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Beyond Taxonomies of Private Authority in Transnational Regulation

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1. Introduction

The emergence of private actors in setting standards and sometimes contributing to monitoring and enforcement functions is a key feature of contemporary transnational regulation. Transnational private regulation fills significant gaps in governmental and inter-governmental capacity, offering the potential of public goods which both provide some coordination for global markets and address some of the externalities such as environmental degradation and exploitation of workers.

The establishment of independent state regulatory agencies with responsibilities for monitoring and enforcing rules is the classic mode of regulation referred to in literatures on the rise of the regulatory state.² Following this approach an analysis of the emergent private authority will classify the phenomena in terms first of the variety of non-state actors assuming authority positions in contemporary governance arrangements and second the nature and extent of modes for exercising authority which deviate from the exercise of regulatory authority through delegation of powers by public law instruments. The significance of these governance trends may be evaluated by moving beyond a taxonomical approach to consider the transnational reach of much contemporary private authority, in particular the deployment of market mechanisms (both contractual and non-contractual,) and community-based modes of governing (for example self-regulation). Whilst transnational private regulation has attracted significant attention over recent years, distinctive feature of the research from which this article is drawn include a consideration of the mixed public and private participation in many regimes and a move beyond considering the variety of actors and modes involved in standard setting to consider also the central importance of mechanisms of monitoring and enforcement. When considered as involving not only private standard setting capacity, but also monitoring and enforcement activity, the significance of transnational private regulation becomes more evident.

Transnational private regulation requires normative evaluation in respect of the legitimacy attaching to the effects of such private authority in relation to government. To what extent does transnational private regulation advance public and/or private interests and, in the absence of a direct link to democratic governance, what are its sources of legitimacy? To put the question another way, is transnational private regulation merely a technical exercise of authority or does it create sites of political contestation and battles over interests. Issues concerning environmental protection and labour rights provided the more obvious sites of contestation.³ Recent analysis of more technical areas of transnational private rule making suggests the struggle between interests, even when clothed in technical language, is more universal.⁴

² D Levi-Faur, 'The Global Diffusion of Regulatory Capitalism' (2005) 598 *The Annals of the American Academy of Political and Social Science* 12-32G Majone, 'The Rise of the Regulatory State in Europe' (1994) 17 *West European Politics* 77-101P Selznick, 'Focusing Organizational Research on Regulation' in R Noll (ed) *Regulatory Policy and the Social Sciences* (University of California Press, Berkeley 1985).

³ T Bartley, 'Institutional Emergence in an Era of Globalization: The Rise of Transnational Private Regulation of Labor and Environmental Conditions' (2007) 113 *American Journal of Sociology* 297-351

⁴ T Bütthe and W Mattli, *The New Global Rules: The Privatization of Regulation in the World Economy* (Princeton University Press, Princeton, NJ 2011).

2. Taxonomies of Private Authority

The primary focus of this article is on the emergence and nature of private authority within transnational governance regimes. Recognition of the importance of private authority in governance is not new. Robert Hale, writing as long ago as 1923, argued that the protection of property rights by the state gave power to the controllers of those rights.⁵ That power includes giving rights to others in respect of the property. He showed that property rights lie behind the power of employers to regulate their employees, of landowners to coerce tenants and of producers of goods to apply conditions to their acquisition by consumers. Equally the owner of wealth can apply conditions to its disbursement whether in purchase of goods or services or employment of workers.⁶ A key mechanism for the exercise of that coercive capacity associated with property rights is the contract. In this context the establishment of a contract may have the effect of creating a relationship which is more hierarchical than is normally implied by theories of consent-based transactions.⁷ This basic insight is central to the capacity of non-state actors to establish private regulatory regimes. A variety of non-state actors are involved, including businesses, associations of businesses, but also non-governmental organisations seeking to advance particular ideals such as labour rights and protection of the environment.

