

The Normativity of Transnational Private Norms : An Overview

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January, 23rd 2018

1. We live in a more globalized world in which the *states* lose their normative power for regulating transnational private relations¹. The ultimate consequence of this is that the multinational corporations (MNCs) creating their own legal orders², their own norms³ such as private standards and codes of conduct⁴ for their own behaviour (and their subcontractors worldwide)⁵. These ‘transnational private norms’⁶ are enforced through global supply chain relationships⁷ and monitored by third party agencies⁸. Legal positivism, however, turns a blind eye to norms outside of state law⁹, and we think that such a theoretical obstacle impedes progress in addressing global issues of the twenty-first century such as global poverty, environmental degradation, labour violations and climate change. Especially today, the MNCs truly act as ‘public’ legislators by laying down mandatory global rules on environmental protection and labour rights¹⁰. Their lawmaking power is broad enough to encompass areas covered by state laws¹¹.

¹ Dominique Bureau and Horatia Muir Watt, *Droit international privé : Partie générale* (Presses universitaires de France, 2014).

² Jean-Philippe Robé, ‘L’entreprise en droit’ (1995) 29 *Droit et Société* 117.

³ Joost Pauwelyn, ‘Non-Traditional Patterns of Global Regulation : Is the WTO ‘Missing the Boat’ ?’ in Christian Joerges and Ernst-Ulrich Petersmann (eds), *Constitutionalism, Multilevel Trade Governance and Social Regulation* (Hart Publishing, 2006) 199.

⁴ Anna Backers, *Enforcing Corporate Social Responsibility Codes: On Global Self-Regulation and National Private Law* (Hart Publishing, 2015).

⁵ Robert O’Brien, ‘Workers and world order: the tentative transformation of the international union movement’ (2000) 26.04 *Review of International Studies* 533.

⁶ This expression is used by Andreas Nölke, ‘Private norms in the Global Political Economy’ in Klaus-Gerd Giesen and Kees van der Pijl, *Global Norms in the Twenty-First Century* (Cambridge Scholars Press, 2006) 134.

⁷ Cynthia Estlund, ‘Enforcement of private transnational labor regulation : a new frontier in the anti-sweatshop movement ?’ in Fabrizio Cafaggi (ed), *Enforcement of Transnational Regulation: Ensuring Compliance in a Global World* (Edward Elgar Publishing, 2012) 237.

⁸ Jessica F.Green, *Rethinking Private Authority: Agents and Entrepreneurs in Global Environmental Governance* (Princeton University Press, 2013).

⁹ Ralf Michaels, ‘What Is Non-State Law?’ in Michael A. Helfand (ed), *Negotiating State and Non-State Law: The Challenge of Global and Local Legal Pluralism* (Cambridge University Press, 2015) 15.

¹⁰ Mette Andersen and Tage Skjoett-Larsen, ‘Corporate social responsibility in global supply chains’ (2009) 14.02 *Supply chain management: an international journal* 75.

¹¹ Horatia Muir Watt, ‘Theorizing transnational authority : a private international law perspective’ in Roger Cotterrell and Maksymilian Del Mar, *Authority in Transnational Legal Theory: Theorising Across Disciplines* (Edward Elgar Publishing, 2016) 325.

2. In this respect, several arguments can be put forward to reject the current *state-centric* approach to *law* in a post-Westphalian age. First of all, it is important to make a clear distinction between *law* and *state* (the state-monopoly on law-making¹²) because, from a historical perspective, law exists before States developed¹³. To give a simple example : the Mesopotamian legal system dates from about 2500 B.C¹⁴, whereas the emergence of the first sovereign states in Europe dates only from the sixteenth and seventeenth centuries¹⁵. Additionally, the fictitious link between *law* and *state* is a basic feature of Western European legal traditions¹⁶, which can be explained from the fact that law outside of the state would preclude the aspirations to justice and equity¹⁷. This would mean not only that states would protect individuals sufficiently and would secure their rights¹⁸, but also that *mutatis mutandis*, only states would make law¹⁹.

3. However, this kind of assumption is more and more difficult to sustain, especially in a world in which *state* is not a monolithic entity empowered with a monopoly of coercion²⁰. This raises the fundamental question of what is meant by the *state*²¹. Although traditional international legal theorists attempt to define *state* on the basis of socially constructed characteristics, such as ‘territory’, a ‘permanent population’, a ‘government’, and the ‘ability to enter into relations with other states’²², it would be incorrect to conclude that there is an objective definition of the state²³. This is mainly because state is a social construction²⁴, there are different types of states²⁵, each with its

¹² For this expression, see Elies van Sliedregt and Sergey Vasiliev (eds), *Pluralism in International Criminal Law* (Oxford University Press, 2014).

