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Self-Governance and Law in Transnational Economic Transactions

Edited by
Olaf Dilling
Martin Herberg
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Oñati International Series in Law and Society

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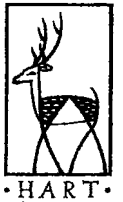

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Contents

Introduction: Private Accountability in a Globalising World

OLAF DILLING, MARTIN HERBERG, AND GERD WINTER*

I. GLOBALISATION AND PRIVATE LAW-MAKING: LEGAL PLURALISM IN THE TRANSNATIONAL AGE

'UBI SOCIETAS IBI ius' (Grotius). Wherever social actors engage with each other for long periods of time, common norms and binding standards of behaviour emerge. At the level of world society, current developments appear to confirm this claim. Evidently, global players and other transnational actors do not approve of a state of anomy; rather, they prefer relatively clear and calculable standards and guidelines of behaviour, and often these actors are even eager to develop such standards themselves.

In many cases, these emerging norm structures do not simply represent an incoherent pool of social norms; in some respects, they represent a kind of a 'living law' of commerce and industry, a 'global law without a state' (Teubner, 1997). These norms are based on their own grounds for validity, they are of lasting character and they often entail their own mechanisms for implementation and control. This development questions many categories of classical legal thinking, among others the unity of law and the idea of the nation state's monopoly on law-making.

The existence of a plurality of norm structures is not new, however. A number of phenomena, discussed in legal sociology since its very beginning, have persistently challenged the state-centered concept of law: just think of different forms of industrial voluntary commitments on the national level, or the increasing relevance of technical standardisation by expert committees (Schepel, 2005). Yet, by introducing procedural safeguards and material opening clauses, state law was able to retain control of these other sources of law. Thus, the state-centric conception of law was maintained. By contrast, today a new level of informality has been reached due to the globalisation

* We wish to thank Harry Bauer for his help in translating substantial parts of this introduction into the English language.

of social spheres. While at the national level activities like private technical standardisation remain embedded in institutional regulatory arrangements, on the transnational level norm generation often appears to be untamed and rampant.

Partly, these private initiatives simply represent a transfer of national standards into the global context. As states cannot extend their law to other continents, private actors can lend global reach to the rules of their home country merely as a result of their private autonomy and their transnational organisational capability. Here, the actors of world society function as transfer managers conveying legal achievements from particular national contexts to the global level.

Often, norms and rules are also generated by private actors themselves; this mostly becomes manifest both in the emergence of new, creative and unconventional types of norms, and in the nature of these norms as highly problem-oriented and practical. Private actors seem unconcerned that such developments can hardly be reconciled with the formal qualities of (modern) law and the criteria of democratic legislation in its classical shape. To the contrary, often the informality and flexibility of these arrangements are seen as the particular advantage of this kind of law-making (Herberg, 2006).

Yet, these processes do not cut off state law from the informal law of world society. Due to their practical relevance, the emerging informal norms cannot easily be ignored from a legal perspective. Although most of the new normative formations lack a classical legal form—for example, as a contract with all its necessary requirements—they nevertheless encompass lawyers' professional concerns as to how the emergent norms can be brought into accordance with generalisable values and legitimated procedures, and thus with formal law. If actors trust in the compliance with a particular norm, if legal interests of a third party are affected, if rights and obligations are allocated in a particular way, this issue is always at stake.

Here lies the first aim of this volume: it is about the interface between the emerging para-legal systems and national as well as international law. As it turns out, dealing with the informal norms of the transnational sphere entails manifold challenges to interdisciplinarity. To bring the interface into focus, social sciences and jurisprudence must be employed both to provide disciplinary analysis and to develop new tools for interlinkage.

II. VARIETIES OF LAW: TOWARDS A TYPOLOGY OF PRIVATE GOVERNANCE

Thus far, the emerging law of world society has mainly found attention in the form of a new 'lex mercatoria'. Industries with a high level of cross-border transactions develop their own practices and, hence, solve different

coordination problems of transnational business that otherwise would remain untouched due to a lack of convincing mechanisms in state law (Appelbaum *et al*, 2001).

The evidence for such internal business norms is hardly surprising as far as it serves to coordinate the actors' private interests. Yet, the real challenge for private self-regulation arises in the field of public interest. Arguably, there is a stark contrast between, on the one side, organising one's own company and arranging credit security and liability for defects among equals and, on the other side, achieving recognition for fair wages, good working conditions, the protection of natural resources and consumer interests among unequals (Winter, 2005).

It is this volume's second aim to look deeper into this matter by contrasting the emergent private sector regimes, evaluating their problem-solving potential and detecting the driving forces behind them. Many of the abovementioned developments are currently discussed under the heading of 'global governance', focusing on how the common goods can be handled beyond classical hierarchical and formal procedures (see Rosenau and Czempiel, 1992). The concept highlights the increasing relevance of private actors as norm-makers and draws attention to processes of experimentation and creative and unconventional strategies in the provision of public goods.

