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Cyberspace: Fertile ground for unofficial regulation

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Abstract:

Cyberspace invites the jurist in the countries of the Romano-Germanic family to rethink the theory of the sources of law. The theory of formal sources which derives the validity of a norm from its official mode of formation appears to be completely out of step with the actual modes regulation of the Internet, among which standards coming from atypical sources (private self-regulation, co-regulation, soft law processes) occupy a determining place. . This study situates the reality and importance of the regulatory activity of cyberspace actors by evaluating its impact on the effectiveness of formal state standards. The text attempts to demonstrate how the product of the self-regulatory activity of cyberspace, embodied by informal norms, could constitute the normative complement of formal norms. Only a renewed, even Americanized, approach to source theory makes it possible to account for the phenomenon of normative production in the field of cyberspace.

*** MESSAOUD BOUREGHDA Narimene.**

Introduction:

> « Hier encore, l'État tenait le premier rôle sur la scène politique nationale et internationale. Réduisant les autres acteurs au rang de faire-valoir ou de figurants, il récitait un grand texte d'auteur, celui de la «raison d'État» souveraine, qui semblait n'avoir été écrit que pour lui. Dans la nouvelle distribution contemporaine, l'État n'a pas disparu ; [il] apparaît désormais comme le représentant un peu vieillissant d'une grande compagnie classique, perdu au milieu d'une troupe d'amateurs exécutant un programme improvisé, le forçant ainsi à adapter son texte à une intrigue dont le sens général paraît parfois lui échapper »
>
> [F. OST, M. VAN DE KERCHOVE, 2002] [1]

Maurice Hauriou noted the triumph of the State since the 19th century: "The State is a summit from which one cannot descend".[2] This success is such that, before globalization calls into question the relevance of State structures, it is the State itself that has been globalized, to the extent that all the world's territories are now criss-crossed by States.[3] It is for this reason that the state is described as "THE form of organization of human societies",[4] "the imposed figure of political organization".[5] It is therefore something fundamentally common and habitual. But law, too, is quite common and habitual; this does not prevent it from being indefinable. In this sense, the state is certainly that which is juridical as opposed to that which is not juridical. And in this sense, it is remarkable that the author of the article "État" in the *Dictionnaire de la culture juridique argues* that the "crisis of the State" is due to phenomena that the State finds difficult to control, and that the best illustration of this situation is the Internet.[6]

Although the Internet is the result of a university project and research by the American Pentagon, it has developed as a private transnational phenomenon independent of any state or inter-state regulation, so much so that even today it doesn't fit neatly into the boxes of the territorial division of power. In this sense, Professor Marie-Anne Frison-Roche sees the law of Internet communication as atypical example of a "law of regulation", i.e. a law over which "the state cannot extend its power".[7] Regulation occurs," adds the professor, "because the State

no longer has the means to keep the sector in question within its sphere; it is overwhelmed by the task. And it is most often overwhelmed geographically, because the notion of territory loses its meaning".[8]

States have in a way sought to regain control, but their action remains largely peripheral to the Internet, since the Internet is characterized not only by significant private self-regulation, but also by the development of new forms of normativity that can combine public and private power, to such an extent that we may wonder whether examining the sources of Internet law should not lead us to reconsider the theory of the classic sources of law.[9]

Indeed, there is no longer any denying that cyberspace, a phenomenon whose reality and influence are indisputable, tends to limit and even challenge the State. While the development of international law undermines its sovereignty, the development of transnational law such as the Internet threatens its power.

With this in mind, our analysis of the sources of Internet communications law tends to show that the Internet is only partially covered by public sources of law (the first topic), while private sources are constantly being called upon to regulate it (the second topic).

THE FIRST TOPIC: The partial takeover of the Internet by traditional sources:

The Internet is indeed a world of law, contrary to claims that it is a legal Far-West. Moreover, the problems posed by the Internet phenomenon generally stem not from the absence of standards, but rather from their application, due to the sometimes elusive nature of electronic communications. The aim of my contribution is not to analyze the actual content of the rules, as this is the subject of other studies... however, identifying the sources involves identifying the rules governing the Internet, including any standards that may emanate from its governance, and it is only once these rules have been identified that we can analyze their origin, their source and the process by which they were drawn up.

By classic or public sources, we mean those authenticated by the classic theory of formal sources, and whose mobilization is likely to reveal the degree of state control over the Internet, or at any rate their desire to regulate the

phenomenon.

Given the intrinsic transnationality of the Internet, efficiency would dictate that public regulation of the phenomenon should spring from international sources,[10] However, we shall see that the formal sources of international law are scarcely mobilized in relation to the Internet -First requirement - , so much so that in domestic orders, the transnationality of the Internet, among other factors, contributes to depreciating the queen source, which is the law - second requirement -.

