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# Regulating Private Legislation

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## 1. Introduction

The development and application of binding rules has never been the sole preserve of governments. Indeed, the medieval guilds undertook the bulk of regulation relating to 'trade, labour and production' prior to the emergence of modern nation states in Europe.<sup>1</sup> Legal realists, writing in the first half of the twentieth century, sought to expose the myth of state sovereignty, pointing to the power of private actors both to enforce<sup>2</sup> and make law.<sup>3</sup> Within contemporary discussions, recognition of private legislation reflects both a desire to better understand the diffuse nature of capacities underpinning regulatory and wider governance practices and a concern respecting the legitimacy of such non-governmental rule making.

In this chapter I offer some analysis of the nature of private legislation. A central consideration is what makes such rules binding – and there is no single answer to this. The issue of bindingness alerts us to the existence of a penumbral area of norms which appear to steer behaviour but without any obvious means of legal enforcement. A further question relates to the nature of private legislators. The second part of the chapter addresses the normative issues concerning the legitimacy of non-governmental rule-making. Legitimacy is a product both of effectiveness and the surrounding mechanisms for review and accountability of private law makers.

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<sup>1</sup> Fernand Braudel, *The Wheels of Commerce* (Harper Collins, London, 1982)

<sup>2</sup> Robert L. Hale, 'Coercion and Distribution in a Supposedly Non-Coercive State' (1923) XXXVIII *Political Science Quarterly* 470-494

<sup>3</sup> Louis Jaffe, 'Law Making by Private Groups' (1937) 51 *Harvard Law Review* 201-253

The extent to which we are comfortable with private legislation may be a product, to some extent, of the narratives we tell about their legitimacy.

## **2. The Nature of Private Legislation**

### **a. Who Are the Private Legislators?**

Rules promulgated by non-governmental actors are an important part of many governance regimes. In the United States the term 'private legislation' is used to denote regimes for setting standards.<sup>4</sup> There exist vast numbers of standard setting organisations (SSOs) setting standards for local, national and international purposes.<sup>5</sup> Well known national SSOs, established in the first quarter of the twentieth century, include the British Standards Institution (BSI), the DIN (Germany), AFNOR (France) and the American National Standards Institute (ANSI).<sup>6</sup> These organisations typically emerged through the institutionalisation of industry efforts to make standards which would facilitate efficient business activities, often with the support of government grants.

Standards institutions remain, fundamentally, industry bodies into which industry expertise is drawn for the purpose of devising and testing standards which are then marketed to anyone who wishes to use them. Supranational standards bodies emerged to deal with coordination problems not capable of solution with

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<sup>4</sup> Chris Sagers 'The Evolving Federal Approach to Private Legislation and the Twilight of Government' Cleveland-Marshall Legal Studies Research Paper No. 05-117  
[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=610587](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=610587) (last visited 28 October 20086)

<sup>5</sup> Nils Brunsson and Bengt Jacobsson, 'The Contemporary Expansion of Standardization' in N Brunsson, B Jacobsson and Associates (eds), *A World of Standards* (Oxford University Press, Oxford, 2000) 1-17

<sup>6</sup> Kristine Tamm Hallström, *Organizing International Standardization: ISO and IASC in Quest of Authority* (Edward Elgar, Cheltenham, 2004)

national standards alone. The international organisation for standards, the ISO, itself, was constituted as a network of national standard bodies, and similarly with the European Committee for Standardisation, the CEN. Many other standards bodies are also constituted as networks of industry or national representatives, often incorporated as non-profit organisations.

Important as they are, standards, or technical standards, are not the only form of rule made by non-governmental organisations. If standards organisations have a loose associational form, in the sense that they emerged from industry groupings, but now develop standards at large, then we can distinguish tighter associational forms in which rules are set within membership organisations. Such membership organisations include sporting and community associations as well as trade associations and many self-regulatory regimes. Trade associations frequently set rules for their members which may be concerned with protecting each other from undesirable conduct of others, or with ensuring the reputation of an industry amongst its customers. (Some argue that such regimes may also be used to underpin cartels).<sup>7</sup> Trade association 'codes of conduct' have statutory recognition in the EC Unfair Commercial Practices Directive where they are defined as an

'agreement or set of rules not imposed by law, regulation or administrative provision of a Member State which defines the behaviour of traders who undertake to be bound by the code'.<sup>8</sup>

