International governance and law : state regulation and non-state law

edited by Hanneke van Schooten
and Johathan Verschuuren.

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State Regulation and Non-state Law

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Preface

This is an important book. It focuses on a question that has been put since statehood emerged: what is to be regulated by the state? The subject has great actuality, too. In a world of interdependency, in which, for example, economic, social and environmental problems are of a growing international character, in which national borders are disappearing and international non-state actors play important roles, the question remains: what is to be regulated by the state? Nowadays this question must be extended to the many international legal bodies, the international institutional framework.

The answer or answers to that question are influenced by points of view from at least two dimensions: a theoretical dimension and a practical one. The theoretical dimension, which contains ideological elements, implies a view on the role of the state, on what is the '*bonum commune*', on the relation between state and society, on the role and responsibilities of individuals within a polity. It implies judgements about the role of law and the rule of law. It is about Justice and its meaning for contemporary and future relations.

The practical point of view concerns effectiveness and efficiency. Once a certain policy has been considered necessary, it may be effective to stimulate self-regulation in one of its manifestations. That may lead to non-intervention by the state or by another official legal body; it may lead to a combined strategy of state law and non-state regulation.

Non-state regulation can be seen as a matter of principle and as a matter of practice, in that order. In fact, the latter is probably the result of a development in state regulation. In the period in which the rule of law started as a leading orientation for the organization of a polity, particularly the national state, there was not much room for non-state regulation next to state regulation. Non-state law was only valid when recognized by law-creating bodies of the state. But the lesson has been that non-state regulation *de facto* exists and that it may be important to use it as a tool for ordering society and societal relations. Although it is tempting for states and their governments to assume that they can 'rule' their countries, the idea of a manipulable society has been abandoned. Besides, state law itself needs the cooperation of the citizens concerned. Here we enter the area of 'governance'.

In this connection I would like to add the notion of 'trust'. States and other legal bodies should trust their citizens, their people; this implies that

their officials operate in a way that people can trust government and state officials.

It is challenging to transfer this issue to the international level of (non-) regulation.

This book arrives at a good moment. Many governments are confronted with the boundaries of their possibilities because of, for example, internationalization, societal complexity, new challenges. Nevertheless, they have to be concerned about the well-being of their people and have the task to order society thereto. In this respect, I would like to mention that deregulation doesn't necessarily mean fewer rules. Rules may be very necessary to make it possible for people to live together peacefully. The question is particularly who will make the rules and how specific rules have to be; how much room they leave.

In this book, both aspects – the theory and practice of state regulation and non-state law – are discussed in a broad perspective. I welcome it with pleasure. It will contribute to the essential discussion about a major problem of our time and times to come, as mentioned here before. I hope it will stimulate many people, citizens and officials, to reflect on government, governance and law. And on Justice.

Dr Ernst M.H. Hirsch Ballin
Minister of Justice of the Netherlands

Editors' foreword and acknowledgements

The idea for this book emerged in discussions we had within the Centre for Legislative Studies at Tilburg University, the Netherlands. For more than a decade, this research centre has focused its attention on the relationship between legislation and all kinds of law originating from sources other than the legislature. The Centre's main focus is particularly on the relationship between legislation and sources of law outside the sphere of government, i.e., non-state law, in the light of effectiveness and legitimacy. We wondered whether there were other research groups that researched this theme from a similarly broad perspective. The most important characteristic of the research by the Centre for Legislative Studies is its multidisciplinary approach, including various areas of positive law, legal sociology, legal theory and legal history. We came to the conclusion that a similar group did not exist, and there was not much relevant academic literature that takes a similarly multidisciplinary perspective, either. However, since various academics from around the world do study the same subject, we decided to invite these researchers to come to Tilburg University to further discuss the topic and to write a book on it together with several of the Centre's researchers.

We are very grateful to these authors for embarking on this project. The results of the project are important as well as topical. Many legislatures and regulators around the world struggle with the question of what should be done with non-state law. We believe that, with this book, we have made considerable headway in the ongoing discussions on this issue.

We are honoured that the Minister of Justice of the Netherlands, His Excellency Ernst Hirsch Ballin, devoted his precious time to reading the book and writing the preface. We are very grateful to Edward Elgar Publishers for believing in our project from the start and for their continuous interest and support. Also many thanks to those who contributed to the editing process, especially Ineke Sijtsma and Truus Verhoeven (both from Tilburg University).

The contributions are current as of 1 December 2007. We sincerely hope that this book will further enhance the relationship between non-state law and state regulation. The book shows that, in some instances, the legislature

should refrain from intertwining regulation and non-state law, yet it can also be concluded that there are cases in which such a relationship may lead to better regulation.