First requirement: International sources in the background :

The first point, which I won't go into at length, is the existence of a common body of international law, i.e. the general rules which are not specifically aimed at the Internet but which are intended to apply to the electronic network, such as the prohibition of interference in internal affairs, the obligation of *due diligence*, and the rules for the protection of the human person,such as freedom of expression: the question of the sources of these rules does not call for any particular comment in the context of my study. What I'm aiming at are the sources of international law that lead to rules that specifically concern the Internet, and the 1st thing that jumped out at me was the paucity of public international law on the Internet.

This poverty manifests itself primarily in the total absence of any public international regulation of the network (-1-), and in the fact that the formal sources of international law are not mobilized to govern the essential, but rather the accessory (-2-).

(-1-) The ITU (International Telecommunication Union) could have been entrusted with the regulation of the Internet by the States. The question was raised in a somewhat controversial manner at the 2012 conference[11] by certain States who wanted to internationalize Internet law in order to better control it; China, Russia and the United Arab Emirates wanted to extend the scope of the International Telecommunication Regulations to the Internet, not so much to regulate its development as to better control the network, since they wanted the regulations to enshrine the sovereign right of each state to regulate the Internet

on its territory. This provoked very strong opposition from Western states, led by the USA, which wanted to preserve the freedom of the Internet, and in any case avoid appropriation by certain states (to preserve the network from state interference).

There have been other proposals for the internalization of Internet law, which I won't go into here, but the problem is that the Internet is already in place, and functions without the involvement of states, particularly in the technical aspects, such as transmission and porting protocols, which are thework of private individuals; and so achieving international regulation of the Internet would almost presuppose a prior nationalization of the network, whichis clearly not on the agenda. So rather than regulating the essential, international law is content to regulate the accessory.

(-2-) There are very few international treaties specifically aimed at the Internet, such as the Convention on Cybercrime adopted under the aegis of the Council of Europe in 2001 and its additional protocol,[12] but these are only solutions that have been described as very classic, in the sense that they bring into play the territorial jurisdiction of states.[13] In fact, the few international treaties that deal with the Internet are more concerned with harmonizing national legislation than with regulating the Internet. There are also a number of international treaties on cooperation between states, notably in the field of cross-border data flows, and bilateral conventions have been used in the fight against terrorism.[14] It could still be used to combat the phenomena of digital havens, but once again, there are very few treaties that tackle Internet law head-on. In fact, the Internet has not been the subject of any universal treaty, even if conventional norms concerning intellectual property, whether or not related to international trade, are likely to be applied to it.[15]

In any case, harmonization implies that States, through a common political will, bring their legal systems closer together on issues relating to cyberspace; and the first step would be to agree on a minimum set of universal values, whose effective application they would be responsible for ensuring. However, it is doubtful that States are really more inclined to come closer together through harmonization than to agree their positions within the framework of treaties, since the issues in both cases are relatively the same, while the means, if they differ, are similar in that they presuppose finding, more or less explicitly, political agreements. Differences between national conceptions are

no less an obstacle to harmonization than to unification. Both imply a "legal acculturation",[16] possibly an "Americanization of the law", which lawyers in different countries and legal cultures may not be ready to welcome. Ifonly to transcend the Romano-Germanic law/common law divide is no mean feat. It may be a long time before governments become "champions of comparative law".[17]

Nevertheless, as is often the case in emerging normative fields (such as environmental law), *soft law* production methods (recommendations by international organizations, such as the numerous UNCITRAL model laws and non-conventional concerted acts[18]) are tending to be used more and more, which could augur well for the development of an international Internet law based on processes leading to binding norms, once soft law has been tested.

As for the other sources of international public law, they are very little used, I have not managed to identify any customs in place, perhaps the case law deserves to be mentioned in particular on the European Court of Human Rights on new technologies that can be considered as a source of this law of the Internet.[19]

In the European Union, for example, there is a common body of law that applies, such as EU private international law, the Rome 1 and Rome 2 regulations, which can govern Internet-related disputes, but if we look at the regulation or the very purpose of the Internet, there are relatively few texts, such as the 2000 directive on e-commerce, which also calls on states to harmonize their national legislation. And so all this contributes to the depreciation of national sources**,** which is the 2nd point.

Second requirement: Domestic sources of low added value :

There's no shortage of legislation governing the use of the Internet and the Web. This is illustrated, for example, by the numerous provisions enacted since the 90s: conditions and procedures for setting up and operating Internet services,[20] electronic exchanges, electronic proof and signature, [21] electronic certification,[22] processing of personal data,[23] e-commerce,[24] protection of copyright and neighboring rights, cybercrime[25]... from a quantitative point of view, the problem is not so much the low number of legislative standards enacted, but the large number of non-legislative standards enacted, this being the

consequence of the legislator's difficulties in enacting consistent and effective legislation.