For businesses the globalization of markets has increased the needs of multinational enterprises to deploy property rights for regulatory rather than transactional purposes. In particular, forms of standardization have been required for a number of reasons.⁸ Standardization has permitted purchasing of components across global markets with reassurance that, for example, parts manufactured in different parts of the world can be effectively assembled to meet expectations. As legislative requirements for products have become increasingly general, private standards have become a key instrument for satisfying national regulatory requirements. The so-called 'new approach to technical harmonization' pioneered in the European Union in the 1980s is a core example of this trend.⁹

The primary instrument through which a requirement to meet standards is applied, for example to product suppliers, is through contracts, at the choice of one party (or both parties). We may think of the regulatory activity as transnational when, *de facto*, it crosses national boundaries either in the setting of standards (as with the many standards bodies drawing members from two or more countries), or when contractual commitments lead to the implementation of standards across national borders. In practice, of course, both the setting and implementation of standards crosses borders in many instances. Whilst the origins of many of these business standards were self-regulatory, in the sense that particular businesses cooperated in establishing the standards to apply to their markets, the scale to the activity increasingly detaches the standard setting from the businesses who may adopt the standards. In such cases the testing point for the standard will lie in decisions by businesses, for market reasons, to adopt standards.

⁵ RL Hale, 'Coercion and Distribution in a Supposedly Non-Coercive State' (1923) XXXVIII Polit. Sci. Q. 470-494.

⁶ *Ibid.*, 472.

⁷ A Stinchcombe, 'Contracts as Hierarchical Documents' in A Stinchcombe and C Heimer (eds), *Organizational Theory and Project Management* (Universitetsforlaget, Bergen 1985).

⁸ N Brunsson, 'Organizations, Markets and Standardization' in N Brunsson, B Jacobsson and Associates (eds), *A World of Standards* (Oxford University Press, Oxford 2000).

⁹ Council of the European Union, 'Council Resolution 85/C 136/01 of 7 May 1985 on a New Approach to Technical Harmonization and Standards' (Council of the European Union, Brussels 1985).

In the case of over-the-counter derivatives (OTC) transactions, standards have been set through a Master Agreement developed by technical committees of the International Swaps and Derivatives Association (ISDA), a membership organisation of leading banks. The Master Agreement is, in essence, a boilerplate contract, permitting banks to enter transactions by reference to a set of standard and widely understood terms (with or without amendment for the particular transaction) rather than negotiate terms afresh for each contract, reducing both cost and risks of uncertainty.¹⁰

By contrast with standards, codes of practice or conduct typically have rather different origins, emerging from networks of businesses, public sector bodies or NGOs which constitute a form of community concerned to lay down standards of conduct for participants in particular markets. More effective codes back the standards up with their own provision for monitoring and enforcement or by requiring adherents to the code to establish their own capacity for these purposes. The precise legal basis for such codes varies, sometimes being linked to the establishment of an association and, in other cases, a collective contract between business members.

But businesses are not the only actors engaged in such transnational codes. The coercive power of wealth is not limited to large firms or individuals with whom wealth is concentrated, but may also be aggregated amongst numerous potential purchasers of products. It is this potential which is harnessed by NGOs involved in setting standards for such matters as sustainable forestry and fair trade, who are then able to persuade businesses to implement the standards, again through their supply chain contracts. In such regimes of 'non-state market driven governance' the adoption of NGO codes by businesses is legally a voluntary matter, undertaken with an eye to enhancing reputation and thus market position.¹¹ Contracts are typically deployed by adherents to promote compliance up and down supply chains.

The architecture of regimes involving codes with transnational reach is often complex. In the case of the international standards developed for advertising from the 1930s by the International Chamber of Commerce, the norms developed have been given effect to by national self-regulatory organisations operating as associations constituted by advertising industry members or through collective contracts between such members. This national self-regulation has had a significant degree of steering by the European Advertising Standards Alliance, a membership organisation comprising initially the SROs and, more recently, also associations representing the advertising industry directly.¹² EASA initially developed the architecture for handling cross-border complaints about advertising in the EU and now produces Best Practice Recommendations which are widely followed by SROs as a source of learning and also direction for newly established regimes within the EU.

The setting of standards, without more, does not of itself indicate the existence of a regulatory regime. It is widely accepted within the regulatory literature that regulation comprises processes for setting the norms or objectives of the regime, mechanisms for detecting or feeding back information about compliance and deviation from the norms, and apparatus for correcting deviations (for

¹⁰ J Biggins and C Scott, 'Public-Private Relations in a Transnational Private Regulatory Regime: ISDA, the State and OTC Derivatives Market Reform' (2012) 13 *European Business Organization Law Review* 309-346.

¹¹ B 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.

