

Brooklyn Journal of International Law

Volume 34

Issue 3

SYMPOSIUM:

Ruling the World: Generating International Legal
Norms

Article 1

2009

Introduction: Ruling the World

Steven A. Dean

Claire R. Kelly

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/bjil>

Recommended Citation

Steven A. Dean & Claire R. Kelly, *Introduction: Ruling the World*, 34 Brook. J. Int'l L. (2009).

Available at: <https://brooklynworks.brooklaw.edu/bjil/vol34/iss3/1>

This Article is brought to you for free and open access by the Law Journals at BrooklynWorks. It has been accepted for inclusion in Brooklyn Journal of International Law by an authorized editor of BrooklynWorks.

INTRODUCTION: RULING THE WORLD

Steven A. Dean & Claire R. Kelly***

As recent events have taught us, globalization demands that we consider not just the national, but also the worldwide, implications of regulatory shortcomings of all sorts. There is no single country with the power to impose its legal framework throughout the world. Just as important, no country operates in legal or regulatory isolation. Legal failures and their consequences cross borders, sometimes in spectacular fashion. National economies have never been more interconnected.

Norm entrepreneurs work to connect the legal frameworks that guide and constrain behavior within these economies. International legal norms not only facilitate economic interaction among States and nonstate actors from different parts of the world, but also foster stability, predictability, and prosperity. Even isolated rule failures have the potential to reverberate throughout the world. A less visible, but no less troubling, reality is that where legal vacuums arise, opportunities go wanting.

A host of organizations, communities, and groups have stepped forward to generate norms that shape conduct across borders. The subject of this Symposium is how these entities manage the alchemical trick of turning chaos into order despite daunting legal, philosophical, practical, and cultural impediments. We focus on the development of international norms in the private law context, a process that can be contentious and even frustrating. The Symposium explores different models for the creation of international legal norms, including, but not limited to, institutional regulation, private legislators, model treaties, legislative guides, and transnational harmonization.

Of course, government actors have not abandoned the field. In fact, different lawmaking bodies compete with each other for relevance. States and domestic rule-makers vie for influence while interest groups hope to direct lawmaking activities. When norms do take root and blossom into soft or hard law, the interrelated problems of compliance and legitimacy bedevil would-be enforcers. This Symposium Issue explores these concerns and many others by considering three case studies: commercial law, taxation, and financial regulation. We are fortunate to have a diverse lineup of experts from all over the world to examine these issues.

In *Three Metaphors of Norm Migration in International Context*, Roderick A. Macdonald, F.R. Scott Professor of Constitutional and Public Law, Faculty of Law, McGill University, frames our discussion of inter-

* Associate Professor of Law, Brooklyn Law School.

** Professor of Law and Associate Director of the Dennis J. Block Center for the Study of International Business Law, Brooklyn Law School.

national norm development using three metaphors: harmonization, transplantation, and viral propagation. Each of these metaphors reveals defects in universal norm generation and highlights the fallacy that one view of the law may be good for all people at all times. Using specific commercial law examples, Professor Macdonald illustrates that the differences among States, their legal architectures, their political and legal environments, and their adaptive capabilities make perfect harmonization or transplantation of law unattainable and, perhaps, undesirable. Likewise, the ability of a legal concept or norm to infect a legal community depends on a variety of factors, including the nature of the lawmaking authority (e.g., highly centralized, hierarchically organized, or legislatively, rather than judicially, driven); the points of entry (e.g., agencies or scholarly communities); and the relationship of the State to other countries and ideology. These metaphors help us understand how States are inseparable from their social, economic, and political contexts. In doing so, we realize that international norm generation cannot be based on the unique socioeconomic and political contexts of a few States. This overarching perspective informs all of the panels and Articles that follow.

