

COMMENT ON “A NEW JURISPRUDENTIAL FRAMEWORK FOR JURISDICTION”

*Tom Ginsburg**

Dan Svantesson has introduced an important proposal to reformulate the way we allocate jurisdiction in the international community.¹ Rather than asking whether a proposed assertion of jurisdiction falls into one of the canonical principles identified in the *Harvard Research Draft Convention on Jurisdiction with Respect to Crime* of 1935, Svantesson proposes to subject claims of jurisdiction to three “core” principles: (1) whether there is a substantial connection between the matter and the State seeking to exercise jurisdiction; (2) whether the State seeking to exercise jurisdiction has a legitimate interest in the matter; and (3) whether the claim of jurisdiction is reasonable given the balance between the state’s interests and other interests that might be asserted. He sees the first two of these as being implicit in the Harvard Draft paradigm, and the third a helpful addition to resolve conflicts in an increasingly interdependent world.

I found the piece to be provocative and basically sound. What I seek to do in this comment is to elaborate on what it tells us about general conditions for changing legal tests, using jurisdiction as an example. I articulate a set of meta-principles that allow us to answer the question as to whether a prior legal regime ought to be replaced. This allows us to consider whether Svantesson’s proposal is worthy of adoption. My answer is a cautious yes, but I identify a crucial variable that must be considered as well: the quality of courts. Too often, discussions of international law assume the quality of adjudicators, but I see quality as a variable that ought to be explicitly addressed in thinking about institutional design and doctrinal tests.

A jurisdictional regime, like any other legal test, is a set of general standards to be applied by courts in particular disputes that arise. Some cases will easily fall into one side or the other of any legal test, while others will be more complicated and require more thorough evaluation. Any legal test can be assessed in terms of its ease of application and whether it easily sorts most of the phenomena to be considered into one side or the other. Does it provide relatively clear criteria to resolve most disputes? What is the underlying distribution of cases in the sense that how many of them are hard to resolve? What is the balance of false negatives and false positives that the test is likely to generate? And what are the consequences of those errors? As should be obvious from these questions, a test can not be considered in the abstract, without thinking about who will be applying it.

When should legal tests change? Like all law, jurisdictional regimes are subject to pressures as underlying social conditions change. Svantesson is surely right that we are now in a world in which territoriality, which once seemed the master principle of jurisdiction, no longer serves to provide clear and definitive answers in many disputes. The cyber law cases that motivate Svantesson are only the tip of the iceberg here. With increasing assertion of extraterritorial jurisdiction in fields like antitrust, intelligence gathering, and national security, territoriality no longer provides a definitive answer to many legal disputes. Many situations will involve multiple

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¹ Dan Jerker B. Svantesson, *A New Jurisprudential Framework for Jurisdiction: Beyond the Harvard Draft*, 109 AJIL UNBOUND 67 (2015).

assertions of jurisdiction. And in a cyberworld, the idea of territorial effects very quickly could become a form of universal jurisdiction, in which any access of a website within the territory is presumed to provide an excuse for regulation outside the borders. This is obviously undesirable as it will lead to frequent conflict among different regulators, multiplying regulatory traps for cybercitizens.

The traditional territorial principle is unhelpful because it might lead to false negatives—cases in which jurisdiction would be appropriate but would not be found. It might also lead to false positives, meaning cases in which the territorial state is given jurisdiction that would be inappropriate. In the Microsoft case of concern to Svantesson, the real problem is false negatives. That is, Ireland may have a genuine interest in regulating servers on its territory, but the United States also has an interest in being able to search e-mail accounts for which an ordinary warrant would be available, except for the fact that the servers holding the e-mail just happen to be located overseas. By failing to provide jurisdiction to the United States, the risk is too little regulatory power, not too much. The technical possibilities produced by cloud computing and floating servers make it a very real possibility that we will have a zone of no regulatory authority.² This is good for cyberanarchists, libertarians and Google, but I am not sure it is good for the rest of us. So long as one believes there are genuine cyberthreats, there must be some cyberregulation.

What is to be done? The first thing is to acknowledge that in a cloud-computing world, regulatory conflicts are likely to be ubiquitous and so a balancing approach akin to that used in private international law might be helpful. Here, one quickly sees that the third prong of Svantesson's test—interest balancing—will likely be the key one in a practical sense. His suggestion to adopt it as the meta-principle of jurisdiction would represent the continuing triumph of policy over formalism. Note though, that interest-balancing provides little firm anchor for courts in deciding how to proceed.

One general response in public law has been proportionality, which began as a principle of administrative law in 19th century Prussia, but has spread rapidly to become the adjudicative technique *par excellence* for constitutional decision-makers the world over. Proportionality is also a principle of international law, applied in contexts as diverse as the WTO, the International Covenant of Civil and Political Rights, and international humanitarian law. It provides a rigorous framework for evaluating competing interests under high-stakes conditions.

The next question is whether interest balancing, perhaps taking the form of proportionality, would do better than would simple territoriality. It seems that at first glance, there may be fewer false negatives under a well-applied balancing test than are likely to occur under a simpler territorial rule. Here, however, the classic distinction between rules and standards (which will be familiar to many readers) offers an important reminder. In choosing between a rule and a standard, we need to consider *who* will be applying the law. Recall that rules (arguably including territoriality as classically formulated) are useful in part because they are simpler to administer. Standards require application of general principles to particular cases, and so require more skill in the adjudicator. Svantesson is proposing a shift from an increasingly unwieldy rule to a looser standard.

As this discussion suggests, a crucial variable in choosing between rules and standards is judicial quality. If we trust the adjudicators to make the right calls, then giving them more discretion in the form of standards is a helpful thing to do. On the other hand, if we think that judges are prone to error, simple rules of thumb will do a better job and lead to fewer mistakes, so long as we think we can formulate a reasonable rule. To be sure, much of the pressure on territoriality has arisen because it has become less “reasonable” in many cases.³

So should we move to interest-balancing as opposed to a rule of territoriality? While primary decisions in jurisdictional disputes are made by courts of all kinds, the decisions as to the *international legality* of assertions

² *Is Google building a navy? Internet giant launches second 'floating data center'*, DAILY MAIL REP., Oct. 30, 2013.

³ See *Hartford Fire Insurance Co. v. California*, 509 US 764, 812-822 (1993) (Scalia J., dissenting).

of jurisdiction are likely to be applied by the international judiciary. The international judiciary is not a career judiciary, but instead composed of judges selected on the basis of their reputations in national courts, diplomacy and other fields.⁴ It is a relatively high-quality set of decision-makers (though perhaps average quality is declining as the number of international judicial positions continues to expand). This would argue for moving to a kind of standard, and letting rip with interest-balancing. This is especially true to the extent that international judges come from national constitutional courts where they will have had experience applying proportionality and other balancing tests. While assessing the proportionality of infringements on constitutional rights may be quite different than assessing competing state interests in asserting regulation, the structured nature of constitutional adjudication *may* provide sufficient rigor to be a useful discipline on decision-making.

On the other hand, one might argue that shifting to interest-balancing among diverse criteria (Svantesson lists 11 from private international law alone) is essentially to invite judges to substitute policy judgements for law. And here, the question of who is doing the adjudicating again comes to the fore.

So in the end, I agree with Svantesson's proposal. But I also identify the one condition that would be necessary for such a radical shift to be appropriate: trust in the adjudicators.

⁴ NUNO GAROUPA & TOM GINSBURG, JUDICIAL REPUTATION (2015).