¹² European Advertising Standards Alliance, *Blue Book 6: Advertising Self-Regulation in Europe and Beyond* (EASA, Brussels 2010).

example through enforcement.¹³ Whilst the processes for setting of standards have, in many cases, become increasingly transparent, mechanisms of monitoring and enforcement which are rooted in contractual relationships are liable to be relatively opaque. A key legitimacy issue for transnational private regulatory regimes concerns the capacity and commitment for reporting on compliance with standards or codes, a matter a turn to in the next section.

3. Legitimacy of Private Authority

Because of a widely accepted linkage between legitimate governance and democratic politics, private regulatory regimes face significant legitimacy challenges. Famously Adam Smith hinted that business people could not communicate over any matters without the risk they would seek to establish some form of cartel.¹⁴ The suspicion that self-regulation by businesses is liable to be animated by private rather than public interest considerations persists. With NGO activity, by contrast, there is a tendency to assume that regulatory activity is motivated by good intentions, whether or not the capacity to be effective is present.¹⁵

The principal normative challenges presented by transnational private regulation include the implicit or explicit delegation of key governance functions to non-state actors, and the effects of regimes for the public interest and private interests. Whilst delegation to private actors is an important issue, it is inextricably bound up also with an evaluation of the quality of the mechanisms through which such private regulation is undertaken. Though the deployment of contracts as instruments of regulation raise few issues in principle, since states also frequently make use of such instruments, there is a need to scrutinise and evaluate the detailed mechanisms for setting norms, and also for detecting deviations and ensuring compliance. In some instances we might treat this a matter for the market. If components supplied are not compliant with the appropriate standard the parties are likely to find some solution to the problem, whether by invoking the provisions of the supply contract or otherwise. Where public and private interests are clearly aligned then it may be sufficient to leave it to market mechanisms to determine which private regulatory regimes survive. But the idea of purely technical regimes which do not affect interests has been questioned.¹⁶

One way to address this legitimacy deficit for private regulation is to point out that public agencies central to many public regulatory regimes derive a substantial portion of their legitimacy from their technical capacity, the quality of their outputs and even their insulation from electoral politics. Insulation from electoral politics is identified as a key structural factor in establishing the credible commitment of regulators to reasonable stability in their actions and reducing vulnerability to interventions driven by short terms political requirements rather than the long term stability of the regulated sector.¹⁷ Such arguments, that regulators in some spheres should be evaluated by reference to substantive or output measures rather than procedural or input considerations may certainly go some way towards supporting their legitimacy, but are rarely likely to be sufficient.

¹³ J Black, 'Critical Reflections on Regulation' (2002) 27 Australian Journal of Legal Philosophy 1-35C Hood, H Rothstein and R Baldwin, *The Government of Risk* (Oxford University Press, Oxford 2001).

¹⁴ A Smith, *Wealth of Nations* (Penguin, Harmondsworth 1970 [orig. publ 1776]).

¹⁵ RE Goodin, 'Democratic Accountability: The Distinctiveness of the Third Sector' (2003) XLIV European Archives of Sociology 359-396.

¹⁶ Bütte and Mattli, *supra* note 3.

¹⁷ M Thatcher, 'Delegation to Independent Regulatory Agencies: Pressures, Functions and Contextual Mediation' (2002) 25 West European Politics 125-147.

Whilst the substantive legitimacy arguments may have some weight in many regimes, legitimacy may also derive from linkages to democratic governance institutions. The relationship between private regulatory regimes and the state has a number of potential forms. Where the state is involved in initiating, approving or adopting private regulatory instruments we may refer to this as a form of co-regulation.¹⁸ Any of these connections may be achieved formally, through legislation, or informally through encouragement, and in the case of approval, through inaction.

Where governments or inter-governmental bodies make decisions to initiate private regulation they may either offer informal encouragement or a statutory mandate for the activity. Though governmental actors may remain in the background the fact of governmental initiative implies a continuing role in monitoring the regime and, potentially acting if it is defective. Much discussed regimes of press self-regulation in the United Kingdom and in Ireland were initiated with government encouragement, informally in the UK, and with a form of statutory approval by a minister in Ireland.¹⁹