These aspects gain additional relevance in the global context where a plethora of steering mechanisms of non-state origin exists. The role of private actors is not limited to influencing the ongoing political processes of law-making. Instead, without recognition by state actors they generate their 'own' law.

For a provisional taxonomy, it might be helpful to distinguish three actor constellations from which the para-legal systems of the business world emerge.

(1) In some respect, the first constellation—corporate self-responsibility—is the simplest case. Often based on existing societal demands and expectations, single multinational corporations independently define binding rules for conduct, concerning affairs in their own subsidiaries. Frequently, internal norms and rules are made public by announcing some kind of self-commitment; often compliance is guaranteed by internal monitoring and control mechanisms. Thus, a kind of 'inner law' of multinational corporations emerges. The parent company proactively accepts responsibility for behaviour in different countries of investment, although its subsidiaries are legally independent entities. Apart from single enterprises, corporate associations and standardisation organisations present a second kind of corporate self-responsibility.

(2) The second constellation—the law of transnational corporate networks—shows a higher level of complexity. The reach of networks by far exceeds that of single corporate groups; they encompass regions of very different development and firms from very different industries. As the concept of networks implies, different companies acknowledge that the prevailing issues cannot be resolved single-handedly.

Accordingly, different stocks of knowledge and resources have to be pooled. Transcending single companies, a division of tasks and responsibilities exists on the basis of shared norms and values. Common rules are developed and often new forms of control emerge, especially more generalised control procedures as an alternative to checking and testing on a case-to-case basis.

(3) The third constellation—non-governmental organisation (NGO)–business partnerships—mobilise the power of civil society, particularly by organising consumer interests. Increasingly, NGOs address corporations directly with their demands instead of choosing to go through state institutions. Frequently, this leads to the mutual development of standards which are ambitious in substance and achievable in practice. In such hybrid arrangements, NGOs guarantee some objectivity and neutrality, especially concerning the monitoring of compliance. The use of market mechanisms, especially the award of quality marks and certificates, provides corporations with an economic incentive for cooperation. The procedures of norm creation are highly institutionalised—frequently granting all parties equal opportunities to influence proceedings—and often institutions for dispute resolution and for further norm development exist.

These three actor constellations—single enterprises,[1] networks, and partnerships—are those which will more fully be explored in this volume. Even though they are not meant to cover the entire spectrum of non-state governance structures, they are widespread and particularly pertinent for closer examination. All of them show characteristics which are normally attributed to classical state law. Insofar as they establish a clear distinction between acceptable and non-acceptable practices and create trust in the binding character of rules, one can speak of 'soft law' (Kirton and Trebilcock, 2004). In some respects, the para-legal systems under research show a transition from soft to hard law, since bodies for norm implementation are set up and powers are created to impose sanctions in cases of violation.

The degree of consolidation can only be identified from case to case, in general, however, the resemblance to law is striking. Yet, concerning the reach of these norms one has to tame expectations. Private actors might not be able to generate a comprehensive and universal conception of justice for the entire world society, even if it is the rule that within certain business segments the relevant norms are widely dispersed. Nevertheless, without a central regulatory authority superior to individual firms and corporate

[1] Corporate associations and standardisation organisations are not dealt with in depth in this volume. However, some of the chapters do include some initiatives of industry associations as an additional source of transnational standards.

networks, collectively shared standards do emerge out of mutual learning and the horizontal exchange of experience.

Under aspects of democracy and the rule of law, equivalent procedures to state law can rarely be found (perhaps the pluralistic arrangements between business actors and NGOs show the most advanced mechanisms of democratic legitimation). However, the creation of norms is always oriented towards convincing solutions, which find maximum recognition by all relevant groups and stakeholders.

Regarding aspects of implementation, world society cannot draw on an executive body comparable to national administrative systems, yet there exists a tight net of norm control. Frequently, specially trained actors take on auditing and monitoring functions, leading to in-depth enquiries and the systematic search for violations. In order to enforce compliance, private actors possess numerous sanctioning mechanisms: from measures in staff management (especially within the type of 'inner law' of corporate groups), through the cancellation of business dealings (within networks), to the withdrawal of certificates or quality marks (especially relevant in the context of NGO–business partnerships). Frequently, in the case of disputes, an appeal to court-like institutions is possible.

To summarise: in the era of globalisation, the institutions of the constitutional state seem to be increasingly bypassed by informal law-making. As soon as one abandons the common equation of law as state law, numerous new issues demand attention, raising questions about the origins of the emergent norms, about their efficacy and about the future of state law in a situation of global legal pluralism.

