TRANSNATIONAL GOVERNANCE

Emerging Models of Global Legal Regulation

Edited by

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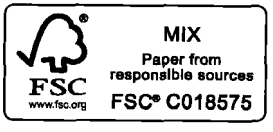

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Preface

The last century has seen the development of governance as a critical area of study for economics, politics, finance, accounting, law and regulation. Without doubt, hundreds of books and articles have been written on governance and, over the last 25 years, a particular focus has been on corporate governance. This book has uniquely put together a series of essays with a common theme of transnational governance. There are few books that have tried to connect the complexities of legal, ethical, political and economic paradigms in the way this volume has done.

It is a credit to the quality of authors in one law school that so many different points of view can be expressed with such analytical approach. The University of Western Sydney School of Law brings together a unique approach to the issues surrounding transnational governance. It attempts to grapple with large issues the twenty-first century will face in the coming decades. The authors each show a detailed analysis of the existing literature and topics, but also provide a wide range of solutions, commentaries and reforms for the problems outlined in each chapter.

As a professor of corporate law and an expert in national corporate governance, and some elements of international governance, for me this book really opens up the debates and the topics which impact many societies and nations around the world.

Scholars, students, lawyers, politicians, activists and reformers will all benefit from the insights shown in this collection of essays. The diversity of topics within the transnational governance umbrella reflects the continuing issues with the global move to transnational corporations that are much larger and have more influence than many sovereign nations. This book adds important value to the debates that are raging on these topics.

It is important to start in an historical context with the origins of transnational governance and then move to the economics and trade influences on global entities. Many forget the importance of taxation across borders and the impact on foreign currency in transactions. As we look forward, the planet is at risk in ways that could never have been imagined and the growth of environmental governance and its link to human rights is critical. A special emphasis of this collection of essays is that topics of governance over terrorism, international criminal governance and global regulation through the United Nations are left wanting in the twenty-first century.

The general editors (who are also contributors), Dr Michael Head, Dr Scott Mann and Simon Kozlina, have done an excellent job of balancing diverse views and adding to the independent research and analysis of transnational governance.

I can guarantee the reader will be left challenged, but stimulated, in examining the role of transnational governance across these many domains. The world has shrunk in many ways, but the underlying issues have not been appropriately

resolved. This provides huge opportunities for exploitation and long-term damage to individuals, to regions, to nations. This book places these issues high on the global agenda.

Professor Michael A. Adams
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Contents

Introduction

Michael Head, Scott Mann and Simon Kozlina

Introduction: The Significance and Problems of Transnational Governance

This volume examines the challenges to traditional notions of regulation, governance and authority posed by the globalisation of economic and social life. Increasingly, vast financial, technological and corporate processes are eroding the capacities of national governments to meaningfully regulate society. At the same time – as the ongoing global financial crisis that erupted in 2007–08 and the breakdown of the 2009 Copenhagen climate change summit demonstrate – efforts at international coordination are proving highly problematic.

These developments and crises are themselves, to a significant extent, bound up with deep-seated changes in economic life. These are, in turn, reflected in shifts in ideologies and practices of national and international governance in the 1970s and 1980s. The three planks of the post-Second World War Keynesian Bretton Woods system – capital controls, demand management and full employment – have given way to what has been called the 'Washington Consensus' system of free trade, deregulation and 'shareholder value'. These developments accentuate the changing ways in which authority and sovereignty can be exercised in such a globalised political context (Stiglitz 2008). As globalisation continues to extend and change, it has become increasingly important to understanding the institutional and transnational means by which nation states and others have attempted to govern international phenomena such as financialisation, tax evasion, corruption, terrorism, civil and military conflicts, environmental dangers, social polarisation, and the challenges in human rights implementation.