In the case of private regulation of print advertising regulation in the UK the regime administered by the Advertising Standards Authority was apparently established by the industry for its own reasons concerned with protecting its reputation, but its standards and structure have been amended on a number of occasions with encouragement from government. Thus government observed and implicitly delegated responsibility to the private regime, but also sought to steer it towards meeting public objectives through threatening statutory intervention, 'bargaining in the shadow of hierarchy'.²⁰ With the ASA there is also an example of explicit delegation as the statutory regulator, the Office of Communications (OfCom) decided to allocate responsibility for broadcast advertising to the private regulator also, with provision for backstop enforcement powers to be retained by the public agency.²¹ In the case of regulation of Online Behavioural Advertising in the EU, the initiative has been taken by the industry working with the European Advertising Standards Alliance, but with the involvement and encouragement of the European Commission. It is at least implicit that the Best Practice Recommendations produced by EASA in 2011 will, if effectively implemented by national self-regulatory organisations across the EU, offer a form of delegated regime within the EU.²²

The European Union has many examples of different forms for giving effect to private regulation. The Unfair Commercial Practices Directive, for example, includes measures which give legal and regulatory effect to private codes. The Directive provides for penalties on traders for failure to follow

¹⁸ G-P Calliess, 'Transnational Consumer Law: Co-Regulation of B2C E-Commerce' in O Dilling, M Herberg and G Winter (eds), *Responsible Business: Self-Governance and Law in Transnational Economic Transactions* (Hart, Oxford 2008) T Prosser, 'Self-regulation, Co-regulation and the Audio-Visual Media Services Directive' (2008) 31 *Journal of Consumer Policy* 99-113 L Senden, 'Soft Law, Self-Regulation and Co-Regulation in European Law - Where do they Meet?' (2005) 9 *Electronic Journal of Comparative Law* .

¹⁹ J O'Dowd, 'Ireland's New Defamation Act' (2009) 1 *Journal of Media Law* 173-190.

²⁰ R Baggott and L Harrison, 'The Politics of Self Regulation: The Case For Advertising Control..' (1986) 14. *Policy and Politics*. 145-159.

²¹ Prosser, *supra* note 18.

²² European Advertising Standards Alliance, 'EASA Best Practice Recommendation for a European Industry-wide Self-Regulatory Standard and Compliance Mechanism for Consumer Controls in Online Behavioural Advertising' (EASA, Brussels 2011). But see the critical remarks on privacy produced by Article 29 Working Party, comprising the national data protection agencies, operating within the framework of the EU: Article 29 Working Party, 'Opinion 16/2011 on EASA/IAB Best Practice Recommendation on Online Behavioural Advertising' (Article 29 Working Party, Brussels 2011).

a code to which they claim adherence.²³ Civil or criminal penalties are applicable for breach of this provision throughout the EU. With technical standards a number of EU measures specify general standards which may be complied with through adherence to technical standards produced by European or national standards bodies, for example with consumer products. The General Product Safety Directive requires that all products put on to the European market shall be safe.²⁴ Safety may, in the absence of more specific legal instruments, be demonstrated by conformance with voluntary national standards complying with private European standards.²⁵ In this way EU legislation effectively adopts European and national technical standards as an aspect of compliance with general rules.

In the EU examples noted in the previous paragraph, norms are set privately through codes or technical standards, but then monitored and enforced as part of public enforcement regimes. In the case of OTC derivatives the norms are set down privately in the Master Agreement and also monitored and enforced privately by the parties to the agreement. There is, however, some relationship to state regulators, both through implicit decisions not to impose public regulation (though those decisions have come under pressure following the global financial crisis) and also in some states through the willingness of national legislative bodies to adopt legislation to align national law with the expectations as to enforceability of contractual terms provided for in the Master Agreement. For example, an Irish minister stated that the adoption by the Irish legislature of ISDA's master legislation which, amongst other things disapplied aspects of gaming legislation to derivatives transactions, was undertaken to encourage a major bank to establish itself in Ireland without uncertainties as to the effects of the ISDA Master Agreement. Similar processes of legislative alignment with ISDA norms have occurred in a number of other jurisdictions.²⁶ Thus some degree of legitimation may be achieved through linkage to the actions of elected governments, but without necessarily being sufficient to satisfy the demands of the legitimacy environment.

Whether or not there is link to public governance institutions, the legitimacy of private regulators may be evaluated in part by reference to processes adopted which may mirror or substitute for the processes of democratic governance. Mirroring might involve private regulators emulating administrative law norms involving rights of those affected by the regime to hearings, opportunities to make comments, and rights of appeal.²⁷ Substitutional processes might involve different

²³ Article 6 of the Unfair Commercial Practices Directive 2005/29/EC, OJ 11.06.05, L146/22 provides, *inter alia*, 2. A commercial practice shall also be regarded as misleading if, in its factual context, taking account of all its features and circumstances, it causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise, and it involves...

