

Introduction: Networks and Networked Governance

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A much-discussed feature of the emerging global legal order has been the proliferation of so-called transnational regulatory networks. These new institutional forms consist of routinized, purposive interaction between diverse actors that share a common sphere of expertise. Such networks are of different types, some involving cooperation between public bodies, others entailing interaction between public, private and quasi-public institutional actors. These networks perform diverse functions: e.g. ‘enforcement networks’, designed to make enforcement more efficient across international borders; ‘information networks’ aimed at promoting information exchange; and, ‘harmonization networks’ setting standards and seeking uniformity in substantive and procedural normative standards.

The resulting global web of regulatory networks has transformed the legal environment in which business enterprises now operate. And yet, these polycentric structures occupy an ambiguous space between traditional forms of legality and market-oriented regulatory mechanisms. The classic liberal system of nation states coordinating activities at the government level has thus been displaced by a more fragmented system of “multi-layered” networked governance in which new institutional and normative forms have proliferated, and which state sovereignty is increasingly disaggregated. In particular, transnational regulatory networks need to be distinguished, on the one hand, from predominantly hierarchically organized legal mechanisms operating at a domestic level and, on the other hand, from international governmental organizations with their formal institutional structures and restricted (state-only) membership. As such, transnational regulatory networks represent an innovative institutional adaptation to the specific conditions of late modernity and address some of the limitations in extant forms of legality in responding effectively to these conditions.

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In spite of the ambiguous status of transnational regulatory networks—at least from the perspective of traditional distinction between domestic-international laws—such networks perform a number of crucial functions and these regulatory structures exert a powerful influence over legal developments at a national level. The notion that transnational networks are performing a merely advisory role with no “real” governance powers ignores the global reach of these networks. Across multiple fields of regulation, transnational networks exert a powerful influence over the general direction and substantive content of domestic legislation. Deepening our understanding of how these networks operate (the empirical question) and how they should operate (the normative question) thus represents a key site of contemporary legal debate.

In characterizing these new institutional forms, it has become customary to employ the network concept. One can find this in the earliest works discussing this issue (e.g. Keohane and Nye), as well as in more influential recent discussions (e.g. Castells or Slaughter). The power of the network concept is that it highlights a number of key features of these institutional forms. Firstly, cooperation is based on loosely structured, *horizontal* relationships developed over time through iterative practice, rather than *ex ante*, centrally coordinated, *hierarchical*, agreement. The network metaphor is thus used to highlight that the relationships between the various actors interacting in order to produce public purpose are best viewed in *heterarchical* rather than *hierarchical* terms. Secondly, regulatory cooperation within networks is most commonly structured by informal or, at least, non-legally binding agreements, and entails routinized peer-to-peer modes of coordination and cooperation between interdependent actors that is “trust-based”. Compliance with any norms established by the network is primarily achieved through political rather than legalistic forms of obligation. Thirdly, the network metaphor is designed to capture the linkage of both public and private actors from different institutional “levels”—national, regional and international—in a system in which action is coordinated through voluntary agreement and routinized practice. In fact, such networks often function to blur the distinction between the public and private realms. The concept of a network thus highlights the shift from hierarchical legal forms to the more flexible, responsive, multi-layered structures of “networked governance”.

Nevertheless, there are some doubts about the efficacy of the network concept, at least in its current form. In particular, there are concerns that the network metaphor may obscure structural considerations, and that networks are only intelligible if you look “behind” the network at the structural factors that explain what gives particular actors power in a particular institutional setting. At the very least, there are suggestions that more need to be done in theorizing networks and in elaborating our understanding of actual networks.

Another set of themes structuring the discussion on transnational networks concerns the issue of the origins of such networks and the question of how do we account for the emergence of transnational networks at this particular historical juncture? From a sociological perspective, networks should be thought of as a

functional adaptation to the particular conditions of accelerated functional differentiation that has occurred under conditions of late modernity.

The context and primary impetus for the emergence of transnational networks is the liberalization of trade that has occurred over recent decades. In this regard, transnational networks clearly represent an adaptation to economic liberalization. Transnational networks are a functional adaptation to this predicament, specifically the failure of existing legal forms to respond effectively to the particular challenges of economic globalization. Transnational regulatory networks typically arise as a result of policy failure and other structural deficits with traditional legal forms. In particular, the prohibitive transaction costs of achieving agreement between state actors at the international level, has led interested stakeholders to seek alternative institutional means to achieve their regulatory objectives.

Networks are a form of non-hierarchical structural coupling between various interested actors in which repeat communication and interaction are crucial. Organizing themselves in this way permits an expert-oriented, flexible approach to problem solving which can contribute to stabilization of expectations between interdependent actors. Networks can therefore reduce the cognitive capacities that an organization needs to deploy in order to continue operating and are efficient and responsive, at least in comparison with alternative regulatory forms.