The depreciation of national sources in the regulation of the Internet is manifested, obviously for questions of efficiency, to which I'll return later, but also by the fact that the law ultimately retranscribes norms that come from higher sources (treaties, directives, etc.) and so the creative genius of the legislator is not much in demand. Where the Internet is concerned, we might even wonder whether the law is really the work of parliament. if we refer to Algerian laws specifically devoted to the internet, we can point out, by way of example, that Algeria has updated its Personal Data Protection Policy in accordance with law no. 18-07 of June 10, 2018, which is none other than the retranscription of the RGPD[26] which came into force one month at par before (on May 25, 2018), which is in turn inspired by the "*Guiding Principles for the Regulation of Computerized Personal Data Files"* adopted on December 14, 1990 by the United Nations General Assembly as part of its resolution A/RES/45/95.

We can also take the example of French law, where we note that an organization such as the **Internet rights *forum*[27]** was behind a bill aimed at reinforcing consumer protection in distance selling,[28] which was partly taken up by the *Chatel* law of December 2007. Another example is Quebec's law on the legal framework for information technology, which does not hesitate to refer to technical standards adopted in private international *forums*, so that, as Canadian Professor Pierre TRUDEL writes, "the law thus takes the form of a component, of a process within which other sources of normativity play a more or less dense role". [29]

All these phenomena ultimately lead to a depreciation of national law. Added to this is the cumbersome nature of the formal procedures for creating law, in the face of the rapid evolution of digital networks, which poses a problem of arrhythmia.[30] The regulation of cyberspace by law is largely justifiedby the perceived risks that unregulated use of the Internet can cause. It istherefore foreseeable that normativity relating to the Internet is perilous, and even sometimes futile, in the context of risk anticipation/ management/ distribution, which is one of the major concerns of legal systems.

But the most disparaging aspect of national law is the discrepancy

between its territorially limited character and the transnational basis of the Internet[31] : does this mean that a State can now apply its law outside the limits of its territory, and thus disregard the sovereignty of other States? More fundamentally, is the very definition of the State being called into question by the technological phenomenon of the Internet? Classical doctrine teaches us that territory is one of the essential conditions of a state's legal existence. Ignoring its scope could lead to unfortunate challenges. Carré de Malberg nevertheless points out that "*the sphere of power of the State coincides with the space over which its means of domination extend*", and that "*the State* thus *exercises its power not only over a territory, but over a space, a space which, it is true, has as its basis of determination the territory itself*".[32] The notion of territory has long since been dissociated from that of land. There is nothing, at least theoretically, to prevent it from being extended to larger or smaller portions of *cyberspace*, which would itself become a vast *border zone* where states would be in a kind of competitive situation. Generally speaking, this very real multiplication of links between content present on the Net and the law of a State, whatever their respective geographical locations, does not seem to call into question the very definition of the State form.[33] Nevertheless, we are forced to note that even if servers, access providers and network users are geographically localized, the best national legislative arsenal cannot regulate the phenomenon without impeccable inter-state cooperation, which to date is rarely forthcoming.

More fundamentally, the application of state law depends on the ability of states to engage physically within their geographically established jurisdictions, at least theoretically.[34] However, the emancipation of territorial constraints in cyberspace, coupled with the delocalized virtual nature of this electronic environment, totally eludes this ability and could affect the expression of normative and coercive powers in this environment. The "Great Chinese Firewall" in front of high-ranking Websites (like American search engines such as AltaVista and Google...)[35] to, officially, restrict access to sites of a prejudicial nature,[36] raises suspicions of the establishment of borders in a certain Chinese cyberspace.[37]

At the end of this brief survey of Internet standards emanating from classic, or orthodox, sources, we can see that cyberspace law is characterized by the fact that all state sources are, for one reason or another, "in crisis". As a result, it would be characterized by the retreat of state sources in favor of non- state

sources, particularly private ones. And we shall now see that the more "heterodox" sources of law occupy an essential place within this network.

THE SECOND TOPIC : The proliferation of unofficial sources in Internet regulation

Alongside the secular sources we have just considered, there are less majestic sources of law that flourish in the interstices of official sources of law.

The heterodoxy, not to say heresy, of the formal theory of the sources of law can be seen in the importance of private sources in the regulation of the Internet, but also in the de-formalization of public sources. In the context of my study, I will focus solely on private sources, whose development always goes hand in hand with the "crisis of law", or at least the "crisis of the state", the main issue of my article.

Since we're moving away from the formal theory of sources, I'd like to say a few words about the material sources of cyberspace law, in particular the Declaration of Independence (First requirement), before moving on to the "pseudo-formal"sources - why pseudo, because they don't fit into the positivist nomenclature; what are they? (Second requirement).