21 January 2008

Hanneke van Schooten
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1. Introduction

Jonathan Verschuuren

In most western societies, the role of the legislature was originally based upon the principle of the separation of powers, as 'developed' by Montesquieu in his *De l'esprit des lois* (Montesquieu [1748] 1979), and upon the principle of the rule of law. Elected representatives in parliament adopt the law, the executive applies the law and is limited in its powers by the law, and courts test the executive's decisions against the law and thus interpret the law. In modern states, the principle of the separation of powers does not fully apply. In particular the role of the executive in the law-making process has changed. As indicated by Türk, modern governments have broad legislative competence, leading to a decrease in the role of parliaments in the adoption of legislation. Modern bureaucratic administrations are better suited to generate the necessary laws, especially in times when state intervention covers many fields (Türk 2006, p. 8). The theoretical responsibility of the state for everything has resulted in the practical presence of the state in every aspect of life, thus causing a flood of laws (Karpen 1996, p. 55).

Today, this is generally seen as one of the major weaknesses of the legislature. There are too many laws, sometimes they contradict each other, or they are inaccessible. In general, legislatures are criticized for the phenomenon of 'overregulation' and for producing poor-quality legislation which ignores input from citizens and stifles private initiative. Already since the late 1980s, many countries have adopted deregulation programmes, today usually referred to as 'better regulation' (Wiener 2006).

It was probably not a coincidence that the same period saw the global rise of non-state law, i.e., all kinds of self-regulation and soft law (guidelines, handbooks, etc.), aimed at issues of public interest that, undoubtedly, are issues that normally are or can be governed by 'official' law as well. Such 'non-state law' is generated by a whole range of very different non-state actors such as business organizations, groups of individual companies, non govermental organizations or other non-profit organizations, or combinations of these, sometimes even with some government involvement (usually referred to as 'co-regulation'). The rapid growth of non-state law can be observed not only at the national level, but also at the regional

(for instance, European) level and the international level. The latter is not only relevant for international institutions, including institutions of the EU, but also for the national state legislature, both directly and indirectly (through its involvement in international and EU law). In many policy fields, the international or regional level cannot be clearly distinguished from the national level.

Non-state law has several advantages over traditional state law. Most importantly, since the people who develop, apply and enforce the rules are the same as those bound by them, these people are probably more committed to them than to state rules. In addition, they are better known to the regulated, easier to understand, more flexible (in the sense that they can be changed more easily than official state rules), and so, in general are more effective (Baldwin and Cave 1999, p. 40). Therefore, non-state law is considered to be an alternative to state law. In addition to reducing the shortcomings of state law, non-state law could also be better suited to address problems connected to globalization, as non-state law is not necessarily restrained by national borders (Bastmeijer and Verschuuren 2005, p. 317).

These developments, i.e., the growing role of the executive and the diminishing role of parliament in the law-making process, and at the same time the rise of non-state law, have many fundamental as well as practical implications for legislatures around the world. The rule of law ideally reserves a monopoly position for democratically legitimized legislatures to act decisively in order to solve societal problems by way of legislation. What does the decreasing role of the legislature mean for the concept of the rule of law and, vice versa, what does the rule of law mean for non-state law? Practical questions arise as to the relationship between laws and regulations by the state and non-state law. Should legislatures keep an eye on the development of non-state law in a certain policy field, should they take it into account when drafting new legislation, or should they even integrate non-state law into statutes and regulations?

This particularly topical and complex problem is the leading theme of this book. The focus is on the interaction between state legislatures and state regulators on the one hand, and regulations and other regulatory activity by non-state actors on the other. We take a broad perspective not only by looking at statutory and regulatory law, but also by including in our scope the process of implementation and enforcement of laws and regulations, as well as application of laws and regulations by the judiciary.

The central question of the book is thus the following:

To what extent does non-state law currently influence state regulation, and what should be the consequences of non-state law for state regulation?

The two parts of the question can be understood as follows. The first part of the question involves clarification of the different phenomena that can be grouped under the heading of non-state law. What different forms of regulation by non-state actors is the legislator confronted with and how do these interact with state law? Codes of conduct, rule-making by private organizations, trade customs – they are all examples of law of which the primary author is not the state legislature. Does the legislature take such phenomena into account, either explicitly or implicitly?

The second part of the question concerns the consequences for the role of state regulation. Should legislation be adapted to make room for non-state law? If the state legislature is not the only producer of rules, its primary task may change. The legislature may have to focus its attention on more specific tasks, such as protecting weak interests, and safeguarding rule of law values, legal certainty and democracy. Or can non-state law serve these interests just as well?

In this book, scholars in various fields of law, as well as socio-legal studies, from around the world address the central question in a cross-disciplinary manner. The book comprises two parts: a theoretical part and an empirical part.

In the theoretical part, non-state law is defined: its goals and functions, its legitimacy and its relationship to state law. From several theoretical starting points, conclusions will be drawn as to the consequences of non-state law for today's national legislature. In Chapter 2, the various attempts in international socio-legal literature to construct a general theory of non-state law are examined through concepts such as 'living law' (Ehrlich), 'emergent law' (Selznick), 'implicit law' (Fuller), 'intuitive law' (Petrazycki) and 'law as whatever people recognize as law' (Tamanaha). Analysing these concepts, Hertogh focuses on two dimensions: the distinction between 'subjective' and 'objective' approaches to non-state law, and the question of whether non-state law is something which will eventually develop into state law. In this chapter, a broad overview is given of the legal theory on non-state law, focusing on the main question of the book, i.e., the relationship between non-state and state law.