In some domains legislative underpinning gives to trade or professional associations a monopoly over particular areas. Such

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<sup>7</sup> See eg Daniel J. Marx, *International Shipping Cartels: A Study of Industrial Self-Regulation by Shipping Conferences* (Princeton University Press, Princeton, NJ, 1953)

<sup>8</sup> Directive 2005/29/EC. OJ 2005 L149 22-39, 11.06.2005, art 2(f).

a monopoly position may otherwise be achieved through an association acquiring a reputation amongst its members, for example with a sporting association, or among the customers of the members, as being the best in respect of one or more important criteria.<sup>9</sup>

The standards organisations are not the only examples of associational regimes whose scope has grown beyond the confines of the association. Advertising regulation in many European countries is at least partially the responsibility of 'self-regulatory' organisations established and funded by the advertising industry, but whose rules are applied to all advertisers, irrespective of whether they are a member of the relevant association. Some idea of the scale of the activities may be gauged from the fact that the European Advertising Standards Alliance has member organisations which are self regulatory organisations in 24 European countries.<sup>10</sup>

In addition to associational regimes, private rules are made within bilateral relationships in the form of contracts. Contracts are routinely used by one party to set down rules of conduct over another.<sup>11</sup> Supply contracts provide a classic example where buyers or goods or services set down not only quality and price conditions, but also rules relating to process, certification or inspection. Buyers who exercise monopsony, or otherwise have substantial power relative to the other party, are particularly well placed to use contracts in this way. In some instances chains of contract may emerge, as where retailers impose conditions on

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<sup>9</sup> Antony Ogus, 'Re-Thinking Self-Regulation' (1995) 15 *Oxford Journal of Legal Studies* 97-108.

<sup>10</sup> Colin Scott, 'Private Regulation of the Public Sector: A Neglected Facet of Contemporary Governance' (2002) 29 *Journal of Law and Society* 56-76

<sup>11</sup> Arthur Stinchcombe, 'Contracts as Hierarchical Documents' in A Stinchcombe and C Heimer (eds), *Organizational Theory and Project Management* (Universitetsforlaget, Bergen, 1985

distributors relating to provenance of goods, which distributors must then incorporate in their contracts with their suppliers. Insurance contracts are similarly used by insurers to set down conditions of conduct underpinning the acceptance of the risk.<sup>12</sup>

In many domains the rules set down in the contracts which are effectively imposed by one party on the other are actually drawn up by a third party. It is very common within professional and trade associations for members to be offered 'boilerplate' contracts which have been drawn up by the association, and through which the association is effectively able to set down rules not only for its members, but also for the customers of its members. It has been suggested that when it comes to the interpretation of such contract terms the intention lying behind them is better gauged by reference to the intention of the organisation which drafted the boilerplate terms, rather by the more normal reference to the intention of the contracting parties.<sup>13</sup>

#### b. What Makes Private Legislation Binding?

The question of how private legislation becomes binding is no more capable of precise answer than is the more general question of why laws are followed. Laws are followed to varying degrees because the norms are reflective of wider social values and/or because it is in the interests of the rule-follower to do so (for example to avoid sanctions or to secure benefits). Where norms are internalised then no consideration of consequences is necessary for a rule-follower to

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<sup>12</sup> Richard V. Ericson, Aaron Doyle and Dean Barry, *Insurance as Governance* (University of Toronto Press, Toronto, 2003)

<sup>13</sup> Stephen J. Choi and G. Mitu Gulati 'Contract as Statute' NYU Law and Economics Research Papers 06/06 [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=872861](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=872861) (last visited 1 November 2006).

decide to follow the rule. In practice it is likely that internalisation of rules is reinforced to a greater or lesser extent by the fact of consequences for non-compliant behaviour. The possibility of consequences is, of course, dependent on the deviation being detected. Accordingly it is necessary to think about the range of consequences which may follow from failure to follow rules generally, and the rules contained within private legislation in particular.

What is clear with legal rules generally is that they are not followed simply because of the threat of sanctions exercised hierarchically.<sup>14</sup> This is equally true with private legislation. The basis for bindingness with private legislation is diverse, even at the level of hierarchical enforcement. In the case of private legislation made under delegated legislative authority, as with codes and practices by some professional associations, the legal basis for enforcement is often based in administrative law, with the possibility of administrative sanctions.