First requirement: private material sources :

From its very beginnings, the Internet has been experienced as an a-state space of freedom, based on the idea of self-management, as has been noted: "the web was initially frequented by pioneers of Anglo-Saxon origin, from university backgrounds, young, male, and for the most active, marked by Californian utopias (*New Age*, counter-culture ideas) and anarcho-capitalist (libertarian) theses" [38]

The first efforts by states to regulate the network were perceived - and sometimes continue to be perceived - as undue interference, as demonstrated by the "Declaration of Independence of the Cyberworld"[39] drafted by John Barlow in response to the *Communication Decency Act* of 1996 - the first legislation on the Internet adopted by the USA, the purpose of which was to penalize the distribution of pornographic or obscene files. The Arab Spring and the *Wikileaks* affair have not failed to fuel this perception of the Internet as a counter-power to the state.

In a largely unprecedented move, Internet players are challenging the very legitimacy of government action - all the more so when it emanates from authoritarian regimes anxious to lock down the network, while liberal states open to private self-regulation[40] are content to set up safeguards. These considerations underline the importance of private normativity in Internet regulation.

Second requirement: Private pseudo-formal sources :

It must be emphasized that the architecture and general organization of cyberspace is not merely the negative expression of a balance of power, i.e., in this case, a greater or lesser obstacle to the application of the law. The Internet - and this is essential - generates its own codes of behavior, its own customs, totally autonomous from States.

First of all, there are the rules behind "**Netiquette**": this is the code of conduct for Internet activities,[41] particularly when exchanging information in forums, by e-mail and on social networks. The aim of this deontological framework is to describe the polite behavior and good manners to be observed on the Net.[42] More specifically, Netiquette is divided into three parts: rules applicable to person-to-person communication, including e-mail; rules applicable to person-to-person communication, including mailing lists; and rules applicable to information services, including all web services. Examples of standards that are classically found in Netiquette include the requirement to write only short messages, the prohibition on writing text in capital letters (using capital letters is tantamount to shouting), and the requirement to respect a certain "code-smileys"...[43]

Netiquette, the etiquette of the Net, thus represents the various "unofficial" rules of etiquette on the Internet. These rules of courtesy are the result of spontaneous generations of usage forged by users themselves as they use the Internet. Today, the general conditions of use of access providers, web hosts and portals very often refer to netiquette in their contracts, and a user's failure to comply with this code can result in the suspension or termination of his or her account. To this end, a clause such as the following is used: "Netiquette is the code of conduct for Internet users, whether professional or private. Failure by the user to comply with this code may result in the suspension or termination of the user's account".[44] Netiquette thus benefits from the legal force conferred

by conventions. For example, with regard to the practice of sending unsolicited mass e-mails, a Canadian court ruling (Ontario Supreme Court 9-07-99)[45] even referred directly to netiquette in upholding an ISP's decision to terminate a contract on the basis of netiquette.

In addition, and on the model of the *lex mercatoria*[46] of international trade, we can observe a *lex electronica*[47] developing: a set of private norms governing the Internet network, which would have several aspects:

Firstly, it is the result of **the technical standardization of the Internet**,[48] with private forums, which are at the origin of all the security, accessibility and interoperability standards that ensure the functioning of the Internet's technical network. This standardization is now elaborated by the *Internet Engineering Task Force*, which deals with all these protocols. As for formalism: even if developed in a private setting, technical standards are the fruit of the implementation of finely-specified procedures that are strictly adhered to, since the trust and consensus necessary for their effectiveness depend on them[49] - standardization structures are voluntary and negotiated in nature, and must therefore be conventionally accepted by contract in order to produce their effects.

Depending on its purpose, the aim of a technical standard can be social: the purpose of a technical standard is to set a precise standard which, once uniformly respected, guarantees the interoperability of the tools used by Internet users and professionals.[50] As a result, it applies to both infrastructure and info-structure, against the backdrop of the relativity of values. Incidentally, if the computer codes on which software is based, regardless of the programming language in which they are expressed - Java, Pascal, C/C++, Perl, DOT NET, etc. - authorize certain actions in the cyber world, then it's not just a matter of the software itself. - authorize certain actions in cyberspace, they can also contribute to prohibiting others. One example is authentication, without which it may be impossible to access certain content, for example on an intranet or, more commonly, via e-mail. The virtual wall of computer code that a password can represent is also a way of putting into practice values such as the protection of privacy.[51]

As a result, the technical framing of rights and freedoms is a reality in the virtual world of cyberspace. And if we take a closer look at this normative

process, it's extremely interesting to see that there is indeed a reference standard that itself explains how technical law is created in this field. In any case, we can detect an interesting normativity that could come under the heading of *lex electronica* .

As for its origin, **a technical standard is most often** produced by a private transnational non-profit institution, by one of the major firms in the sector in a dominant position, or by a public international organization; but it is never produced by the two main jurislators, the legislator and the courts.