The next three chapters are closely related, focusing on the theoretical core of law and non-state law. First, Krygier goes into the relationship between state and non-state law through a critical analysis of the work of Philip Selznick, who can be seen as the most influential author on this topic. Because of the dominance of Selznick's work, this book would have been incomplete without such an analysis. Since the book mainly deals with the question of what still is or should be the role of state law, given the growing role of non-state law, the author focuses his analysis on this question.

Then, Taekema further defines state and non-state law along the lines of its functions, taking a legal theory perspective (i.e., based on legal theory literature). The chapter is interesting because it goes into more detail regarding the various functions of the law in general and may offer better insight into the part to be played by the state legislature, and how big a part that could be, and probably also into what exactly has to be regulated by the government. The exciting question that remains is whether such an approach really leads to concrete indications as to the future role of regulators.

Finally, van Klink goes into the differences between state and non-state law starting from the discussion between legal sociology and positivist legal science on what law is. In that discussion, the conceptual and political question of what norms can be legitimately enforced is important. Originally this debate focused on the recognition of (for instance) tribal law, but more recently sociologists have tended to include all kinds of non-state law. The main argument seems to be based on the concept of democracy: non-state law is preferred over state law because it is supposed to originate directly from 'the people' themselves. Van Klink criticizes this point of view and defends a positivist conception of law instead, without neglecting the emancipative goals of non-state law. This chapter confronts a legal vision on non-state law with sociological and political views, especially focusing on the position of the legislature within this debate, since the legislature, as one of the three state powers, has a special position within the concept of democracy.

Although these four chapters already set out a fairly complete and substantive theoretical basis for providing answers to the research questions formulated above, a legal history perspective is still required. In the last chapter of the theoretical part of the book, Tellegen-Couperus tests Ehrlich's statement that, under Roman law, non-state law was the most important source of law, used by jurists to interpret the law, including state law. In his influential work, this legal sociologist uses the example of Roman law to show that public law laid down in statutes and judge-made law are not the prime sources of law, and should only be applied and understood in the light of norms that originated from institutions and structures in society. This legal history perspective on the book is interesting because it refutes Ehrlich's statement which has consequences for the theoretical basis of non-state law.

In the empirical part of the book, examples of non-state law in the field of, among other things, international and national environmental law, law with regard to nanotechnology, tax law and health care law are discussed, again especially focusing on the consequences of these alternative sources of law for the state legislature, both on an international and a national level.

In the first of these empirical chapters, Gunningham shows how government regulators have lost (at least part of) their power to regulate

businesses, and how other forms of regulation have taken over (again part of) the role of government regulation. Then he goes into the regulatory reform that has been or is taking place as a consequence. Since we aim to focus the book on what (still) is, or should be the role of government regulation, in the light of the growing role of non-state law, the second part is the central focus of this chapter. In other words: what are the broader lessons for the future? Gunningham illustrates his chapter with empirical data and concrete examples from the field of environmental law.

The emergence of nanotechnologies creates huge governance challenges which, for instance in the UK and the US, are mainly tackled through self-regulation. The state legislature appears to view such self-regulation as a preparation for hard law. For example, the UK and US self-reporting schemes are expected to deliver information about nanotechnological properties and risks on the basis of which the applicability of existing legislation can be tested. Dorbeck-Jung and Van Amerom describe the UK soft law and self-regulation activities and their interaction with regulatory activities of other countries, the EU, the OECD and the ISO. Then they discuss the influence of these regulatory activities on UK legislation. In their analysis, they also pay attention to the various public interests involved in nanotechnological development and the conflicts between them. In this respect, the question arises how governmental support for nanotechnological innovation is balanced against protective measures that call for legislation. Does the UK government focus on soft law and self-regulation because it regards legislation as an impediment to desirable technological development? What insights does the UK case provide on the 'hardness' of soft law and self-regulation in nanotechnological governance?

The next chapter deals with tax law. Job goes into the issue of compliance with state law in Australia through programmes run by the tax office to achieve better compliance. Within these programmes, several private actors, such as the New South Wales Bar Association and large accounting companies, were very active, resulting in a close cooperation between state and non-state actors, towards self-regulation and new state tax law. Focusing on this part of the process generates answers to such questions as: Was the government indeed able to have private actors create non-state law? How did government regulators subsequently react to that non-state law? What were the consequences as far as compliance was concerned?

The next empirical chapter deals with the judiciary and the oldest category of non-state law: native law. How do judges deal with non-state law, in this case, with Australian aboriginal law? Dominello answers this question by going into case law on native title to land.

Subsequently, Lembcke focuses on the role of the state legislature in questions that are primarily dealt with in a non-state environment, in this