

# TOWARDS REINFORCING OR CONTESTING THE VISION OF THE RULE OF LAW?

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## Abstract

The UN Declaration of 24 September 2012 reaffirming the commitment of Heads of State and Government to the Rule of Law reflects the current uneasiness accompanying the application of just the concept. This paper argues that it is also due to discrepancies in its worldwide understanding and to the rise of non-state, transnational regulatory regimes. Presumably they are not compelled to apply it as such. Thus, a governance issue arises to either reinforce or contest the rule of law\*\*.

**Keywords:** Regulatory Regime, Rule of Law, Declaration

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## 1 Introduction

Considering normative governance, this paper points to the issue of either reinforcing or contesting the vision of the rule of law. Why this issue? Indeed, the Declaration of the UN General Assembly on the Rule of Law on 24 September 2012 solemnly reaffirming the commitment of Heads of State and Government to the Rule of Law can be interpreted as reflecting the current uneasiness accompanying the application of just the concept of the rule of law. It is a concept of fundamental importance for political dialogue and cooperation among states. At first sight, two main issues arise: why now and which are the rationales leading to this Declaration? I will cover the following points: first, the characteristics of the rule of law, second, the current rationales, and third, the prospects: governance towards a reinforced or a contested rule of law.

## 2 Characteristics of the rule of law

First, the characteristics of the rule of law. In the title of the paper the word vision of the rule of law is used, why? It is to indicate that there is no generally accepted definition of what the rule of law is. Similarly to legal science, the rule of law is a construction. It is a model, an idealistic model, which should be appropriate and adaptable to real situations. However, in practice, as a model, it is a constituent part of a system. As such, it is not complete, but

evolves in accordance with the system or in other words with its environment.

Admittedly, everyone – individuals, the state, legal actors, public institutions and entities – is accountable to just, fair and equitable laws. Hence, the formal requirements for an understanding of the rule of law include the regulation of government power, equality before the law and the availability of an independent judicial process<sup>1</sup>. The rule of law should be applied by all states equally and by international organisations too. Currently though, the concept of the rule of law both at the national and international levels appears to be undermined.

An important issue lies in the fact that the rule of law is based on the concept of the state and there is the undifferentiated assumption that the legal principles and mechanisms applied by states can be transposed directly to the international level or the global sphere. In reality, the architecture, content, and role of national or domestic laws are not comparable to the architecture, content, and role of international law. The classical state system applying a command and control mode of regulation is questioned and international law has expanded and diversified.

<sup>1</sup> Simon Chesterman, *An International Rule of Law?*, *American Journal of Comparative Law*, Vol. 56, 331-361, 2008, NYU Law School, Public Law Research Paper No. 08-11; A. V. Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed., London, 1968; Tom Bingham, *The Rule of Law*, London, 2010. See also: Gunther Teubner, *Verfassungsfragmente, Gesellschaftlicher Konstitutionalismus in der Globalisierung*, Berlin, 2012.

Furthermore, accompanying the process of globalisation, regulation is no longer the prerogative of the state. Beside international law understood as law defined by states or a legitimated authority, a number of alternative regulatory regimes have emerged. Non-state and private actors, networks, and epistemic communities are the new standard-setters. They now play an influential role and are in a position to define regulation. Their regulatory activities have led to the emergence of a third level of regulation besides the traditional divide between national and international regulation. This regulation is functionally orientated and – contrary to state law or public international law – not political. It applies to determined policy issues at either the national, international, or global levels. Indeed, it breaks this divide. As a body of rules it is commonly subsumed under the term of transnational regulation<sup>2</sup>. Currently, transnational regulatory regimes abound in all sectors. They present diverse grades of crystallisation.

Consequently, in relation to the structure of state and international law, two aspects can be made out: on the one side a fragmentation of regulation and on the other side a dispersion of regulation. What should be understood under these aspects?

In legal terms, fragmentation is used to indicate that the state and international legal orders break or separate themselves into fragments<sup>3</sup>. Parts detach themselves from the whole or from the center. However, although their origin remains the same, the legal order of the state is divided and in the process of getting even more divided. Since the eighties for instance, we have assisted to the emergence of a large number of specialized, functionally orientated agencies based on a delegation of power by the states themselves. These agencies – first of all at the national, but also at the international level – possess proper regulatory competencies. As a result, the legal order is not unified anymore, but fragmented. At this place, it is important to underline once more that with fragmentation, the origin of the rules remains the same: the state or international law.

The second aspect is dispersion. While the fragmentation of regulation is the result of a process of specialisation and delegation of power by states, the same states cannot cope adequately with all issues and in all cases. In particular, developments such as the rise of new technologies for instance necessitate prompt, adequate regulatory interventions, and worldwide coordination. They encompass both institutional issues and issues regarding the

substantive aspects of regulation. Often, there is an institutional vacuum either at the national or international level. In addition, the states are not always in a position to introduce regulatory solutions within a reasonable time frame and to seize measures, which is not least due to political rationales and the lengthiness of the state regulatory process.