The technical standards that make up Internet law are highly symptomatic of the fact that private structures are challenging the legitimacy of public bodies to create law. Indeed, in general terms, the field of technical standards is a striking illustration of the fact that "the State now shares the burden of producing law, of constructing legal spaces, with private powers".[52]

A significant proportion of the rules binding Internet users are contained in **the standard contracts** imposed by the main web services: these are the famous *general conditions of use* that Internet users must "accept" in order to use the service, whether it's a distance commerce service or a social networking service. Although they are accepted contractually, individually by each user,[53] their general scope makes them regulations as much as contracts. What's more, some services have become so central to the social lives of so many individuals that their terms and conditions of use are akin to real laws that it's impossible to refuse, since it's impossible to live without them. Firefox, Yahoo!, Gmail, Facebook ,Tweeter, Instagram, YouTube... Today, no one disputes that these "digital giants" have acquired the factual capacity to exert constraint and guide behavior... in the same way as the state! . This self-regulation of essential web services is an incredibly revealing illustration of the competition with existing state law. This is even more true of social networking services, which have their own intellectual property law[54] and their own personal data law.[55]

In the same context, we could also mention **the free licenses[56]** - for free software in particular - proposed by non-profit organizations such as the *Open Source Initiative*,[57] and *Creative Commons*.[58] These flexible "copyright" contract models _ known as *Creative commons* - have spread impressively around the world, to disseminate creations, especially online. And although the State has long erected a relatively complete legal framework for intellectual

creations, which is generally of public order and therefore indelegable, the authors of works disseminated via the Internet in many cases prefer to work within the framework of this privately-originated right formed by *creative commons*.[59]

All of which goes to show that it is indeed standard contracts, rather than existing laws, that are at the heart of the legal regimes applicable to cyberspace. This raises the question of whether an *electronic lex mercatoria is* not also developing, as a sort of revival of the *lex mercatoria* theory ...

If we push a little further, we could ask ourselves whether there isn't, for example, a *lex facebook*, or a *lex tweeter*, where everything is initially based on a contract between the user and the American firm, but behind this contract there is also a kind of institutional power manifesting itself. If tweeter decides tomorrow that messages will no longer be in 10000 characters[60] but in 280 as before, can we see in the contractual framework the manifestation of a transnational private power that imposes its rules everywhere in the world? After all, it's well established that the drafters of standard contracts exercise de facto regulatory power. [61]

Of course, there are ICANN[62] rules which would be part of this lex electronica...

Here, too, the two schools of thought may clash: for a positivist, it's nothing more than self-proclaimed legal daub? or, at best, a custom that only becomes positive law if it is enshrined in domestic law, as was the case, for example, with Netiquette, which was recognized as a source of law in an Ontario Supreme Court decision as early as 1999, in this case to vindicate an Internet service provider that had terminated a subscription contract on the basis of Netiquette.[63] This was the first recognition of a specific transnational usage as a source of law.[64]

We can take a more institutionalist stance, and in any case a more pluralist one, which consists in saying that, by observing realities, we have norms that flourish, that are applied and respected, that state intervention is merely pathological, and that the entire community of Internet users is nevertheless governed by these norms, independently of a state endorsement that, once again, is only exceptional. For my part, I would tend to consider these norms as almost autonomous sources of Internet law.

Conclusion:

Cyberspace, with its particularities, represents today one of the most interesting challenges posed to the legislator of the Latin-Germanic family. We have seen how private sources benefit from fertile ground for their emergence in cyberspace. The first characteristic of their regulation lies in its mode of imposed intervention. Indeed, the new norm that results, and which directly conditions behavior, is strictly speaking invisible. It is not the result of an open consultation process, it does not give rise to parliamentary debates or public positions, apart from a few discussions within small groups of experts.

In other words, this standard does not meet the requirements of a democratic process. But the fact is that it is there! It regulates! It implements – or not – a certain number of values. It guarantees certain freedoms, or prevents them. It protects privacy, or promotes surveillance. She governs cyberspace, she is its laws and she decides how it should function and how we should behave in it.

The words of Philippe Jestaz come to mind: “The fact of private legislation corresponds to a withdrawal of public power and not to a weakness” [Philippe Jestaz, 2005]. The exclusion of the State from the regulation of this cyberspace, on the grounds that it and its traditional modes of regulation are particularly ineffective in cyberspace, is an attitude which denotes a certain radicalism. On the other hand, suspicion, even condescension, with regard to an alternative normativity which finds its expression in informal norms reflects conservatism, even blindness in the face of a certain mutation of the law.

The fact remains that cyberspace and the Internet contribute to the trivialization of the State. And we observe every day how these competing private normative claims come up against the sovereignty of States so that today the web giants behave like true heads of state. Immediately comes to mind the famous speech by Mark Zuckerberg on January 9, 2015 concerning the affair will censor the caricatures of the Prophet Mohammed (peace be upon him): *"We follow the laws of each country, but we never let a country or group of people dictate what people can share around the world”.* [65]

Maurice Hauriou noted the triumph of the State since the 19th century: “L’État est un sommet d’où l’on ne peut descendre” [66] It is clear that the State of today is far from being that of yesterday.