Scope and Focus

While much has been written on the emerging forms of transnational governance in the early years of the twenty-first century (for a review, see Djelic and Sahlin-Andersson 2006), this book brings together differing legal perspectives on the issues of corporate governance, environmental regulation, human rights, humanitarian intervention, international trade, global corruption, international taxation, international peace and security, international crime, terrorism and civil liberties. Necessarily, these legal perspectives are bound up with economic, political and ethical approaches and analyses. The volume's scope highlights the challenges of governing human activity in an age of remarkable interconnectedness. The

combined contributions are an attempt to continue understanding of the competing models of transnational governance in this era. While the studies in this volume are predominantly legal in approach, they incorporate a broad range of policy areas and analyse these emerging governance structures from a range of frameworks, from liberal to critical and Marxist. Contemporary financial, environmental and strategic developments pose tremendous challenges for transnational governance in the first half of the twenty-first century. They have profound implications for the viability of economic regulation, as well as legal responses to social unrest, human rights violations, climate change and military interventions. Arguably, the future of the planet itself is threatened unless the environmental and economic contradictions are resolved. This volume is another contribution to the growing study of the emergent forms of authority, coordination and power developing in response to today's challenges.

The Idea of 'Transnational Governance'

This book adopts a broad approach to the concept of transnational governance. While not exhaustive, the understanding of governance in this work is consistent with Sanson (2008) in its focus on outcomes, rules, practices and actions of actors, including but not limited to national governments, which remain important but not the sole sources of authority and power. In this view, transnational governance is a multi-layered system of rules, practices, procedures, customs, values and activities through which influence is exercised and resources deployed to address issues and achieve objectives at a level beyond a single state.

In the context of this volume, a simple definition of 'transnational' means to be beyond the boundaries of any one nation-state, and embodies a less grandiose aim than to assume a 'global' or world-wide application of all regimes. While there may be legitimate distinctions to be drawn between 'global' and 'transnational', the distinction is not emphasised in this volume. For various reasons, transnational governance may fall short of being truly global. To be precise, 'transnational' in this book is most consistent with Djelic and Sahlin-Anderson's idea of 'entanglement and blurred boundaries' (2006: 4) – in that 'transnational' is a term that upsets traditional understandings of power and government rather than clearly establishing an alternative. The contributions to this volume examine some quite different aspects of the 'transnational', but they all share this notion of a shifting balance between nation-states, individuals and other international actors in exercising authority and power.

In that sense, transnational governance recognises and seeks to reinforce the role of the state in the exercise of domestic and international authority but it also enhances the relevance of non-state actors such as international organisations, non-government organisations and trans-national corporations, and implies a restriction of nation-states' assumed independence and sovereignty.

The dual focus of the volume is the practical problems of transnational governance and an evaluation of the paradigms and theoretical frameworks that

exist to solve transnational problems. There are compelling reasons supporting the invention and growth of transnational institutions and regulations, but there are concomitant concerns and risks to these developments. The concept behind this collection is that, through a diverse range of perspectives, useful insights can be obtained on transnational governance in three key areas: first, the effectiveness of coordination between nation-states and other actors when engaging in transnational governance, secondly, the viability of transnational regulation, and third, the implications for democracy and sovereignty. These perspectives provide the organising themes of the book and are explored below.

The Role of Law

Law is implicit in the notion of transnational governance examined in this book. The rule of law, the use of legality, the adoption of standards, principles and coercion all point to the 'law-centred' method of exercising power. Governance need not be limited to law, but the works in this collection all recognise the ubiquitous role of law in the exercise of power and authority. This is not the same as a traditional legal approach that assumes the centrality of law. An expanding body of writers are reconceptualising the role of law internationally, especially in relation to governance. Goldstein and others (2001) laid the groundwork for a rigorous study programme in the 'legalisation' of international governance. Byers (2000) reconsidered the role of law in international relations to expand the notion of what is law, but also to examine more closely the significance of institutions and actors in the creation, interpretation and application of law. The collection of works by Simmons and Steinberg (2006) re-imagines the ways in which law is now deployed in international governance.