With the various forms of contractual rules, whether made through associations or in bilateral contractual settings, the bindingness of the rules derives from the contracts themselves and can be enforced as such. Associational rules are liable to provide not only the substantive rules of conduct, but also the mechanisms governing membership and expulsion. Thus where provision is made in the rules of the association then a member consistently in breach can be subjected not only to financial or other penalties but also expulsion from the regime itself. This is an equivalent to the measure in public regimes of revoking an operating licence. Where membership is a *de iure* or *de facto* prerequisite to participation in a market, then, as with licence revocation, expulsion may be

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<sup>14</sup> Sharon L. Roach Anleu, *Law and Social Change* (Sage, London, 2000).

tantamount to killing off the business. The nuclear qualities of this sanction may appear to make a regime rigorous. However, in practice the drastic consequences associated with expulsion may make it appear disproportionate for all but the most severe violations, and therefore practically unusable. It is in any case very difficult to secure information on the sanctioning practices of contractually based associational regimes and this is in marked contrast with the detailed reporting practices which typically characterise public regulatory regimes.

In the case of bilateral contracts it is for the parties to specify consequences for breach, or otherwise rely on the default rules provided by legislation or common law (depending on jurisdiction). Where boilerplate terms are used then the organisation drafting the terms will typically make provision for breach. What is clear from sociological research on the relations between businesses in contractual settings is that many businesses pay little attention to their strict contractual rights, even where things go wrong.<sup>15</sup> A possible conclusion arising from this research is that in many settings the rules are not so important in making the relationship work as other mechanisms are used by the parties to keep matters within an acceptable range of outcomes. These alternative mechanisms derive from the position of social actors within community and market settings.

In some instances failure to comply with the requirements of private legislation may result in social consequences deriving from the location of the actors within communities. This is likely to be particularly true for rules developed within professional associations and other community settings. Thus a doctor or lawyer who

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<sup>15</sup> Stuart Macaulay, 'Non-Contractual Relations in Business: A Preliminary Study' (1963) 28 *American Sociological Review* 55-83; Hugh Beale and Tony Dugdale, 'Contracts Between Businessmen' (1975) 2 *British Journal of Law and Society* 45-60

breaches professional codes may find themselves being ostracised by other members of the profession before the question of formal sanctions within the regime ever becomes an issue. Within bilateral contractual settings, to the extent that legal enforcement of rights is not deployed, or not fully deployed, then social sanctions are liable to have a role in addressing breaches. The social character of the people who make up businesses may lead them to seek approval, inclusion, status within contractual settings, giving others mechanisms for denying them some of the things they seek as a consequence of deviation from the rules (whether written or unwritten).

A third set of consequences flow from market behaviour. Where a business or professional is known to be in breach of applicable private legislation then potential customers may decide not to deal with them, or not to continue to deal with them (exit). Perhaps the clearest example here relates to technical standards, compliance with which is a *sine qua non* for businesses operating in many economic areas. This reason for following rules has been described as rational voluntary market behaviour.<sup>16</sup> Failure to comply may make doing business impossible. Equally, the market consequences of expulsion from an associational regime may provide the real reason for compliance with the rules, albeit mediated by a process of hierarchical enforcement against offending members. Within bilateral contractual settings, many contracts have relational qualities, such that there are market incentives to maintain good relations and thus sustain some kind of joint enterprise. Accordingly, even where there are legally enforceable penalties for breach of contract, the capacity of one actor to contract elsewhere may be a more important reason for compliance with the rules.

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<sup>16</sup> Kristine Tamm Hallström, *Organizing International Standardization: ISO and IASC in Quest of Authority* (Edward Elgar, Cheltenham, 2004)

Indeed, it has been argued that in some spheres, such as employment relations, implicit relational contracts may trump strict legal rights in short term contracts.<sup>17</sup>