III. TOWARDS A THEORY AND APPRAISAL: PERFORMANCE AND LEGITIMACY OF THE NEW MODES OF GOVERNANCE

At the current moment, a comprehensive theory explaining and appraising global norm emergence does not exist; yet, there are numerous approaches, middle-range concepts and also a number of methodological principles that are commonly employed by research in the field.

To develop these approaches further towards an empirically informed general theory is the third major aim of this volume. The main challenge is to portray the new governance mechanisms not as a deficiency but to define them in their positivity, their inherent rationality and their productive potential. This touches upon the point that globalisation does not per se dissolve order. On the other hand, the emerging norms in their actual shape rather resemble a patchwork of sectoral regimes, instead of a comprehensive and consistent system.

In some regards, the volume's focus on private governance is a somewhat narrow frame of reference. That is to say, certain phenomena such

as the unscrupulous abuse of power are left out. Nevertheless, in terms of the existing problem-solving capacities of the corporate world, the contributions to this volume can claim to be based on a realistic perspective. The widely held anti-globalisation positions are replaced by a perspective stressing the double character of economic globalisation: on the one hand, globalisation is the source of numerous problems (from the global transfer of ecologic risks through the exploitation of cheap labour to human rights violations), on the other hand, it may provide various mechanisms for resolving or at least cushioning these problems.

Concerning industry's scope for engaging in public or long-term concerns, it should be clearly stressed that economic rationality cannot be equated with a one-dimensional logic of cost reduction. Often, global players are market leaders in their business segment, and the exploitation of price differences is not always the most important motive for transnationalisation. Numerous other aspects like reputation, brand image, trust and issues of staff recruitment are also important prerequisites for a firm's success. Research into the global emergence of norms requires a 'praxeological' approach (Bourdieu, 1977), an approach that focuses on a concept of praxis as a source of innovation. The bases for norm formation from below are processes of organisational and inter-organisational learning, which can be defined as the reconceptualisation of existing frames and concepts in the confrontation with new circumstances, occurring scandals, and failures.

All this does not, however, imply that the attributes of creativity, innovation and learning capacity could be ascribed to the initiatives at stake without the precise reconstruction of their actual shape and operational mode. Certainly, the concept of governance is coined in opposition to governmental inefficacy and gridlock. Yet, neither can it be claimed that emerging steering mechanisms are free of such deficiencies, nor can it reasonably be argued that they are always founded on an unbiased perception of the prevailing problems.

The effort to come to, as far as possible, a differentiated perspective also implies evaluating private regulatory structures with respect to their transparency and accessibility for third parties, as well as their compliance with fundamental rights. Quite often, the success of private initiatives is gained at the cost of classical constitutional values: for instance, when the demands of weaker groups are insufficiently taken into account in the process of norm formulation, when the para-legal systems mainly consist of internal, non-published (or even implicit) norms and standards, or when the voluntary character of rules is given as an excuse for violations.

From a more minimalist perspective, one can perceive the legitimacy of the emerging norms simply in the fact that they exceed the legal requirements in some countries (as a higher level of protection is perceived to be better than a lower one). Yet, if one takes into account that private actors de facto work as global norm makers, one could raise more ambitious

standards of legitimation, for instance, the possibility to revise norms in case of a better cognitive basis, a certain pluralism in decision-making, a consistent separation of norm creation and norm implementation in order to guarantee the necessary neutrality, and a fair procedure for dispute resolution in case of norm violation.

IV. RETHINKING FORMAL LAW

Exactly here is the systematic place where formal law comes back into the game. By including the informal structures within its area of responsibility, formal law can enhance their degree of publicity, reliability and substantial consistency and, therefore, their legitimacy. In doing this, formal law will itself become subject to numerous changes and processes of self-transformation.

To examine such internal readjustment of formal law to transnational private governance is the fourth aim of this volume. Changes in this respect can be expected at three levels: that of state law, that of international law, and that of self-constitutionalisation of transnational law.

(1) Traditionally, informal norms are touched upon by state law via explicit reference or via opening clauses relating to negligence, good customs, or state of the art, for example. From the vantage point of parliamentary legitimation, this has always been problematic yet it has been accepted since the processes of norm creation are embedded into a reliable procedural arrangement and are overseen by a national public. The transnationalisation of norm creation raises the question whether reference and hinge conceptions have to be constituted anew, that is, under what circumstances and criteria the transnational norms are to be legally recognised. Instead of merely reacting to informal norms, state law can also proactively attempt to foster and shape their creation. Also in this respect, transnationalisation requires a new approach. Although a single state does not hold competence for law-making in the transnational realm, it nevertheless can indirectly impact on transnationally active corporations, eg, via setting conditions for access to its market.