Underlying the works in this volume is a broad conception of law that recognises legality in the language, structure and practices by which governance is often exercised or legitimated. Most of these works do not explore in depth the 'lawyer' distinctions between 'hard' and 'soft' law, nor do they directly deal with the changing conception of 'rules' in the transnational system of regulation (Byers 1999). However, they examine and analyse the role and effect of emerging structures that define themselves as 'legal' or clearly are so in manner or form.

The Effective Coordination of Nation-states

The changing role of nation-states in the regulation of transnational activity has already been examined from many perspectives. Chayes and Chayes (1995) emphasise the role of international regulatory compliance in determining state action on transnational issues. Slaughter (2004) highlights the increasingly important role of governmental and non-governmental networks for the transnational implementation of rules and principles. Barnett and Finnemore (2004) examine the 'bureaucratisation' of transnational governance through the increasing scope and operation of international organisations. These writers are

examples of a growing body of researchers examining governance by studying the changes in the ways nation-states and other actors coordinate international and domestic action, usually with a growing emphasis on the role of non-state actors. With this approach, sovereignty is maintained or pooled and the exercise of power becomes more diffuse, but nation-states remain the main agents for action and accountability. In some ways, most of the studies in this volume directly or indirectly examine this theme, whether that is the role of international organisations like the United Nations, World Trade Organization, or the International Criminal Court, or the coordinated actions of states in dealing with corruption of public officials and terrorism.

But in all respects, the contributors to this volume are interested in whether this coordination is effective: can humanity rely on improved coordination to address fundamental global problems and how effective can these emerging forms of governance be? In most respects, the writers are optimistic that coordination is possible, that there are sufficiently shared interests between nation-states (and citizens of nation-states) to believe that a negotiated outcome is possible. However, several contributions in this volume question this belief. Even if there is coordination, and even if it is effective, is that necessarily good? Do the coordinated actions of nation-states protect the interests of the global citizenry or do they deliver outcomes that serve only partisan interests?

The Viability of Transnational Economic Regulation

Economic regulation provides some of the greatest challenges and opportunities for 'transnational governance'. Braithwaite and Drahos (2000) comprehensively re-examined the role of nation-states and other actors in regulating global business activity. They identified as a key challenge the mismatch between the transnational scale of some commercial practices and the often sub-national scale of domestic regulatory enforcement by nation-states, such as in consumer goods where manufacturing processes are transnational in operation but consumer protection is often carried out on a local or regional basis. At one level, as economic activity has become more globalised, so then the regulation of that economic activity must occur at a global (or transnational) level. However, at another level and at the same time, legitimacy in economic regulation is still tied very much to the nation-state. Currencies, stock exchanges, competition agencies, trade barriers (and trade facilitation) remain primarily under the aegis of nation-states. As outlined by Braithwaite and Drahos, the difficulty is in aligning the two levels of activity and regulation – transnational business practice and nation-state governance. Braithwaite and Drahos also emphasised the role of non-state actors and non-legal forms of persuasion and modelling as some of the most effective and novel means by which economic activity is regulated beyond the national sphere.

Many of the contributions in this volume examine the issue of economic regulation and ask whether such transnational regulation is at all possible. An important aspect of this book is the extent to which the writers evaluate the

effectiveness of transnational governance structures and diagnose what failures exist in current transnational practices. Several writers in this collection point to the question: if there are successful examples of transnational regulation, whom does this benefit and how do we determine whether the outcomes are desirable?

The Maintenance of Democracy and Sovereignty

The third theme in the book is the concern that the methods of transnational regulation result in the diminution in the involvement of domestic citizenries in their own government. Sometimes called the 'democratic deficit' of international institutions, the delegation of authority to foreign ministers and other international negotiations – often in the context of deliberations and treaty negotiations that are necessarily private or opaque – means that decisions made at a global level do not reflect popular concerns and are not subject to democratic accountability. This theme challenges the assumption that states act as agents of their citizens, rather than on behalf of powerful elites.