In practice the mechanisms which make private legislation binding are likely to be found not in isolation, but rather operating in hybrid forms. In many cases the application of social sanctions is likely to overlap with market behaviour. This phenomenon is exemplified by the movement for developing and regulating sustainable logging practices established by the Forest Stewardship Council (FSC). The FSC established a code and encouraged retailers to require suppliers to ensure that all wood products supplied to them were produced in compliance with the code. Thus the social norms institutionalised in the code are reinforced by the market behaviour of retailers refusing to deal with suppliers unable to guarantee compliance with the code – a process referred to by Cashore as 'non-state market-driven governance'.<sup>18</sup> The potential for such hybrid consequences for failure to follow the norms of private rules is accentuated by a trend observed in the United States and elsewhere for at least some consumers to seek information about the production of products they consumer, and the compliance by produces with ethical codes.<sup>19</sup>

Equally market-based sanctions might operate in combination with hierarchical enforcement. Whilst technical standards are generally adopted by businesses for market reasons, there are often circumstances where it is desirable that a standard is followed universally, but there is inadequate market incentive to insure this.

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<sup>17</sup> Clive Bull, 'The Existence of Self-Enforcing Implicit Contracts' (1987) 102 *Quarterly Journal of Economics* 147-159

<sup>18</sup> Benjamin Cashore, 'Legitimacy and the Privatization of Environmental Governance: How Non-State Market-Driven (NSMD) Governance Systems Gain Rule Making Authority' (2002) 15 *Governance* 503-529

<sup>19</sup> Douglas A. Kysar, 'Preferences for Processes' (2004) 118 *Harvard Law Review* 525-642

There are many instances where technical standards are referred to in legislative instruments. Sometimes such references are specific – as with the ‘no product to be lawfully sold unless complying with the standard’ type of regulation common in the UK, and also used by agencies in the United States<sup>20</sup> or in the kind of general terms favoured by the New Approach to Technical Standards, adopted by the European Commission in 1983.<sup>21</sup> The New Approach deploys a more generalised approach within which general requirements are set down in legislation with detailed requirements supplied by technical standards from European or national standards bodies. The General Product Safety Directive locates technical standards within a hierarchy of rules, such that the general safety requirement of the Directive may be complied with through following technical standards where no more specific EC or national legislative rules govern the product.<sup>22</sup>

The use of technical standards is not the only mechanism for incorporation of private legislation within regulatory regimes. Within the European Community regime on consumer protection there have been marked efforts to link voluntary codes of conduct with hierarchical sanctions. One of the best examples is provided by the Unfair Commercial Practices Directive which requires Member States to provide administrative or criminal sanctions for misleading conduct by traders and provides:

‘A commercial practice shall also be regarded as misleading if...it involves...

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<sup>20</sup> Jody Freeman, 'Private parties, public functions and the new administrative law' (2000) 52(3) *Administrative Law Review* 813-858

<sup>21</sup> Michelle Egan, 'Regulatory Strategies, Delegation and European Market Integration' (1998) 5 *Journal of European Public Policy* 485-506; Giandomenico Majone, 'The Credibility Crisis of Community Regulation' (2000) 38 *Journal of Common Market Studies* 273-302

<sup>22</sup> Directive 2001/95/EC OJ L 11/4-17, 15.01. 2002 Art 3(2) (previously Directive 92/59/EEC on general product safety OJ L 228, 11.8.1992, p. 24–32).

Non-compliance by the trader with commitments contained in codes of conduct by which the trader has undertaken to be bound, where

- (i) the commitment is not aspiration but is firm and is capable of being verified, and
- (ii) the trader indicates in commercial practice that he is bound by the code.<sup>23</sup>

### **3. The Legitimacy of Private Legislators**

The very concept 'private legislation' implies some normative problem, the appropriation by non-state actors of an essentially public function, the challenge to Weber's idea that the state was characterised by its monopoly of the legitimate use of force against others. Within democratic states the core usage of the term legislation implies rule making through representative legislative institutions, organised variously around principles of majority decision making or power-sharing, each with mechanisms for the protection of minorities.<sup>24</sup> Normative concerns about 'private legislation' are commonly premised on this ideal-typical conception of public legislation. However, we should be aware that in many states the delegation of public legislative authority to ministers and others means that in practice a majority of public legislative instruments are adopted with limited or negligible involvement of the core legislative institutions. Furthermore many rules made by public bodies are made in a manner which does not involve the processes of public legislation, as with many contractual rules, and soft law instruments such as guidance and circulars. Thus, while we might accept the special qualities, in terms of legitimacy, attached to public legislation, we should not take as our starting point an

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<sup>23</sup> Directive 2005/29/EC. OJ 2005 L149 22-39. 11.06.2005, art 6(2)(b).