(b) The 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 aspirational but is firm and is capable of being verified, and
(ii) the trader indicates in a commercial practice that he is bound by the code.'

Additionally, Annex 1 blacklists as misleading commercial practices (meaning there is no requirement to demonstrate effects on consumer behaviour) false claims to be a signatory to a code, the display of quality mark without authorisation, false claims that a code has approval from a public or other body, false claims that a trader or a product has approval from a public or other body..

²⁴ Directive 2001/95/EC Art 3(1).

²⁵ Art 3(2).

²⁶ Biggins and Scott, *supra* note 9.

²⁷ C Harlow, 'Global Administrative Law: The Quest for Principles and Values' (2006) 17 *European Journal of International Law* 187-214B Kingsbury, N Krisch and RB Stewart, 'The Emergence of Global Administrative Law' (2005) 68 *Law & Contemporary Problems* 15-61.

mechanisms for building some form of demos and the means to engage it processes over reflection not only on what rules to adopt but also more fundamental issues concerning the ethos and purposes of the regime. Paying attention to such processes is part of a wider pattern of managing regulatory legitimacy which has frequently seen regulators, public and private, innovating effectively in developing principles both of transparency in participation in their processes.²⁸ Where government approval for private regulators is absent or insufficient, the potential for such active engagement with legitimating strategies is likely to be of particular importance. Equally the more the regulatory sphere is seen as contested as opposed to technical, the more significance is likely to attach to processes.

In addition to processes, private regulators might also pay attention to mechanisms of accountability. Reactive forms of accountability include rights of complaint and appeal. More proactive forms include the establishment of mechanisms of scrutiny of the quality and effects of regimes, equivalent to better regulation policies adopted in most OECD member states. These are forms of meta-regulation – structures for steering or regulating self-regulatory capacity²⁹, well suited to providing oversight and reassurance about the quality and appropriateness of transnational private regulation³⁰. A key example of such a meta-regulatory approach to oversight of private regimes has emerged in the labelling sector where the ISEAL Alliance has progressively produced a series of codes applying to their member organisations which are private regulators. The ISEAL Codes of Good Practice address minimum standards for such matter as standard setting, assurance and the measurement of impacts of regimes which it effectively oversees.³¹ The ISEAL Codes thus move beyond the traditional concerns with standard-setting to set meta-standards for core implementation and evaluation processes for its member organisations.

4. Conclusions

The growing significance of transnational private regulation to the operation of global markets requires evaluation both of its forms and of the conditions for its success and legitimacy. On one view it is only when linked to governmental organisations in its operations that TPR is likely to be legitimate. An alternative view, sketched in this article, is that it may be possible for TPR regimes to develop their own sources of legitimacy, both through developing strong technical capacity (for example involving rigorous evaluations of implementation and effectiveness, beyond those routinely applied by or to public regulators) and through the constructing structures of decision making and evaluation which effectively engage a demos associated with the regime, creating an alternative source of democratic legitimacy to that of elected governments. Such achievements are challenging but not unthinkable.

²⁸ J Black, 'Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes' (2008) *Regulation & Governance* 137-164; M Suchman, 'Managing Legitimacy: Strategic and Institutional Approaches' (1995) 20 *Academy of Management Review* 571-610.

²⁹ C Parker, 'The Open Corporation: Self-Regulation And Democracy' (2002); Sharon Gilad, *It Runs in the Family: Meta-Regulation and its Siblings*, 4 *Reg. & Gov.* 485-506 (2010).

³⁰ J Bomhoff & A Meuwese, *The Meta-Regulation of Transnational Private Regulation*, 38 *J. of L. & Soc.* 138-162 (2011).

³¹ Codes are available on the ISEAL website <http://www.isealliance.org> (last visited 3rd December 2012). A current initiative at the time of writing is a new set of Credibility Principles which establish minimum requirements to establish and maintain credibility as a sustainability regulator, recognising the consumers have a choice whether to purchase goods labelled in accordance with codes set down by ISEAL members and that credibility of labelling regimes is critical to market acceptance.

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