[1] Trad : "Only yesterday, the State played the leading role on the national and international political stage. Reducing the other actors to the rank of stooges or extras, it recited a great authorial text, that of sovereign 'raison d'État', which seemed to have been written only for it. In the new contemporary cast, the State has not disappeared; [he] now appears as the slightly aging representative of a great classical company, lost in the midst of a troupe of amateurs performing an improvised program, forcing him to adapt his text to a plot whose general meaning sometimes seems to escape him", F. OST, M. VAN DE KERCHOVE (2002), De la pyramide au réseau? Pour une théorie dialectique du droit, Publications des Facultés universitaires Saint-Louis (Bruxelles), p. 125.

[2] M. HAURIOU (1916), Principes de droit public à l'usage des étudiants en licence et en doctorat ès sciences politiques, 2nd edn, Librairie du Recueil Sirey, p. 16.

[3] H. LEFEVBRE (1976), *De l'État*, t. I, Union générale d'éditions, coll. 10/18, p. 24.

[4] J. BAGUENARD (1998), L'État - Une aventure incertaine, Ellipses, coll. Mise au point, p.41.

[5] J. CHEVALLIER (2008), L'État post-moderne, 3rd edn, LGDJ, coll. Droit et société, p. 24.

[6] F. POIRAT (2003), "État", in D. ALLAND, S. RIALS, eds, *Dictionnaire de la culture juridique*, Lamy-Puf, coll. Quadrige-dicos poche, p. 644. And the author observes that "the paradox is there: despite these factors dissolving state power, the state remains the matrix, the ideal scheme for exercising power" (*ibid.*).

[7] M.-A. FRISON-ROCHE (2001), "Le droit de la régulation", *D.* 2001, p. 610.

[8] *Ibid*

[9] The positivist theory of formal sources, in this sense, refers to the modes of formation of legal norms, i.e. the processes and acts by which these norms come into historical existence, become part of positive law and acquire validity.

[10] The transnational nature of the network and its function as a communications medium may well make it *a subject of international public law by its very nature*, in the same way as the sea or outer space, "global public goods" over which States cannot proclaim any territorial sovereignty. It is therefore hardly original to note that *a universal mode of communication needs a universal right*, J. HUET, E. DREYER (2011), *Droit de la communication numérique*, LGDJ, coll. Manuel, p. 187.

[11] FROM DECEMBER 3 TO 14 (2012), a historic conference was held in Dubai (United Arab Emirates), at the initiative of the International Telecommunication Union (ITU), the United Nations' specialized agency dealing with information and communication technologies (ICT). The 2012 World Conference on International Telecommunications (WCIT-12) was tasked with reviewing the international treaty that forms the basis of the hyperconnected world, the International Telecommunication Regulations (ITR). The provisions of this treaty govern how we communicate, by telephone or computer, using voice, video or data, around the world, WCIT Dubai UAE, WHAT ARE THE INTERNATIONAL TELECOMMUNICATIONS REGULATIONS AND WHY ARE THEY IMPORTANT, ITU 2012, available at (last accessed 24/ 09/ 2020): https://www.itu.int/en/wcit-12/Documents/WCIT-background-brief1-F.pdf

[12] Additional Protocol concerning the criminalization of acts of a racist and xenophobic nature committed through computer systems (2003)

[13] VIVANT M. (2011), Internet, Rep. Int. Dalloz, December 2011, n° 47.

[14] Agreement between the EU and the USA on cross-border data flows, known as the "*safe harbor*" (decision no. 2000/520 EC of July 26, 2000, OJEC, no. L215, August 2000).