This situation leaves room for the emergence of alternative, private, self-regulatory, and transnational regulatory regimes. These regimes constitute themselves autonomously. Their emergence is spontaneous and not hierarchical, but heterarchical. These regimes represent a scattering or a dispersion of rules<sup>4</sup>. They do not deviate from the state or international law framework or fragment it. On the contrary, they emerge from outside of it. Considering the framework of state centred regulation versus private regulation, dispersion of regulation means that – contrary to fragmentation – there is no centre from where a regulatory regime is initiated. Dispersion is a more open and broader concept. It signifies that there is not a definite source. Rather it indicates that there is an acephalous system of regimes. Third, non-state orders, or orders emerging outside of the state and national and international legal orders coexist. Consequently, the regulatory space is polycentric, multi-faceted, and multilevel. This situation gives rise to a competitive contest over the regulatory space.

Admittedly, the realisation of the rule of law is first linked to the concept of the state and state law. It requires the consistent application of the basic principles of law. Taking the commitment to the rule of law into account, a challenge is to find ways to integrate or link these non-state regulatory regimes to the state and international regulatory regimes or to commit them to respect and implement the rule of law.

### **3 Rationales**

With view to this situation, I argue that two matters not sufficiently pointed to within the debate on the rule of law and the challenges its realisation poses, lie in the fact that no sufficient attention is paid first to the implementation of the concept in the context of international law and second, to the role played by the dominating political system in a state.

First, the concept in the context of international law. International law has widely expanded, deepened, and diversified in the course of time. It has also superseded state laws in many cases. Nowadays, international law is a quasi omnipresent field of law. However, as argued by some academicians, it shall not be overlooked that the architecture and substantive content of international law first have been shaped by Western cultures. Although international law pursues the overall goal of realising human rights worldwide, it remains primarily a model representing the values and interests of Western countries. At its origins, it has

<sup>2</sup> Philip C. Jessup, *Transnational Law*, Storrs Lectures on Jurisprudence, New Haven 1956; Graf-Peter Calliess, *Law, Transnational*, in: Mark Juergensmeyer, Helmut Anheier, Victor Faessel (eds.), *The Encyclopedia of Global Studies*, London 2012, 1035 et seqq.

<sup>3</sup> Martti Koskeniemi, *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission, United Nations, A/CN.4/L.682, 13 April 2006.

<sup>4</sup> Myriam Senn, *Non-State Regulatory Regimes, Understanding Institutional Transformation*, Heidelberg, 2011.

been imposed to other countries. It is based on the concept of the sovereign democratic state and depends on just that concept.

Hence, the current international law model is primarily understood as an instrument of power of the west. It is still not understood and implemented as a world order providing justice and realising the same goals everywhere or worldwide. Up to now, this model has been applied to other countries and regions without sufficiently taking their own traditions, values, and interests into account. In fact, the relations of power among countries and regions are evolving and the concept of international law is losing some of its preponderance and significance as far as the influence of western countries is concerned. This in turn influences the understanding of and commitment to the rule of law. This ongoing power and ideological struggle weakens the recognition of the role and acceptance of the rule of law. At the same time, it offers room for the emergence of alternative, non-state, and self-regulatory regimes, which on their side represent a challenge with regard to their commitment to the rule of law.

The second and probably most important challenge relates to the state political system. Overall, the rule of law should contribute to create welfare and to achieve sustained economic progress and development. This implies that the states are in a position to protect and enhance the exercise of their citizens' liberties, supporting their free development. As such it is linked to the concept of democratic state. Democratic states are committed to liberalism. Liberal comes from the Latin language. It means that there are no frontiers, but liberty. Democratic states do not pursue the goal of effectuating an all-encompassing and controlling power within their territory, over their citizens, or over everything. In democratic states, the exercise of activities is based on a multilateral consensus among the citizens, state institutions, and politics. On the contrary, dictatorships or totalitarian states are characterised by their all-encompassing exercise of power. They claim to exercise an entire control over their citizens and over everything within their territory.

Liberalism also includes the openness of the state towards changes, and therefore towards the emergence of alternative regimes. Thus, it is the concept of the liberal democratic state that determines which values are protected and which interests are pursued<sup>5</sup>. As a matter of fact, it is this concept itself, which leads to, allows, and supports the emergence of alternative: transnational or non-state regulatory regimes now resulting in a shift as to the prevailing institutional divide between state law and public international law and in a reconsideration of the application of the rule of law.

In other words: Transnational developments basically take place or can take place in democratic states. The autonomy of these regimes is supported and boosted by the constitutional order of democratic

states and their institutional structures. As a result, the emergence of alternative, transnational regulatory regimes is just the confirmation and proof of an effectively functioning democratic liberal state. It can be interpreted as a reflection of the dominating political system. Though, it should not be forgotten, that contrary to state law or public international law, these regulatory regimes are not political, but functional. Although – under an institutional point of view – they depend on just the dominating political regime in a country and emerge or can emerge out of its democratic structures. In that regard, it is interesting to note that the concept of transnational regulation as understood nowadays has been conceived and delineated by Philip Jessup who used it to designate the continuation of cooperation among Eastern and Western countries or among democracies and dictatorships during the Cold War<sup>6</sup>.

