order. The study shows which substantial and procedural principles are applicable, including commitments to ensuring human rights, keeping the internet as an unfragmented space and ensuring the security, stability, reliability and trustworthiness of the internet, premised upon a strong cooperation between actors. Such cooperation is proceduralized within the order as well.

Each field of norms within the order – international law, national law, transnational normative arrangements – is legitimized either through traditional normative processes or by its integration into national legal orders. Each actor group is legitimized directly or indirectly and transfers this legitimacy potential to the normative outcome, which is often – additionally – epistemically legitimate. The normative order itself is legitimate as a necessary order to ensure protection of and from the internet. The process of justifying the order is narrativized. As any order participant has a right to justification against norms and practices generally-reciprocally, the normative order of the internet is an order of justification.

The normative order of the internet thus established, parsed and legitimized is both an empirical-conceptual and a normative construct: it provides legitimacy (and justification) narratives and functions as an elastic normative space, with principles and processes for solving public policy conflicts connected to safeguarding the internet's integrity and protecting states and societies, natural and legal persons, from dangers related to internet use and misuse. It importantly includes the normative tertium and is thus a unifying theory. These transnational norms and normative arrangements transcend binary normative solutions and can counteract diffusions of regulatory responsibility in transnational settings.

Establishing the normative order of the internet was a conservative exercise in that the *ultima ratio* was not to *secure the internet*, which is merely a technological facility, but rather the interests of all actors, individually and collectively, in the use and development of the internet insofar as this invokes the exercise of private or public authority and the distribution of basic goods.

V. CONCLUSIONS

There is a normative order of the internet. This order integrates norms materially and normatively connected to the use and development of the internet at three different levels (regional, national, international), of two types (privately and publicly authored), and of different character (from *ius cogens* to technical standards). As a legal order it, operates through the form of law and analogously to it. Its actors – states, legal persons, natural persons – fulfil diverse functions as norm entrepreneurs, norm appliers, and norm enforcers. The order's justification narratives control new norms by assessing their technical consistency and their legal-cultural consonance *vis-à-vis* the order's purposes. Though not without autonomous elements, the normative order of the internet is interlinked through legitimation relationships with national and international legal orders.

The order is made up of international law, national law, and transnational regulatory arrangements of variable normativity. Apart from international and national norms, a 'third' category of norms exists, a normative *tertium*, which has only recently emerged as a normative category in its own right. *Tertium* norms are fundamentally technical standards and soft law norms that emerge in the contested space between technical necessity and socio-legal values. They evidence a variable normativity and transcend binary normative solutions and can thus counteract diffusions of regulatory responsibility in transnational settings.

The order's normativity shapes technicity. The technology-orientation of non-legal normativity, including its focus on code and standards, needs to be reoriented through a value-based normative approach, while the effective internal norm (re)production mechanisms of private standards need to be embraced. It is thus not technicity that shapes normativity. Rather than letting a technical medium define our societal values, it is the values embedded in the normative order of the internet that define the evolution of the internet's underlying technologies through normative framing and regulatory interventions. Value-based normativity must influence standard-setting to ensure the primacy of international legal commitments, and their national legal counterparts, in determining the finality of the normative order of the internet. Rather than accepting arguments out of technical necessity, we demonstrate that technical norms are properly placed within the value-oriented common frame of the normative order of the internet.

The internet's forces of normative disorder can be identified and countered. Centrifugal forces contribute to the emergence of normative redundancies ("normative froth"), real conflicts of norms between regulatory layers and geographically bounded normative spheres ("normative friction"), substantial structural problems ("normative fractures"), and political, commercial and technological fragmentation of the internet. However, technical invariants of the internet exercise defragmentation forces. These are then normatively reified within the normative order of the internet.

The internet has taken a normative turn. The study on which this working paper is based shows that a normative turn has taken place on the internet allowing norms impacting its use and development to self-constitutionalize and – through autonomous normative processes – to develop and legitimize other norms within the order. This approach has considerable explanatory and predictive potential regarding the evolution of norms and how this process will impact the internet. For instance, the study demonstrates that attempts at norm entrepreneurship that are in dissonance with key principles of the normative order, or that do not cohere with other order norms, will fail.

The normative order of the internet is a legal and legitimate order which is connected to, and legitimated by, international and national legal processes. It is further a legitimate order of norms. Processes of legitimation of norms take place within the order, but also through national law and the international legal system. Internationally, the norm creation process, which allows for the integration of all actors, legitimates the normative outcome. Nationally, tertium norms have been progressively recognized within national legal orders through processes of formal and non-formal application, transposition, and referencing.

Author Biography



Matthias C. Kettemann

PD Mag. Dr. Matthias C. Kettemann, LL.M. (Harvard), is senior researcher at the Leibniz Institute for Media Research | Hans-Bredow-Institut (HBI) and head of its research programme on rule-making in online spaces. In 2020 he is visiting professor (*Vertretungsprofessor*) for International Law at the universities of Heidelberg (winter term) and Jena (summer term). He is *Privatdozent* for International Law, Internet Law and Legal Theory at the Institute of Public Law of the University of Frankfurt, project lead for International Internet Law at the Alexander von Humboldt Institute for Internet and Society (HIIG), Berlin, and Leader of the Research Group *Content Governance* at the Privacy and Sustainable Computing Lab of the Vienna University of Economics and Business.

His research focuses on the rule and the rules of digitality. He studied international law in Graz, Geneva and Harvard Law School and completed his postdoctoral work at the Cluster of Excellence “The Emergence of Normative Orders” at the University of Frankfurt, where he is founder and convenor of the Frankfurt Colloquium for Internet Research.

Matthias has published widely and has provided expertise for the German Bundestag, political parties, several DAX companies, foundations and international organizations, including the Council of Europe, the European Parliament and OSCE on Internet regulation, cybersecurity and human rights.

Selected publications

- *Kettemann*, *The Normative Order of the Internet. A Theory of Online Rule and Regulation* (Oxford: Oxford University Press, June 2020)
- *Kettemann* (ed.), *Navigating Normative Orders. Interdisciplinary Perspectives* (Frankfurt/New York: Campus, May 2020)
- *Mosene/Kettemann* (eds.), *Many Worlds. Many Nets. Many Visions. Critical Voices, Visions and Vectors for Internet Governance* (Berlin: HIIG, 2019) (online OA at <https://www.hiig.de/publication/many-worlds-many-nets-many-visions>)
- *Kettemann/Dreyer* (eds.), *Busted! The Truth About the 50 Most Common Internet Myths* (Berlin: BMWi/Hamburg: Verlag Hans-Bredow-Institut, Nov. 2019) (online OA at <https://www.internetmyths.eu>)
- *Kleinwächter/Kettemann/Senges* (eds.), *Towards a Global Framework for Cyber Peace and Digital Cooperation. An Agenda for the 2020s* (Berlin: BMWi, Nov. 2019) (online OA at <https://leibniz-hbi.de/de/publikationen/towards-a-global-framework-for-cyber-peace-and-digital-cooperation>)
- *Wagner/Kettemann/Vieth* (eds.), *Research Handbook on Human Rights and Digital Technology. Global Politics, Law and International Relations* (Cheltenham: Edward Elgar, 2019)