[15] In particular, the agreement on trade-related aspects of intellectual property law.
[16] É. LOQUIN (2001), Les sources du droit mondialisé, Dr. et patrimoine, p. 96.
[17] O. PFERSMANN (2001), Le droit comparé comme interprétation et comme théorie du droit, RID comp. p. 275 (quoted by J. HERVOIS (2011), La production de la norme juridique en matière scientifique et technologique, Th., Université de La Rochelle, p. 345).
[18] For example, UN General Assembly resolution A/RES/59/239 (creating a global culture of cybersecurity), the Global Information Society Charter adopted by the G8 in 2000 in Japan.
[19] A case in point is that of May 22, 2000, when a French judge ordered the American company Yahoo! to prevent any person residing in France from accessing parts of the website it operated in the United States, and which contained information contrary to French public policy [TGI Paris, ord. réf., May 22, 2000, Légipresse, septembre 2000, 174-III-139, note C. Rojinsky]. Rojinsky]. Regarded as both the political birth of an "Internet law" and the mark of its own limit, this decision was immediately very badly received by the Internet community, for more details see Cyril Rojinsky (2001), cyberespace et nouvelles régulations technologiques, Dalloz, France, Chron. p. 844.
[20] Executive decree no. 98-257 of 3 Joumada El Oula 1419 corresponding to August 25, 1998 defining the conditions and procedures for setting up and operating Internet services.
[21] Law no. 05-10 of June 20, 2005, amending and supplementing Ordinance no. 75-58 on the Civil Code, recognizes electronic writing as a means of proof, and enshrines the electronic signature in law (arts. 323 to 327).
[22] Law N. 15-04 of 11 Rabie Ethani 1436 corresponding to February 1, 2015 laying down general rules on electronic signature and certification
[23] Law N. 18-07 of 25 Ramadhan 1439 corresponding to June 10, 2018 on the protection of individuals in the processing of personal data.
[24] Law n° 18-05 of 24 Chaâbane 1439 corresponding to May 10, 2018 relating to e- commerce.
[25] Law 09-04 of 14 Chaâbane 1430 (August 5, 2009) on special rules for preventing and combating ICT-related offenses.doc
[26] Regulation EU 2016/679 of the European Parliament and of the Council of April 27, 2016 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC, known as the General Data Protection Regulation(GDPR).
[27] Le forum des droits sur l'internet (also known as FDI) was an Internet co-regulatory body set up as an association under the French law of 1901. Founded with the support of the public authorities, the Forum's nearly 70 members included public bodies, associations and private companies, and its mission was to reflect on legal and social issues relating to the Internet.
[28] FDI (2007), Recommandation- Droit de la consommation appliqué au commerce électronique , adopted August 31, 2007, available in digital version at (last accessed 02/14/2021): http://data.over-blog-kiwi.com/0/57/30/82/20150427/ob_31a698_reco-conso-20070831.pdf
[29] Pierre TRUDEL (2006), L'encadrement normatif des technologies : une gestion réseautique des risques, Report presented at the 30th Congress of the Institut international de droit d'expression et d'inspiration françaises, Cairo, December 16-18, P. 13
[30] GAURAIS V., LEFEBVRE G. & BENYEKHLEF K. (1997), droit du commerce electronique et normes applicables : l'emergence de la lex electronica, RDAI/ IBLI , n°5, p. 551.
[31] Gaurais vincent, Guy Lefebvre et Karim Benyekhlef, *Op. Cit* ; Serge Kablan et Arthur Oulaï , 2009, L'essence des approches du droit cyberspatial et l'opportunité de la co-régulation , Revue générale de droit, vol. 39, n° 1, pp. 5-49. p. 10.
[32] R. Carré de Malberg, 1920, Contribution à la théorie générale de l'Etat, Tome I, Sirey, p. 5.

[33] Cf. H. RUIZ FABRI (1999), *Immatériel, territorialité et Etat*, Archives de philosophie du droit, n° 43, p. 187; see also CYRIL ROJINSKY (2001), Cyberespace Et Nouvelles Régulations Technologiques, Dalloz, Chron. p. 844.
[34] SERGE K. and OULAÏ A., *Op. Cit.*
[35] List of websites blocked in mainland China: (Last accessed 25/ 03/ 2021) https://en.wikipedia.org/wiki/List_of_websites_blocked_in_mainland_China
[36] At the opening ceremony, Chinese President Xi Jinping outlined his vision for the future of the Internet in China. "We must respect each country's right to independently choose its own path of cyber-development," said Mr. Xi, warning against foreign interference "in the internal affairs of other countries. "Elizabeth C Economy, China's Great Firewall: Xi Jinping's Internet Cut, The Guardian: (Last accessed 25/ 03/ 2021) https: //www.theguardian.com/news/2018/jun/29/the-great-firewall-of-china-xi-jinpings- internet-shutdown
[37] KABLAN S. & OULAÏ A. , *Op. Cit.*
[38] LARRIEU J. (2002), l'internationalité et internet, Revue Lamy Droit Des Affaires, Supplément, Février n° 46, p. 42.
[39] *John Perry Barlow (*2019), A declaration of independence for cyberspace, 18 *Duke Law & T echnology R eview 5-7* (2019)
[40] LATTY F. (2007), La lex sportiva - recherches sur le droit transnational, coll. Etudes de droit international, Leiden/Boston, Martinus Nijhoff publichers, p. 444 ff.
It should be noted that, when private sources are not seized by the state, we should speak of *"self-regulation"*, whereas, when they are, we should speak of *"co-regulation"*. Self- regulation gives rise to a "*freely* consented and elaborated right [...] resulting from an *autonomous* process", *Lamy Droit des médias et de la communication* (2012), n° 466-54; we could therefore speak of *co-regulation whenever public institutions invite private players to establish the standards that should govern their activities*, not only in the situation where the construction of a legal regime is shared between public and "private power", Boris Barraud, Les sources du droit de la communication par internet, th., Université d'Aix-Marseille, 2016, p 75.
[41] K. BENYEKHLEF, K. SEFFAR (2006), "Commerce électronique et normativités alternatives", *University of Ottawa Law and Technology Journal* p. 374.
[42] The first official document defining netiquette rules was RFC 18551, written by Sally Hambridge (of Intel) for the Internet Engineering Task Force, and published in October 1995 (Netiquette Guidelines, Request for comments no 1855, October 1995). Other authoritative documents include *Netiquette* (Virginia Shea, 1994) and *The Net*: Users guidelines and netiquette3 (Arlene H. Rinaldi, The Net: User Guidelines and Netiquette - Index, Boca Raton FL, Florida Atlantic University, May 1996).
[43] The Netiquette also includes more standard norms, such as "respect[r] the copyright of reproduced works".
[44] Ex: https://policies.google.com/terms?hl=fr-DZ&fg=1
[45] Vivant M., 2011, internet, rep. Int. Dalloz, december 2011, n°49.
[46] A non-state source of international trade law, the *lex mercatoria* is historically a set of customs, general principles of law, contractual clauses and standard contracts created by the merchant community to govern contractual relations between merchants.
[47] Lex Electronica was founded in 1995 by Prof. Karim Benyekhlef, who wanted to develop the law of information and communications technologies.
[48] The definition of a technical standard generally adopted is that proposed by the United Nations Economic Commission for Europe and ISO: "A technical specification or other publicly available document, established with the cooperation and consensus or general approval of all interested parties, based on the combined results of science, technology and