Related to this is the broader notion of sovereignty and the population's right to participate in their own governance. An aspect of the global changes and problems that frame this volume is that the traditional understanding of sovereignty is being undermined. Climate change, for example, may remove a state's ability to act in its own defence. Economic liberalisation may deny democratic participation in traditional areas of economic activity.

In framing the theme in these terms, there is an explicit recognition that there is often a difference between sovereignty and democracy. Sovereignty – recognition of a nation-state by other nation-states of their independence and legal authority – is not necessarily based on democratic processes and institutions. In most of the studies in this volume, sovereignty and democracy coexist but that need not be the case and, even where that does occur, may not remain that way in the future.

Governance and Power

Underlying much of the analysis in this book is a keen awareness of the relationship between governance, law and power. Underpinning the exercise of law is power and often, when examining method of governance, the manifestation of power is framed in legal terms. As Simpson (2004) has suggested, the global reality may be better described as legalised hegemony, with the most powerful states exercising greater influence internationally.

The adoption of law in many forms of governance is not neutral. As examined in several chapters of this book, legality privileges some interests over others. Legalism presents barriers and opportunities to different actors competing against each other in a transnational space for governance. More importantly, law is imbued with ideas and assumptions that find their source outside of the law, especially in the area of economic regulation. Critiques of theories such as neoliberalism by

critical and Marxist writers add depth to the reappraisal of law's function and purpose in transnational governance.

Apart from their engagement with the three themes of the volume, a common question to all the contributions is whether the extension of the 'transnational governance project' is 'good' or 'bad'. The writers fall into several different but sometimes overlapping camps in responding to this question. Some express scepticism toward the transnational governance project, in particular in its ability to extend inequality and power imbalances, both nationally and internationally. Others believe that the current forms of exercising transnational power can be changed to achieve better outcomes. Others still espouse that the project is essentially good, is generally heading in the correct direction and only requires some modification to minimise adverse consequences that have emerged in implementation.

Another assumption underlying many, but not all, of the works in this volume is that the rules we analyse through the framework of transnational governance are a product of rational development and consultation; in other words, the legal frameworks of transnational governance are a rational output of a rational and deliberative law/policy development process. However, other authors question whether this is true, and suggest that the rules might result from unintended consequences of a system of compromise and negotiation, or from the direct or indirect exercise of power.

Outline of the Book

This volume begins with historical and economic examinations of transnational governance. Further chapters then turn to trade, corporate and taxation dimensions, before widening the survey to issues of climate change, conflict, terrorism and international criminal justice. Finally, proposals are considered for a humanitarian law paradigm shift from state sovereignty to an international responsibility to protect.

Origins of Transnational Governance

In Chapter 1, Simon Chapple provides some important and thought-provoking historical context. He argues that the origins of transnational governance may be found in the interconnectedness of the legal regimes of developed countries in the nineteenth century. This chapter examines the evolution and development of transnational governance in the areas of commerce, property and human rights by considering the legal legacy of colonialism, the exchange of legal ideas among developed nations, the influence of moral norms and economic networks on the development of law, and the role of non-government organisations. The chapter is an examination of the history and context of coordination amongst nation-states, in particular the circumstances that allowed such coordination to develop.

By considering the connections between national legal regimes and the shared influences that cut across national borders, this chapter explains how transnational laws developed within national legal frameworks and laid the foundation for the development of more formal examples of transnational governance in the twentieth century.