¹³ Sally Engle Merry, ‘Stateless law : Before, Inside and Outside the Law of the State’ in Helge Dedek and Shauna Van Praagh, *Stateless Law: Evolving Boundaries of a Discipline* (Routledge, 2016) 3.

¹⁴ Roberta Kevelson, *The Law as a System of Signs* (Plenum Press, 1988).

¹⁵ Chris Thornhill, *A Sociology of Constitutions: Constitutions and State Legitimacy in Historical-Sociological Perspective* (Cambridge University Press, 2011).

¹⁶ Robert Kolb, *Théorie du droit international* (Editions Bruylant, 2013).

¹⁷ Thomas Schultz, *Transnational Legality: Stateless Law and International Arbitration* (Oxford University Press, 2014).

¹⁸ Heather M. Roff, *Global Justice, Kant and the Responsibility to Protect: A Provisional Duty* (Routledge, 2013).

¹⁹ Lan Cao, *Culture in Law and Development: Nurturing Positive Change* (Oxford University Press, 2016).

²⁰ James M. Buchanan, ‘Man and the State’ in Svetozar Pejovich (ed), *Socialism: Institutional, Philosophical and Economic Issues* (Martinus Nijhoff Publishers, 1987) 3.

²¹ Bertrand Badie, Pierre Bimbaum, *The Sociology of the State* (University of Chicago Press, 1983).

²² Chiara Giorgetti, *A Principled Approach to State Failure: International Community Actions in Emergency Situations* (Martinus Nijhoff Publishers, 2010) .

²³ Bob Jessop, ‘The State and Power’ in Stewart R Clegg and Mark Haugaard (eds), *The SAGE Handbook of Power* (SAGE, 2009) 367.

²⁴ Oren Yiftachel, ‘Planning and social control: Exploring the dark side’ (1998) 12 *Journal of Planning Literature* 395.

²⁵ Marijke Breuning, ‘Role theory research in international relations’, in Sebastian Harnisch, Cornelia Frank and Hanns W Maull (eds), *Role Theory in International Relations* (Routledge, 2011) 16.

own interest²⁶ and behaviour²⁷. From this starting point it is argued that states act like corporations, while corporations act like states²⁸. Several examples can be given to illustrate this global trend. First of all, corporations provide public goods (e.g education, health care, infrastructure etc.)²⁹ and protect people's citizenship rights³⁰. Secondly, states maximize their incomes through the marketization of their public services³¹ and through a massive privatization of their public sectors³². Thirdly, states make their legal systems more attractive to investors³³, while MNCs make their legal systems more responsive to the needs of socially sensitive consumers³⁴. These radical changes blur the distinctions between *law* and *non-law*, *state* and *non-state*, *private* and *public*, *local* and *global*.

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²⁶ Torbjørn L. Knutsen, *A History of International Relations Theory: 3rd edition* (Oxford University Press, 2016).

²⁷ Stephen Hobden, *International Relations and Historical Sociology: Breaking Down Boundaries* (Routledge, 2006).

²⁸ Larry Catá Backer, 'The Private Law of Public Law: Public Authorities as Shareholders, Golden Shares, Sovereign Wealth Funds, and the Public Law Element in Private Choice of Law' (2008) 82 *Tulane Law Review* 1.

²⁹ Andreas Georg Scherer, Dorothee Baumann-Pauly and Anselm Schneider, 'Democratizing corporate governance: Compensating for the democratic deficit of corporate political activity and corporate citizenship' (2013) 52 *Business & Society* 473.

³⁰ Waheed Hussain and Jeffrey Moriarty, 'Accountable To Whom? Rethinking the Role of Corporations in Political CSR' (2016) *Journal of Business Ethics* 1.

³¹ Nand C. Bardouille, 'The transformation of governance paradigms and modalities insights into the marketization of the public service in response to globalization' (2000) 353 *The Round Table* 81.

³² Marc Edelman, 'Development' in James G. Carrier and Deborah B. Gewertz (eds), *The Handbook of Sociocultural Anthropology* (Bloomsbury Academic, 2013) 259.

³³ Gerald Epstein, 'The role and control of multinational corporations in the world economy' in Jonathan Mitchie (ed), *The Handbook of Globalisation, Second Edition* (Edward Elgar Publishing, 2011) 185.

³⁴ Larry Catá Backer, 'The evolving relationship between TNCs and political actors and governments' in Alice de Jonge and Roman Tomasic (eds), *Research Handbook on Transnational Corporations* (Edward Elgar Publishing, 2017) 82.