<sup>24</sup> Arend Lijphart, *Democracies: Patterns of Majoritarian and Consensus Government in Twenty-One Countries* (Yale University Press, New Haven, 1984)

assumption that most public rule making is carried out through such special processes. Any discussion should perhaps start from a comparison of the legitimacy of rule making by private as opposed to public bureaucracies.

A key example within the EU of this normative problem is presented by the dependence on private standards in the legislative frameworks of the New Approach to Technical Standards. For Majone there is a 'tension between the essential safety requirements of the New Approach directives, which are legally binding, and the voluntary character of the harmonized standards which provide the technical framework for risk assessment' expressed in terms that the non-state provenance of the standards means that they must be voluntary.<sup>25</sup> The extent of the problem he sees is illustrated by his solution, which is to assign the standard setting to governmental agencies. He values the legitimacy and expertise of the standardisation bodies, but cannot accommodate private rule making within his theory of (public) governance.

The apparent legitimacy problem attaching to private legislation can be turned on its head in a number of ways. A first step is to understand 'the pervasive private role' of non-state actors in contemporary governance<sup>26</sup> and with this accept that the option of governmental organisations 're-claiming' all legislative functions is implausible. Accordingly alternative bases for the legitimacy of the governance regimes we have (rather than those which we think ideal) must be sought.

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<sup>25</sup> Giandomenico Majone, 'The Credibility Crisis of Community Regulation' (2000) 38 *Journal of Common Market Studies* 273-302

<sup>26</sup> Jody Freeman, 'The private role in public governance' (2000) 75(3) *New York University Law Review* 543-675

Legitimacy is widely conceived of as having both procedural and substantive dimensions.<sup>27</sup> From a procedural point of view the involvement of non-state actors in making 'legislation' begs the question whether such processes are subjected to similar procedural safeguards to the processes attaching to public legislation. Public legislators point to traditional mechanisms of political and financial accountability to which they are subjected as underpinning their procedural legitimacy.<sup>28</sup> Thus, ministers and agencies with responsibilities for making rules may have to account for their actions before parliaments, the courts, financial watchdogs and/or public sector grievance handlers.<sup>29</sup> However we need not assume that such public accountability mechanisms are always robust. For some commentators the rise of the regulatory state in the UK generated a crisis in the accountability of public rule makers, more remote from government ministries and parliaments than had hitherto been the case.<sup>30</sup> In particular it is possible to note the somewhat remote and sporadic nature of such key processes as parliamentary scrutiny or judicial review.<sup>31</sup> One might argue that the trade-off for having expertise and independence in regulatory agencies, in terms of the reduced intensity of formal accountability mechanisms, is not dissimilar to that which applies to private legislative processes.

For some the involvement of private actors in core governance activities raises qualitatively different issues. Writing in an American context, Freeman suggests '[t]o the extent that private actors increasingly perform traditionally public functions unfettered

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<sup>27</sup> Fritz W. Scharpf, *Interdependence and Democratic Legitimation*, Max Planck Institute for the Study of Societies, 98/2 (1998)

<sup>28</sup> Jody Freeman, 'The private role in public governance' (2000) 75(3) *New York University Law Review* 543-675

<sup>29</sup> Richard Mulgan, *Holding Power to Account: Accountability in Modern Democracies* (Palgrave Macmillan, London, 2003)

<sup>30</sup> Cosmo Graham, *Is There a Crisis in Regulatory Accountability?*, CRI (1995) .

<sup>31</sup> Colin Scott, 'Accountability in the Regulatory State' (2000) 27 *Journal of Law and Society* 38-60.

by the scrutiny that normally accompanies the exercise of public power, private participation may indeed raise accountability concerns that dwarf the problem of unchecked agency discretion.<sup>32</sup>

Set against the criteria of public accountability, we might conclude that the arrangements for scrutiny of private rule makers are weak. Where no public expenditure is involved, the more rigorous aspects of public sector audit are unlikely to apply and there is limited experimentation in some jurisdictions with applying judicial review procedures to private organisations deemed to be involved in exercising public powers to make and/or enforce rules.<sup>33</sup> The argument for applying judicial review more extensively to non-state actors was powerfully made by Allan Hutchinson some years ago.<sup>34</sup>

An approach premised on the desirability of applying public law mechanisms to private actors appears to me to over-emphasise one set of legitimating mechanisms, at the expense of others which are to a greater or lesser extent, particular to non-state actors. I suggest that a more fruitful approach might be to think first about the advantages, from a legitimacy perspective, of the involvement of non-state actors within governance regimes generally, and second to think more precisely about the various mechanisms through which non-state activities are themselves legitimated, which often go beyond traditional mechanisms of public accountability.