experience, aimed at the optimum benefit of the community as a whole, and approved by a nationally, regionally or internationally qualified body", quoted by M. LANORD FARINELLI, "La norme technique: source de droit légitime? Lanord Farinelli, 2005, "La norme technique: une source du droit légitime?", *RFDA* p. 738.

[49] A. PENNEAU(2003), "Règles de l'art et normes techniques", in D. ALLAND, S. RIALS, eds, Dictionnaire de la culture juridique, Lamy-Puf, coll. Quadrige-dicos poche, p. 1330.

[50] Boris Barraud, *Op.Cit*. p.113

[51] Serge Kablan and Arthur Oulaï , *Op. Cit*. p. 21.

[52] L. BOY (2007), "Normes techniques et normes juridiques", Cah. Cons. const. no. 21

[53] CF. G. Chantepie, 2009, "De la nature contractuelle des contrats-types", RDC p. 1233 ff.

[54] For example: YouTube Operations Guide - Overview of rights management on YouTube : (last accessed 18/02/2024) https://support.google.com/youtube/answer/4597810?hl=fr#:~:text=Une%20vid%C3%A9o%20repr%C3%A9sente%20votre%20propri%C3%A9t%C3%A9,m%C3%AAme%20fichier%20multim%C3%A9dia%20comme%20r%C3%A9f%C3%A9rence.

[55] By way of example: Facebook, Disclosure of Data Privacy Frameworks for Meta Platforms, Inc, (last accessed 18/02/2024) https://web.facebook.com/privacy/policies/data_privacy_framework/

[56] A free license is a license that takes copyright and refocuses it on the possibilities offered to end-users. A license is free when it guarantees the software user a number of fundamental freedoms: the freedom to run the software, the freedom to study how the software works and adapt it to his or her needs, the freedom to redistribute copies of the software, the freedom to improve the software and publish these improvements.

[57] Hollywood-based non-profit organization dedicated to promoting open source software. https://opensource.org/about/

[58] San Francisco-based non-profit organization working to "Provide Creative Commons licenses and public domain tools that give every person and organization in the world a free, simple, and standardized way to grant copyright permissions for creative and academic works; ensure proper attribution; and enable others to copy, distribute, and use those works", in. Official website (last access 03/27/2021): https://creativecommons.org/about/

[59] Boris Barraud , *Op. Cit*. , p.127

[60] Offer available exclusively to subscribers to the Twitter Blue pay service.

[61] JACQUES GHESTIN (1985), normalisation et contrat, Revue juridique du Themis, vol. 19, n.s 1 , p. 18 ff.

[62] The Internet Corporation for Assigned Names and Numbers (ICANN) is an Internet regulatory authority. It is a not-for-profit corporation incorporated under the laws of California, whose principal missions are to administer the Internet's digital resources, such as IP addressing and top-level domain names (TLDs), and to coordinate the technical players.

[63] VIVANT M. (2011), "Internet", Rep. Int. Dalloz, December no. 49.

[64] Marie Bastian (2019), La fragmentation d'un droit préexistant ou la fondamentalité par analogie : le cas du droit d'accès à Internet, La Revue des droits de l'homme, n. 15, n° 25.

[65] GUILLAUME CHAMPEAU (2015), Facebook will censor Mohammed cartoons according to countries, not people, Published online January 28, 2015: (last accesses 06/03/2024) https://www.numerama.com/politique/32039-facebook-censurera-les-caricatures-de-mahomet-selon-les-pays-pas-selon-les-gens.html

[66] Trad : “The State is a summit from which one cannot descend.” M. HAURIOU (2016), Principes de droit public à l’usage des étudiants en licence et en doctorat ès sciences politiques, 2 e éd., Librairie du Recueil Sirey, 1916, p. 16.

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