Our first panel focuses on commercial law. Henry Deeb Gabriel, DeVan Daggett Professor of Law, Loyola University School of Law, New Orleans, articulates an important resource question: is creating nonbinding general principles (soft law instruments) a worthwhile goal when there are scarce resources to generate norms? Noting the call for both harmonization and modernization, Professor Gabriel echoes the challenges identified by Professor Macdonald, positing soft law as a vehicle capable of avoiding pitfalls to harmonization. In particular, *The Advantages of Soft Law in International Commercial Law: The Role of UNIDROIT, UNCITRAL, and the Hague Conference* explores how soft law serves important functions that hard law does not. Soft law is more helpful in achieving harmonization than hard law because of its flexibility. Professor Gabriel observes that with soft law there is “less conflict between the international and the domestic law compared to a binding convention.” Because soft law does not require adoption, it is “more easily and readily available for use.”¹ Additionally, it serves as the basis for further work, provides guiding principles, and fosters party autonomy and neutrality. These attributes, however, also give rise to some criticism. Soft law instruments may offer less certainty because they are non-binding. They may also suffer because a lack “of vetting, compromise,

1. Henry Deeb Gabriel, *The Advantages of Soft Law in International Commercial Law: The Role of UNIDROIT, UNCITRAL, and the Hague Conference*, 34 BROOK. J. INT'L L. 655, 656 (2009).

and ultimate acceptance usually yields instruments acceptable to the various constituencies.”²

Amelia H. Boss, Trustee Professor of Law, Drexel University, Earle Mack School of Law, focuses on electronic commerce to highlight symbiosis at work in norm development. In *The Evolution of Commercial Law Norms: Lessons to be Learned from Electronic Commerce*, she highlights that product and form (either soft or hard law) are not as important as process, particularly the “exchange of ideas, and the education that occurs during the drafting process.”³ Moreover, she reminds us that success is difficult to judge. Success is not simply a matter of adoption or implementation. By examining the relatively recent developmental history of electronic commerce law, Professor Boss shows the process and mutual effect of national and international efforts. She also warns us of the dangers of this process, specifically fragmentation, when missteps occur in international norm development.

Boris Kozolchyk, Evo DeConcini Professor of Law, James E. Rogers College of Law, University of Arizona, recounts the long history of soft law in commercial transactions in *Modernization of Commercial Law: International Uniformity and Economic Development*. He specifically notes that “the vitality and universality of a commercial law shaped by best practices are apparent in institutions that stretch back as far as the ancient Greek version of the maritime contract and security agreement.”⁴ Legal culture is comprised not merely of the written positive law, but also of the attitudes towards commerce and the law, as well as the living law, i.e., how law is practiced. This last variable, how law is practiced, is crucial to the success of law.

Our second panel focuses on taxation norms. Hugh J. Ault, Professor of Law, Boston College School of Law; Senior Advisor, Centre for Tax Policy and Administration, OECD Paris, delves into the process by which the Organisation for Economic Co-operation and Development (“OECD”) develops international tax norms. In particular, he tracks the changes in OECD structure and functioning. His Article, *Reflections on the Role of the OECD in Developing International Tax Norms*, considers tax competition, dispute resolution, and taxation of services. Professor Ault reveals that the OECD process has become more open and inclusive, perhaps at the cost of its ability to reach consensus. In light of these changes, he suggests means by which the OECD may further its agenda.

2. *Id.* at 671.

3. Amelia Boss, *The Evolution of Commercial Law Norms: Lessons to be Learned from Electronic Commerce*, 34 *BROOK. J. INT’L L.* 673, 676 (2009).

4. Boris Kozolchyk, *Modernization of Commercial Law: International Uniformity and Economic Development*, 34 *BROOK. J. INT’L L.* 709, 711 (2009).

He cautions that it will be necessary for the OECD to develop techniques for securing “agreement on policy principles and technical rules” while still allowing an “escape valve” for certain sensitive issues.⁵

Reuven S. Avi-Yonah, Irwin I. Cohn Professor of Law, University of Michigan Law School, considers the subjects of tax havens and tax competition in order to explore norm development. His Article, *The OECD Harmful Tax Competition Report: A Retrospective After a Decade*, argues that the OECD has dealt successfully with preferential tax regimes, but reminds us that this is an ongoing process. He suggests additional mechanisms by which the OECD members can promote norms that combat tax competition.

Lisa Philipps, Associate Professor of Law and incoming Associate Dean (Research, Graduate Studies, and Institutional Relations), Osgoode Hall Law School, York University, Toronto, Canada and Miranda Stewart, Associate Professor of Law, Melbourne Law School, University of Melbourne, Australia conclude our tax discussion by tackling transparency norms in the budgetary context. In *Fiscal Transparency: Global Norms, Domestic Laws, and the Politics of Budgets*, they contend that the discursive roots of fiscal transparency stem from the shifts toward neoliberalism and good governance. Emphasizing fiscal discipline as well as accountability, participation, and ownership concerns, these movements were facilitated by numerous global initiatives: the International Monetary Fund Code of Good Practices on Fiscal Transparency, the OECD Best Practices for Budget Transparency, the World Bank, and the OECD and EU Stability Growth Pact. Philipps and Stewart consider how various transparency mechanisms account for “issues of distributive impact and politics.”⁶ Ultimately, while recognizing the emerging international architecture for transparency, they urge us to acknowledge the need to promote transparency and inclusiveness on the State level.