(2) Such state adaptations and proactive undertakings run the risk of increasing the divergence between the practices of single states. This demands international harmonisation of opening clauses and proactive instruments. A prominent example is the World Trade Organization (WTO) Agreement on Technical Barriers to Trade, which requires contracting states to base national trade restrictions on the standards of transnational standardisation bodies. Yet, requirements of international law as to how such standardisation shall be organised are still insufficient. More advanced forms of constitutionalisation are

necessary in order to do justice to the particularities of the respective processes of norm formation.

(3) In some respects, the quasi-legal orders of world society themselves show constitutional characteristics. In addition to different social and ecological standards and to existing mechanisms of control and implementation, superior norms develop that define where the decision-making power should be located, how violations should be handled, and how third parties should be included. By analogy to state constitutions, private regulations embody mechanisms of self-restraint to reduce intrusions on other actors and other domains (see Teubner, 2003). Is world society thus about to develop functional equivalents to the classical constitutional state, and will the latter gradually become marginal?

Here, again, one has to take into account the relevance of the new phenomena, but at the same time we should avoid relinquishing state achievements in a rush. The emerging norms do not possess the basic, framing nature of a state constitution, they rather mark the focal point for order, representing dynamic systems which emerge out of single fields of praxis and spread by mutual learning and the exchange of experiences. Instead of modelling para-legal systems as an autonomous, self-sufficient legal realm, the focus is on mapping an intermediate zone between the transnational arena and the state-centric world (Sassen, 2002: 107).

Learning processes of this kind could well coagulate into binding principles of transnational law. Although not forming an outright constitution, the existence of such principles could nevertheless encourage state constitutions and international quasi-constitutional frameworks to balance the conflicting normative orders that emerge outside their realm.

V. SUMMARY OF THE CONTRIBUTIONS

The first chapters of the book, assembled in Part I ('Corporate Responsibility and the Law'), deal with the emergent 'inner law' of multinational corporations in different branches and different policy fields.

Martin Herberg's chapter focuses on the global players of the German chemical sector, empirically reconstructing the emergence of environmental standards concerning the behaviour of subsidiaries in the different countries of investment. The existing governance mechanisms are reconstructed in a passage from the published codes and guidelines further to the micro-processes on the shop floor. The analysis is conducted from a socio-legal viewpoint, scrutinising the emergent governance mechanisms under aspects of effectiveness as well as under the aspect of possible legal references—and thus evaluating the chances of re-embedding them into the institutional

system. For Herberg, even in a situation of global legal pluralism, the organs of formal and state law remain an important point of reference, at least in the case of disputes and conflicts of expectations. In its search for useful steering mechanisms, the nation state has to make intensive use of the intelligence and practical knowledge of societal actors. In this context, the supportive function of empirical social research is of great significance, since this societal intelligence, in order to be utilised, first of all has to be thoroughly analysed.

In the second chapter, *Carola Glinski* goes deeper into the legal details of corporate governance. The legal effects are analysed, considering the legitimacy of private rule-making, in particular where weaker contract parties or third parties are concerned. The chapter covers the effects in sales law, the law of misleading advertising, the law of unfair competition and tort law. Glinski concludes that private regulation has legal effects in private law, although these effects may not always, or may rarely, be intended. However, it is only beyond a certain degree of consolidation that those norms constitute legal effects. First of all, private regulation can trigger immediate obligations for those who establish or adopt the rules. Furthermore, private regulation is capable of setting minimum standards for a whole group of corporations, if the authors of the rules are sufficiently representative. This applies both with regard to fair business conduct as well as due diligence in tort law. Thus, private regulation can have a transnational regulatory effect based on private law mechanisms, where public law mechanisms are not available.

The third chapter by *Eva Kocher* focuses on industrial relations. The chapter deals with corporate social responsibility programmes as a possible universal way to enforce workers' rights in transnational business relations. Presenting the results from an empirical study on German firms acting abroad, Kocher shows that the firms often do not enforce their own social standards because of conflicts with national norms or local practices. Considering the legal value of corporate codes of conduct, Kocher analyses how German or European law could sanction violations of voluntary commitments. She concludes that there is no general answer to such legal effects. Kocher then explores to what extent industrial minimum standards can become relevant in the law of unfair competition. Unlike Glinski, who puts the same question in relation to the self-commitment of business, Kocher focuses on the soft law of international organisations, such as the OECD guidelines and the ILO core labour standards.

Part II ('Private Standards in Transnational Business Relations') deals with self-regulation in business networks. The chapters assembled in this part take production chains and the finance sector as case studies.

In his chapter *Olaf Dilling* illustrates the links between private self-regulation and the law by analysing the management of chemical substances in the electric and electronic equipment industry. National product