The virtue we might identify in having private legislative processes is precisely that they have the potential to add additional layers of

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<sup>32</sup> Jody Freeman, 'Private parties, public functions and the new administrative law' (2000) 52(3) *Administrative Law Review* 813-858

<sup>33</sup> Julia Black, 'Constitutionalising Self-Regulation' (1996) 59(1) *Modern Law Review* 24-56

<sup>34</sup> Allan Hutchinson, 'Mice Under a Chair: Democracy, Courts and the Administrative State' (1990) 40 *University of Toronto Law Journal* 374-404

scrutiny and accountability for legislation creating what I have referred to elsewhere as a form of 'extended accountability' premised on interdependence and/or redundancy.<sup>35</sup> The idea of interdependence is premised on the observation that in many settings key actors lack the capacity to act alone, and in order to bring actions to fruition they require the cooperation of others. Such an idea is clearly demonstrated in the public regimes where reference is made to private legislation, as with the New Approach to Technical Standards. It is suggested that administrative law should be adapted to the reality of interdependence through a reconceptualisation of its main subject matter from hierarchical to negotiated relationships.<sup>36</sup>

With redundancy the core idea is that the failure of any one mechanism, in this case for setting norms, will be met by another overlapping mechanism. It is demonstrated by the hierarchy of norms established within the EC Directive on Product Safety, discussed above, under which satisfaction of the requirement that products are safe may be provided by compliance with EU or national legislative requirements and, failing these, European or national non-governmental standards. It may be that in the case the redundancy mechanism would not work so effectively since a poor legislative standard trumps a better private standard. It is not open to a court to choose which standards within the hierarchy to apply. We may expect redundancy to provide a more effective mechanism where public and private rules are, in some sense, in competition with each other.

Thinking beyond interdependence and redundancy the existence of private legislative capacity might be expected to supplement public

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<sup>35</sup> Colin Scott, 'Accountability in the Regulatory State' (2000) 27 *Journal of Law and Society* 38-60

<sup>36</sup> Jody Freeman, 'The private role in public governance' (2000) 75(3) *New York University Law Review* 543-675

accountability mechanisms over public legislators. The existence of standardisation and self-regulatory organisations provides a concentrated expertise and capacity for checking the credibility of public legislative programmes in the same fields of interest, and this checking capacity flows in both directions, as public legislative and executive institutions have capacity for monitoring private legislative institutions. At the level of bilateral contractual rules, the capacity for deviation from public rules creates the potential for innovation and challenge to the quality of such public rules. Contracting parties, in many settings, can effectively choose whether to take the default rules or set their own.<sup>37</sup> The will of public legislatures to override such private contractual rule making, which is routinely exercised in consumer protection fields, must be justified by reference to the public rules being superior, and this, also is a form of accountability.

This last point links to arguments about substantive legitimacy. Substantive legitimacy is premised upon the outcomes or effects of rule. The existence of private legislative regimes might be expected to create competitive pressures, both between private rules regimes and between private and public legislation. Processes of technical standardisation are, perhaps, most obviously, subjected to competition for users of the standards.<sup>38</sup> Self-regulatory regimes may compete for members and for customers of their members, the latter pressures pulling standards up, and the former towards the least costly standards consistent with maintaining market reputation.<sup>39</sup>

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<sup>37</sup> Hugh Collins, *Regulating Contracts* (Oxford University Press, Oxford, 1999)

<sup>38</sup> Kristine Tamm Hallström, *Organizing International Standardization: ISO and IASC in Quest of Authority* (Edward Elgar, Cheltenham, 2004)

<sup>39</sup> Antony Ogus, 'Re-Thinking Self-Regulation' (1995) 15 *Oxford Journal of Legal Studies* 97-108

Turning to the private legislators themselves, I have noted considerable variety in the forms which they take. Whilst they may be subjected to less intense accountability structures of the traditional public kind, we could expect certain forms of private legislator to be subject to other mechanisms which are generally weaker for public legislators. We can distinguish two sets of alternatives to the traditional 'hierarchical' accountability structures, rooted in competition and community.