Economic Governance: Challenging Neoliberal Ideology in a Global Financial Crisis

In Chapter 2, Scott Mann examines more recent historical settings. He considers the ways in which, over the past quarter-century, the theory and practice of governance has been profoundly influenced by neoliberal ideas, espousing the benefits of free trade and free investment, financial deregulation and privatisation, welfare cut-backs for the poor and tax cuts for the rich, accompanied by huge rewards concentrated at the top of corporate hierarchies and unrestricted corporate lobbying and funding of political parties. Mann argues that the policies of major developed-world 'governments' and the operations of the World Bank, International Monetary Fund and World Trade Organisation have been built around these ideas and policies throughout this period. Mann argues that neoliberal ideas have served to facilitate and justify the thoroughgoing subordination of government to the interests of big capital and the expansion of corporate globalisation. He suggests that the policies directed by such ideas paved the way for the global financial crisis, as well as producing a range of increasingly deleterious consequences at every level of contemporary society. In particular, the chapter focuses upon increasing inequality within and between nations, increasing instability and lack of real and sustainable growth in the world economy, and accelerating pollution and climate change. It argues the case for radical changes in structures, practices and policies of governance at all levels of society to begin to reverse these developments. Mann points to the benefits of re-regulated trade, investment, and financial operations and of re-nationalised banks and infrastructure. He argues for protection of political democracy from the business world by the extension of democracy within the business world.

Trade Governance: Legal Institutionalism as a Magnet for Non-trade Issues

In Chapter 3, Simon Kozlina probes the 'mixed benefits' of seeking to tackle wider issues through one of the most pervasive institutions of international trade regulation. He examines the evident attraction of making human rights, environment and labour standards enforceable through the dispute settlement system of the World Trade Organization. The chapter probes the limits and barriers that emerge to effective coordination and enforcement due to the nature of particular institutional forms – in this case, highly legalised dispute settlement. He argues that the 'turn to law' and legal institutionalism through strict enforcement of trade obligations creates a magnet for non-trade issues in a transnational legal

vacuum for enforcement of those rights, but that it is unlikely that this form of transnational governance will be effective for the enforcement of these rights. In that sense, the chapter is a study of the use of a heavily legalised international organisation to improve nation-state coordination in both economic and non-economic spheres.

Taxation Governance: Would the Tobin Tax Democratise Globalisation?

In Chapter 4, Elfriede Sangkuhl explores the implications of the unprecedented growth in daily currency trading in largely unregulated world currency markets. She examines the potential role of a Tobin Tax, which could be levied on currency exchange transactions with the intended purpose of curbing the massive rate of currency speculation. In examining this proposed method of transnational economic regulation, she argues that regulation of speculative foreign currency trading is necessary because it primarily affects people living in countries with vulnerable currencies. Although many advocates of the Tobin Tax support the development of a supranational body to levy, collect and distribute the tax, she argues that this would reduce its effectiveness through exposure to political manipulation, unless power were distributed in such a manner that the needs and desires of members could be balanced against those of other affected parties. This chapter suggests the changing ways in which transnational economic regulation can be re-imagined and the potential problems with this form of institutional nation-state coordination.

Corruption, International Business Transactions and the OECD

In Chapter 5, John Juriansz and Marina Nehme examine corruption – a ubiquitous, complex, multifarious and seemingly intractable transnational concern. They ask why, 14 years after the adoption of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions by the OECD, member states have achieved only moderate success in their progressive goal of eradicating foreign bribery in international business transactions with their economic, legal and political jurisdictions. The lack of significant demonstrable success, attributable to both a flagging commitment to the ambitious goals of the Convention and to the considerable complexities of corruption, has effectively rendered the collective response of the member states unstable and in jeopardy of failure. The authors suggest that, given the transnational nature of the bribery of foreign officials, it is essential for any reform initiative to focus upon the international coordination of laws and enforcement systems. However, a lack of political will demonstrates itself in the lack of adequate funding and staffing of the various enforcement mechanisms as does the political obstruction of investigations and prosecutions.