One of the aims of this volume, therefore, is to seek to elaborate the advantages and limitations of the network concept as a means of understanding contemporary developments in global regulation. This is done in some cases via theoretical elaboration on the network concept and in others via a detailed discussion of a particular network. Part II of this volume, 'Networked Governance, Network Actors and the Limits of the Law', consists of contributions that seek to address these issues.

Ewa Komorek's contribution describes how from the late 1980s the European air transport sector was transformed by the creation of the common EU aviation policy leading to the emergence of new airlines, the opening of new routes and airports, and to lower airfares. This pan-European aviation sector required governance models to evolve accordingly. Not only did regulation to a large extent transfer from national governments to the supra-national EU level, but there has also been a noticeably greater involvement of all interested parties, from both public and private sectors, in policy formulation and decision making processes.

Mikael Rask Madsen, adopting a more sociological approach to the network concept explores how focusing on the properties of legal expert power may provide a necessary supplement to the more descriptive approaches prevalent in studies of transnational regulatory networks. He argues that although notions of regulatory networks clearly have descriptive force and help identify new patterns of transnational law-making, deploying such notions also entail a real risk of leaving out of the analysis those precise social conditions and forces that make networks powerful in the first place. According to this chapter, to make regulatory network power intelligible, one needs to establish the linkage between legal networks and power, including state power, and thus the structured social spaces that networked power is exercised in.

Anna Szajkowska and Bernd van der Meulen analyse the scope of application of risk analysis and the precautionary principle in the context of EU food safety regulation, focusing, in particular, on the degree to which a technocratic, science-based methodology sets limitations on the legislator in deciding on food safety measures that have an impact on trade.

Mark Fenwick explores the question of whether we might push the network metaphor further and examine whether regulatory networks exhibit ‘network dynamics’. The study of networks dynamics is an inter-disciplinary field that has emerged at the intersection between sociology, social psychology and economics. The chapter suggests that one form of network dynamic, namely a threshold model of collective action, can be helpful in providing a new conceptual vocabulary for describing various features of regulatory networks. In particular, it allows us to move away from accounts that regard regulatory networks as expressing the collective normative preferences of participants and ideas of contractual consent.

Shinto Teramoto and Paulius Jurčys, in their contribution, explain how social network analysis might contribute to our understanding of legal networks and discuss some key concepts used by proponents of this methodology. In particular, they discuss how the establishment of trust-based relationships facilitates the transfer of values and resources within the context of regulatory networks.

Kirsteen Shields considers why voluntary regulatory efforts channelled by social movements, in particular ‘Fairtrade’, may achieve compliance in areas beyond the reach of traditional regulatory methods of international law. She argues that insights from network theory can help cast light on how ethical trading networks may serve as catalysts for corporate compliance.

Part III of the volume—‘Networked Governance: From Democratic Deficit to Substantive Legitimacy’—consists of contributions that are primarily concerned with the normative challenge posed by transnational networks, particularly the challenge that such networks pose for justifications of traditional forms of legality and democratic accountability. These new structures are clearly controversial. Most obviously, they have been challenged by a number of high profile NGOs who regard them as a neo-liberal assault on democracy, but such normative concerns have risen elsewhere both amongst academic commentators and practitioners.

The normative basis of this critique seems clear: transnational regulations are neither (public or private) international law, nor so they comprise of self-executing rules in the classical sense. Transnational regulatory networks lack the authority to establish binding law, and they are often under-formalized. Moreover, the conditions and rules of membership are unclear, procedures and due process are often under-developed, and there are no internal means to challenge the decisions of networks. In other words, transnational networks function, on the one hand, beyond the constraints and strictures of the rule of law, but, on the other hand, their “output”—such as decisions or standards—can be extremely influential and have a major influence in domestic lawmaking.

According to this line of reasoning, the efficiency gains of transnational regulatory networks (i.e. their adaptability, flexibility and informality) are offset by the normative compromise that such efficiency inevitably entails. Transnational

networks are engaged in law-making functions that were traditionally performed by democratically elected representatives (i.e. national parliaments). To assert that transnational networks are not generating law, but merely generating recommendations, and that the decision to incorporate these recommendations into domestic law still remains a question for the domestic legislature, ignores the complex interplay and elaborate mutual inter-dependency that now exists between transnational regulatory networks and nation states. And yet, exposing the limits of contractual consent merely begs the question of whether it is possible to construct an alternative justification for transnational networks that is both plausible and persuasive.

Responses to this normative challenge seem to have focused on two issues. On the one hand, there are those accounts that focus on ‘input-oriented’ legitimizing strategies in order to develop transnational concepts of democracy. On the other hand are those that argue for entirely ‘output-oriented’ models of transnational legitimacy. The majority of commentators who are advocating some sort of conceptual change in our understanding of legitimacy in order to accommodate transnational regulatory networks, seek to incorporate both ‘input-oriented’ as well as ‘output-oriented’ elements. According to this approach, it is necessary to determine with regard to every individual regulatory regime whether a sufficient number of legitimizing factors exist that substitute or mutually reinforce each other.