I have noted already the observation that private standards bodies are subject to the competitive pressures of the market in the sense that they sell their standards to potential users. Such standards will be taken up where there are market advantages in doing so. In some instances competing private standards may emerge, with potential outcomes including the persistence of more than one standard, or the success of one and the failure of another. Researchers taking an interest in such competitive processes have often noted that the success or failure of a standard under these conditions is not necessarily directly linked to how good it is. Thus the technically better standard may fail because of factors external to its quality, and a poorer standard may succeed. The example of the QWERTY keyboard, which has survived from the typewriter age into the computer age, comes to mind.<sup>40</sup>

Competitive pressures may, as noted, be expected amongst self-regulatory regimes, also, as they vie for members and their members for customers.<sup>41</sup> Where ordinary businesses exert regulatory power through contracts their activities are subject to ordinary market processes, including, to a greater or lesser extent,

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<sup>40</sup> Paul David, 'Clio and the Economics of QWERTY' (1985) 75 *American Economic Review* 332-337

<sup>41</sup> Antony Ogus, 'Re-Thinking Self-Regulation' (1995) 15 *Oxford Journal of Legal Studies* 97-108

the disciplines of both capital and consumer markets. A key argument in favour of policies of privatization in respect of state owned enterprises is that it frees such businesses from bureaucratic control, whilst introducing the different discipline of the capital market which, in industries dependent on major infrastructure investment, might be expected to involve a good deal of scrutiny of the manner in which investments is made.<sup>42</sup>

Associational regimes are subject to other pressures also, deriving from the very fact of members being more or less loosely associated with them. Community-based control and accountability is likely to be a larger feature of smaller or more homogenous associations. Many professional associations benefit from a high degree of homogeneity in terms of the training and values of the members. Legal and medical professions provide key examples. Consequently there is a form of accountability to the members which, to the extent that members are active in asserting virtuous values and processes, may be expected to assert through forms of peer pressure. Similarly, standard-setting regimes in respect of particular sectors are liable to benefit from a high degree of homogeneity in respect of critical matters. Many features of the development of standards in software for the internet are said to exhibit high degrees of community in the way things are done and, implicitly, also in the way conduct is regulated.

From the perspective of this chapter perhaps the most threatening private legislative regimes are the 'total' ones, where characteristics of interdependence, redundancy, competition and community are all lacking and where the private rule maker has a monopoly not just over the rule making but also over interpretation and enforcement.

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<sup>42</sup> Colin Scott, 'Privatization, Control and Accountability' in J McCahery, S Picciotto and C Scott (eds), *Corporate Control and Accountability* (Oxford University Press, Oxford, 1993

Bilateral contracts in monopsonistic or monopolistic settings appear to best exemplify this situation. The former would include supply contracts where the purchaser is the sole purchaser of products from one company (for example for own-label clothing production) and the latter would include situational or other monopoly selling situations involving services. Franchise agreements frequently have the latter characteristic, where the franchisee is effectively locked into the agreement because their business is so dependent on it. In some other instances the presence of a number of sellers makes little difference if, in practice, they impose similar terms on their customers, whether using boilerplate terms derived from a trade association, or through some other process of convergence. It has often been noted that standard form contracts commonly reflect the balance of power between the parties, and can act as an instrument for the exercise of unequal power.<sup>43</sup>

In the case of these 'total regimes' the foregoing analysis is suggestive of an approach which might argue for greater application of each of the main sets of legitimating mechanisms rooted in hierarchy, competition and community. The first approach is exemplified in the approach of the EC to unfair terms in consumer contracts. The EC Directive on Unfair Terms in Consumer Contracts provides for each member state to establish mechanisms for proactive review of contract terms by administrative agencies and representative groups, with powers to negotiate amendment to terms defined in the Directive as unfair and to seek court orders to prevent continued use of the offending terms where such negotiations fail.<sup>44</sup> Such a hierarchical regulatory approach would be less likely to commend itself in the context of B2B contracts such as franchise and supply agreements, since businesses are more