Environmental Governance: Global Civil Society and Public Interest Advocacy

In Chapter 6, Laura Horn's key argument is that a new global environmental institution is needed that could operate in the interests of the common concern of humankind to ensure that the global environment is protected. This argument is founded upon the view that international environmental governance should be in a process of transformation through innovation. This perspective of innovative governance questions the present reliance upon states to develop effective international institutions to deal with global environmental protection, and raises the possibility of a new global environmental organisation that has a wider representation to include non-state actors. This change could take some time to occur, however, and the threat to the environment is becoming critical. So, it is argued that interim changes such as the development of a human 'right to a healthy environment' could assist to protect the global environment in the intervening period of time. Because of the lack of standing that non-government organisations have in prevailing international fora, Horn asks: who can speak on behalf of future generations? Along with a new human right to a healthy environment, she also suggests the creation of international dispute resolution institutions, with experts competent to deal with technical environmental questions, and appropriate enforcement mechanisms.

Governance Implications of Terrorism: Justifying Abuse of Due Process Rights

In Chapter 7, Michael Head questions the role of the United Nations in the 'war on terrorism'. He examines a tendency toward the selective use of international legal instruments on 'terrorism' to justify the imposition of far-reaching erosions of legal and civil rights. In looking at the relationship between international norms and domestic legislation, he considers how these instruments, supposedly expressing the collective will of states to respond to the problem of terrorism, sit with existing and widely accepted international human rights instruments such as the Geneva Conventions and the International Covenant on Civil and Political Rights (ICCPR). Head suggests that the UN Security Council, while apparently moving with unprecedented unity to require all member states to legislate against terrorist-related activity, became a conduit for the strategic and economic interests of the major powers, notably the United States. Indeed, Security Council resolutions effectively paved the way for military unilateralism, starting with the US invasion of Afghanistan, and for equally self-interested domestic responses, with governments seizing upon the declared 'war on terrorism' – and the lack of any definition of terrorism by the UN – to introduce repressive measures that served their own political purposes. Head considers the driving forces and implications of an indefinite 'war' and how various governments have used it to disorient and distract public opinion and introduce extensive police and military powers. He argues that the ramifications of these legislative abuses of due process

rights will only become apparent in the longer term, which will make them more difficult to challenge.

International Criminal Governance: The ICC and Other International Justice Mechanisms

In Chapter 8, Steven Freeland reviews the significance of the establishment of the International Criminal Court, which is generally regarded as the most significant mechanism as of yet in international criminal governance and as representing an advance toward what is often referred to as the 'internationalisation of justice'. He explores the various governance structures and enforcement mechanisms created to invoke a system of international criminal justice for those serious crimes that represent gross violations of human rights. He argues that, as many of these crimes have been committed in the context of complex factual circumstances, often involving historical as well as diverse cultural, economic, political and religious considerations, it is appropriate that a range of structures, ranging from community-based localised justice mechanisms to supranational criminal tribunals, are used. There is no one simple formula, and the structures established to date have had mixed 'success' in dealing with gross violations of human rights. The internationalisation of justice remains very much a work in progress and highlights the challenge of seeking a coordinated response by nation-states to global problems.

Governing Humanitarian Intervention: Time for Change

In Chapter 9, Michelle Sanson explores one of the most recent and contentious issues in international law. She examines the crystallising customary international law principle whereby state sovereignty yields to an international responsibility to protect ('RTP' or 'R2P'). The development of a norm of humanitarian intervention has had a checkered history since the end of the Second World War and remains in an unacceptable situation where decisions on intervention are subject to the individual foreign policy objectives of the permanent five members of the United Nations Security Council. The question goes to the heart of what are the limits of transnational action and when domestic sovereignty should and should not be respected. In that sense, she explores the competing tensions between effective transnational governance and the protection of state sovereignty. Sanson argues that clear criteria need to be established not only for when intervention is justified but also for when inaction can be justified. If such criteria had been in place prior to the outbreak of tensions in Darfur, and the conflicts in Syria, interventions may have occurred and these situations resolved with less human suffering.