Stefan Wrбка analyses the Proposal for a Regulation on a Common European Sales Law presented by the European Commission in late 2011 from the perspective of the role that consumer interest representation played in the drafting of the text. In particular, it focuses on the impact the European Consumers’ Organisation (BEUC) had (and was allowed to have) in this context. The chapter covers key points of interest in this regard, notably the perceived ‘democratic deficit’ in European law making, the question of transparency of policy-making, *ad hoc* transnational networks installed by the Commission to craft new legislation and the role of lobbying groups and interests representatives in relation to EU consumer protection.

Thomas Ratka examines how within the EU, commercial register law remains—in spite of two EU directives—very much a national matter. Although there have been several attempts, an EU-wide unified commercial register—or even an official network between national registers arranged by EU initiative and governed by EU officials—is still pending. The chapter examines whether private networks provide sufficient democratic legitimation to the any European commercial register that enables citizens to enter other countries’ registers.

In his contribution, Steven Van Uytsel argues that the International Competition Network, as an example of a transnational regulatory network, should set up a review system of its best practices. Best practices of transnational regulatory networks, are seen as a legitimate tool for influencing the regulatory behaviour of their members. These best practices are, at the end, developed by experts in the field based upon the experiences of these experts with their respective legislation or practices. Nevertheless, this chapter shows that this may be problematic if the legislation or the practice with which these experts work exhibits flaws. This is

an argument that can be made in the framework of the leniency program and its best practice under the Competition Network. Van Uytsel shows that the best practice finds its origin in the leniency program of two major jurisdictions, the United States and the European Union. The leniency programs of these two jurisdictions have recently been negatively scrutinized by several scholars. Therefore, the question arises on whether best practice is really reflecting a legitimate end-result for convergence. Suggesting that it is not, Van Uytsel argues that a review process could overcome the potential threat to legitimacy in this kind of transnational regulatory network and he also offers some ideas on how this review process could be institutionalized.

Transnational networks clearly represent an adaptation to economic liberalization. A distinctive feature of contemporary globalization in business regulation has been the emergence, across diverse fields of economic and business law, of regulatory “networks” involving routinized transnational cooperation—both formal and informal—between institutional actors. In Part IV, ‘Networked Governance, Investment and Finance’, the specific challenges are examined in further detail.

Karsten Nowrot focuses on the interrelationships between a number of influential transnational steering networks in one notable segment of the international financial architecture, namely the international standard-setting activities in the realm of financial reporting. This is an area of economic and business law that is frequently and rightly considered to be of central importance for transnational business. Following an introductory discussion of the functions as well as limits of the network concept as an analytical tool for the description and conceptualization of transnational steering regimes in the international economic system, the main part of the contribution is devoted to an analysis of the recently emerging hierarchical relationships between three trans-boundary steering networks, the private International Accounting Standards Board (IASB), the intermediate Financial Stability Board (FSB) as well as the intergovernmental Group of Twenty (G-20). On the basis of the findings made in this section, the final part is devoted to an evaluation of the underlying reasons for and motives behind the evolution of these hierarchical structures, prominently among them the efforts by state actors to establish—or rather re-establish—governmental steering capacity vis-à-vis the activities of private international standard-setting bodies, thereby providing, on the basis of mechanisms of public accountability, for a certain remedy to the legitimacy challenges these non-governmental networks are frequently confronted with.

In their contribution, Mathias Siems and Oscar Alvarez-Macotella discuss whether the approach of the OECD Principles of Corporate Governance, predominantly aimed at the lawmakers and firms of emerging markets, can be regarded as a success. While features of networked governance are clearly visible in the drafting and operation of the Principles, the practical effectiveness may be hindered by the lack of well-functioning local institutions. Moreover, while appreciating that the OECD has engaged in activities such as regional roundtables in order to take account of the local context, the Principles themselves are based on the corporate governance model of the OECD member countries not perfectly suitable for

emerging markets. Recent events also point towards scepticism of whether adoption of the Principles can be seen as an effective way to prevent future financial crises.

Finally, Charlotte Villiers focuses on the role of shareholders in transnational governance, particularly through institutional mechanisms such as the UN Principles for Responsible Investment. Shareholders enjoy particular salience in corporate governance but their role is limited by problems such as confusion over their fiduciary position, resource and information deficits, regulatory uncertainty, and a persistently short-term, profit oriented perspective. Networking has the potential to overcome some of these problems and the UN PRI has had a positive influence, but a fully transformative contribution requires engagement with and active participation of citizens and non-shareholder experts. Such involvement is necessary for a genuinely democratic and legitimate international governance system.



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