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<sup>43</sup> Freidrich Kessler, 'Contracts of Adhesion - Some Thoughts About Freedom of Contract.' (1943) Columbia Law Review 629-642

<sup>44</sup> Council Directive 93/13/EEC on unfair terms in consumer contracts (O.J. No. L95, 21.4.93, p. 29

commonly expected to look after their own interests. There is, in some circumstances, the possibility of resort to competition law remedies, as occurs in the case of franchising.<sup>45</sup>

A second approach is to invoke competitive pressures to seek to exert control over private rule makers. Schemes under which self-regulatory rules are presented voluntarily for approval to regulatory agencies have this characteristic. The regime offers to businesses the possibility of using a label of agency approval, which would be calculated to raise the confidence of consumers and thus market reputation. These features enable the agency to set down minimum standards for codes (for example that they should include effective redress mechanisms) and to negotiate over improvement of draft codes as a condition of approval. A new approved codes scheme operated by the UK Office of Fair Trading has met with rather less success in attracting businesses to seek approval than did earlier versions of the regime dating from the 1970s.<sup>46</sup> This analysis emphasises the market reasons for participating in the code approvals scheme, and the concomitant legitimating role of agency approvals, though there are clearly other mechanisms operating here, which may include hierarchy and community. Equally there are other competition-based mechanisms for asserting controls over private legislation, for example by requiring greater transparency in respect of key terms within standard term contracts, enabling contracting parties to shop around more not just over key quality/price issues , but also in respect of other terms.<sup>47</sup>

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<sup>45</sup> Jean-Eric de Cockborne, 'Franchising and European Community Competition Law' in C Joerges (ed) *Franchising and the Law* (Nomos, Baden-Baden, 1991)

<sup>46</sup> Jeremy Mitchell, 'Government-approved codes of practice: A new approach to reducing friction between business and consumers ' (1978) 2 *Journal of Consumer Policy* 144-158

<sup>47</sup> Mary Graham, *Democracy by Disclosure* (Brookings Institution, Washington DC, 2002)

A third approach to legitimating private regulation is to seek to boost the community-based dimension to control and accountability of a regime. One way to do this is to promote the formation of associations of private regulators operating in similar spheres which might be expected to engage in such processes as benchmarking and peer review of each others activities. This, in a sense, is what has happened in the international community of standards organisations which operates through a loose network coordinated by the ISO and which might be expected to promote the best ways of working in standards bodies in all countries. Thus, a national standards body, though it might appear to fall outside of traditional accountability structures for public bodies, is firmly embedded within a structure which requires a form of accounting to its community for its activities. Similarly franchising associations which exist in a number of countries provide a focus for both franchisors and franchisees in seeking to enhance the viability of franchising arrangements by promoting confidence in the fairness of franchising agreements. The International Franchising Association has a Code of Ethics which is concerned with similar objectives.<sup>48</sup>

It is, of course, an empirical question how well different mechanisms for legitimating private legislation might work in practice. The analysis offered in this chapter offers an array of mechanisms for addressing deficits which are perceived or discovered.

#### **4. Conclusions**

In this chapter I have suggested that the wide array of mechanisms and organisations through which “private legislation” is elaborated require a more robust analytical framework if the full variety is to

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<sup>48</sup> (<http://www.franchise.org/content.asp?parid=354&contentid=360>, last visited 24 October 2006).

be captured. I have offered some suggestions here as to how such an analysis might be developed, classifying different forms of private legislator and various mechanisms of bindingness. I have noted that a number of the most potent private legislative forms do not necessarily depend on legal bindingness for their power. The importance of private legislation lies not just in that fact that 'there is a lot of it about' but also in the observation that there may be things which private legislators can do which are not open to public legislators due to lack of resources or authority. Thus private legislation may offer solutions to public policy problems and should be considered in these terms.

The observation and use of private legislation within public policy regimes raises the normative issues concerning the fragmentation of power and the assignment or at least recognition of the contribution of private legislation to public regimes. The suggestion offered in this chapter is that a superior narrative relating to the legitimacy of private legislation is required which recognises the array of mechanisms which are available. The default position might be that legislation stemming from an associational regime should be thought of as being legitimated by the mechanisms typical of such regimes, such as peer review, application of social or market sanctions for breach of key norms and so on. Where such mechanisms are deficient I have identified an array of alternatives which might be developed to correct the deficits.