#### **4 The prospects – governance towards a reinforced or a contested rule of law?**

With view to this situation, the issue now arising is which governance approach should be adopted to either reinforce or contest the rule of law? Indeed, issues concerning the legitimacy, implementation, and distributional effects of these diverse regulatory regimes have been lively debated. Up to now however, less emphasis has been placed on the cutting-edge issue of governance in relation to national, international, and transnational regulation and its role with reference to the implementation of the rule of law.

Emerging questions for a research agenda are:

- Which principles of good governance should apply?

- Which are the perspectives to integrate these regimes?

- Should a governance approach focus on enhancing the divide among the regulatory regimes, leading to an even more fragmented or dispersed regulatory framework at the national, international, and transnational levels, or should such an approach aim at re-unifying the regulatory framework?

- Is there an interplay among these regimes and which shape does it take? Which mechanisms of coordination and co-operation do apply among them?

- How far should the rule of law be refined and adapted to characteristics proper to international and/or transnational law?

- Do transnational regulatory regimes present elements of convergence with either state law or public international law? Do they apply the general principles of law? Which are possible means to commit them to respect the rule of law? In case of a commitment to the rule of law, how do they implement it?

At this place, it is argued that *prima facie* there is an inherent convergence among these regimes as far as their institutional structure is concerned. This

<sup>5</sup> Teubner, *op. cit.*, 33 et seqq.

<sup>6</sup> Jessup, *op. cit.*

applies although transnational regulatory regimes are not political regimes. On the one hand, a regulatory regime may take shape, because state political instances decided not to intervene in a specific case. A prominent example is the decision adopted by states not to create an organisation of states responsible for standardisation matters. These states decided deliberately to respect the private character of the organisation, the International Organisation for Standardisation (ISO). Hence, the institutional non-state structure now existing is a consequence of just a political decision of states and the public policy debate has played a determining role. On the other hand, regulatory measures may be introduced based on the proper initiative of non-state actors. It is then motivated by efficiency rationales.

Altogether these regimes constitute the parts of a system and are interdependent. Yet, it should be underlined that while the approach of states and also international organisations presents a vertical structure, transnational regimes present a horizontal structure. While transnational regulatory regimes emerge where there is an institutional vacuum within the architecture of state law or international law, they complement them at the same time. Thus, there is an innate institutional convergence, which offers opportunities to promote the establishment of respect for the rule of law within all regimes.

It must also be noted that there is a fundamental divergence as far as the interests pursued are concerned. While state law and international law are motivated by the pursuance of the public interest, the emergence of transnational regulatory regimes is motivated by particular, mostly economic interests of determined groups or networks. On the one hand it is generally admitted that the role of the states as well as international organisations is both to represent and defend the collective interest. States and international organisations should act and steer the interests of the community. Thus, contrary to transnational regimes they operate on the basis of a commonly defined medium and long term strategy. To implement the strategy, they will then seize adequate regulatory measures. Finally, they will have to implement the measures adopted. On the contrary, non-state, transnational regulatory regimes do not follow any predefined strategy. Rather, they operate on a case by case basis. Their behaviour is determined by the logic of competition. They take ad hoc measures without pursuing a determined strategy. They will also concentrate on realising the own interests of the groups they represent. These are particular interests and not necessarily those of the general public. Group common rules emerge, shape themselves in the course of time, and their implementation remains voluntary. However, these regimes cause externalities. As an example, the protection of the environment as regulated by states in the public interest is regularly opposed to the interests pursued by the construction industry, which disposes of a strong transnational network and a proper regulatory regime. Taking the public interest into account, these externalities have to

be internalised. Hence, divergence of interests might lead to contest the rule of law, or at least some of its aspects. Thus, a governance approach should include determining common principles and rules to master these issues in a way acceptable to the regimes involved. The point is to commit transnational regulatory regimes to a shared responsibility. In the field of arbitration for example, efforts undertaken in that sense are already implemented, as is well-known.

Besides this brief mention of seminal elements applying to the distinction of these regimes, the existence of a range of hybrid forms of regimes should not be ignored neither. In practice, their delimitation does not follow a strict scheme. They follow a proper process of constitutionalisation or self-constitutionalisation. This process may take place in accordance with the fundamental political order of a state or be self-reflexive as in the case of transnational regulatory regimes. Taking the diverse forms of democratic states, totalitarian states and the emergence of transnational regimes into account there is indeed a pluralism of constitutional arrangements<sup>7</sup>.

## 5 Conclusion

Taking into account that state, international, and transnational regulatory regimes all are constitutive parts of a system, it should be possible to define a system immanent modelling of these regimes, leading to a reinforcement of the rule of law. In a first step, an approach based on the analysis of either convergence or divergence elements among state law, international law, and transnational law offers a valuable starting point to study their contours and relationships.

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<sup>7</sup> Teubner, op. cit., 62 et seqq.