Our final subject is financial regulation. Kern Alexander, Director of Research in Financial Regulation, University of Cambridge, explores international banking supervision and, in particular, the Basel Committee. His Article, *Global Financial Standard Setting, the G10 Committees, and International Economic Law*, examines the soft law emanating from the Basel Committee, as well as other G10 committees, and its significant public policy influence. He also examines the decision-making process that resulted in Basel II and its weaknesses. While these standards are “voluntary,” Doctor Alexander explains that the pressure on

5. Hugh J. Ault, *Reflections on the Role of the OECD in Developing International Tax Norms*, 34 BROOK. J. INT'L L. 757, 781 (2009).

6. Lisa Phillips & Miranda Stewart, *Fiscal Transparency: Global Norms, Domestic Laws, and the Politics of Budgets*, 34 BROOK. J. INT'L L. 797, 800 (2009).

States to adopt them raises serious accountability and legitimacy issues, and further suggests that the imposition of these standards on States excluded from their development could have negative consequences.

In *The Hardening of Soft Law in Securities Regulation*, Roberta S. Karmel, Centennial Professor of Law, Brooklyn Law School and Claire R. Kelly, Professor of Law, Brooklyn Law School, argue that soft law counteracts regulatory competition and makes regulatory cooperation more palatable. They trace a long history of soft law securities regulation and detail the current international efforts to shape international soft law norms. While they see this continued process as desirable, they nonetheless identify problems with international norm development via soft law, namely, those of authority, process, and legitimacy.

Finally, Elizabeth F. Brown, Assistant Professor, J. Mack Robinson College of Business, Georgia State University, explains the problem of developing international insurance norms. Professor Brown's Article, *The Development of International Norms for Insurance Regulation*, notes that there is a great deal of pressure for international insurance standards, but they have not kept pace with other international financial regulatory efforts. Existing sources of international law (e.g., GATS, NAFTA) fall short, in large part, due to U.S. reservations made to these agreements. And, in fact, some of the principles espoused by these agreements—notably, national treatment and market access—are not fully supported by state legislation. Still, the International Association of Insurance Supervisors has tried to develop guiding principles. Its efforts have been thwarted by the complexity of negotiation due to the number of U.S. states involved. Given the federalism issue posed by U.S. participation, it is difficult to imagine the development of an internationally based consensus.

These symposium Articles, and the Symposium itself, raise many issues for those interested in international norm generation. First, the process of international norm generation is just that, a process. It is ongoing, dynamic, and interconnected. And it cannot be isolated from politics or socioeconomic pressures. Further, questions regarding legitimacy, accountability, power, and transparency are unavoidable.

Second, the reach of soft law and the role it plays in international norm generation are remarkably extensive. Soft law serves a variety of values. Quite obviously, it may harden into positive hard law. More importantly, perhaps, is the role it plays in allowing for a symbiotic process of norm generation. It allows different legal cultures, perspectives, and values to coexist. More profoundly, it lays the groundwork for regulatory cooperation among States.

Third, we see that international norm generation reflects the needs and conduct of the actors affected by the norms. When these rules fail to account for the needs and values of the constituencies they serve, they fail to take hold, and lose whatever legitimacy they may have had.

Lastly, we see that national constituencies and domestic political pressures can thwart the formation of general principles and universal norms. Moreover, the diversity of interests and approaches harkens back to the note struck by Professor Macdonald at the very beginning:

Law is both a constant process of interaction between citizens and officials, and in international affairs, a constant process of adjustment among States conceived in dyadic interaction. If we are genuinely committed to “generating international legal norms,” then we can do no better than attend to Aristotelian wisdom: far from ruling the world, we will first be seeking to rule ourselves.⁷

7. Roderick A. Macdonald, *Three Metaphors of Norm Migration in International Context*, 34 BROOK. J. INT'L L. 603, 653 (2009).