

Global Law for Private Law

Eric Tjong Tjin Tai

Professor of Private Law, Tilburg University, The Netherlands
t.f.e.tjongtjintai@tilburguniversity.edu

Abstract

The standard concept of law, consisting of legislation and case law, provides authority and legitimacy to law, as well as a methodology. Transnationalisation of law has necessitated the recognition of non-state influences. Although this should lead to an updated concept of law, authority and legitimacy are not actually problematic as these are in practice derived from the authority and legitimacy of national courts which decide most cases, albeit using new sources of law. The main problem of global law is methodology.

Keywords

transnational law; global law; legal knowledge; methodology; authority; legitimacy

1. Introduction

The debate on global law or transnational law¹ turns effectively on the question of what law actually is. Somewhat surprisingly, this question is rarely touched upon in the extensive literature on global law.² I will try to provide an answer to the question of ‘what is global law’ from a private law perspective. Given the limited space available, this answer cannot be but sketchy.

2. The Concept of Law

The need for a concept of law derives primarily from the need to distinguish law from non-law, in particular from morality and natural law. Hence the notion of positive law: law which is institutionalised, in particular in

¹ I will use both terms as synonyms.

² Exceptions are in particular D von Daniels, *The Concept of Law from a Transnational Perspective* (Ashgate 2010) and P Zumbansen and GP Callies, *Rough Consensus And Running Code* (Hart Publishing 2010).

statutes and case law. This concept explains two functions of law, namely to provide decisive arguments regarding the applicable rules (hence we need no longer rethink these)³ and thereby provide coordination (because we know the state of the law). However, this concept is limited as it does not encompass what actually occurs in legal practice.

In a broader view of legal practice, law is anything we use to decide legal issues.⁴ This means that we should possibly not speak of law but rather of *legal knowledge*. This is broader than law in the classic positivistic sense: knowledge may lack 'hard' authority, but may still have argumentative force or 'normal' legal authority. This is, in effect, the route along which precedential force has come to be accepted in most countries. It also involves the debate between judges, which may be informed by doctrine and case law even if in their official pronouncements the courts refer only to the code.⁵ In private law in particular we have effectively always used a broader notion of 'soft' legal authority.⁶

This does not mean that the notion of binding, 'hard' authority is useless. Complying with official authority serves the purpose of providing a clear *methodology*, in which statute stands above case law, after which doctrine and other sources may play their role. Without a core of more or less binding authority, law would lose its basis. Furthermore, this methodology provides *legitimation* of legal practice, as formally we respect the decisions of the democratic legislator and the independent courts. This legitimation is in effect based on state sovereignty.

3. The Decline of Sovereignty

The root causes of the receding prominence of sovereignty are twofold. First, the rise of supranational law (European Union, fundamental rights – particularly the ECHR –, and treaties such as CISG and WIPO) and the growing recognition of what is called 'soft law'.⁷

³ The service conception of law (Raz).

⁴ Very provisionally I would define law as a system to allow rational discussion of our basic intuitions on justice, guided by our sense of justice. But the following argument does not turn on this definition.

⁵ Cf. M Lasser, *Judicial Deliberations* (Oxford University Press 2004) regarding French courts.

⁶ Eg N Jansen, *The Making of Legal Authority* (Oxford University Press 2010). Also PAJ van den Berg, *The Politics of European Codification* (European Law Publishing 2007) and other publications.

⁷ In particular, norms created (and possibly enforced) by non-state actors; a broader definition might include state norms that are not enforced.

Supranational law has come about by a voluntary partial transference of sovereignty. Although the general idea was that this would not diminish the actual prominence of national sovereignty, in fact these supranational organisations and their courts have gradually encroached upon the national domain to such an extent and so regularly that they become part of the picture of what law actually is in practice. No longer can we view supranational influence on national law as a temporary imbalance that is quickly absorbed in the national system; nowadays we have a system of multi-level regulation.

Soft law in itself is not new and has always been recognised as an influence on the operation of law, be it in the form of local, customary law, business practices, professional ethics, state of the art, general conditions and the like. It has come to the fore partly by regulators who see it as an alternative to government-proclaimed rules, partly by a renewed interest in what previously was called sociology of law. Soft law rules influence behaviour and are recognised in court decisions, even if they are not law in the traditional positivistic sense of the word. Furthermore, soft law is not limited to state boundaries: soft law appears to have a decided advantage to state law in regulating new areas where international uniformity is paramount.⁸

Strictly speaking neither of these developments falsifies national sovereignty, as that involves the *normative* (instead of empirical) claim that nation states supremely decide what they recognise as legally relevant materials.⁹ However, the incursions into national sovereignty appear to be growing, whereby the appeal of this ideal diminishes. Within quite a lot of areas of legal practice – in particular in specialist areas, ‘functional’ domains of law – lawyers need to consult and apply a large number of sources of law¹⁰ that are not all state-proclaimed, where various courts have jurisdiction, and where the ideal of a coherent legal system¹¹ does not provide much help in solving inconsistencies and uncertainties. This naturally leads to a state that may be called legal pluralism.¹² An encompassing theoretical framework would be ‘general jurisprudence’,¹³ which however appears to lack sufficient solid guidelines for legal argumentation.

⁸ See for example PP Polanski, *Customary law of the Internet: In Search for a Supranational Cyberspace Law* (Asser Press 2007).

⁹ Secondary rules (Hart) or Grundnorm (Kelsen).

¹⁰ Used more loosely, not in the strict positivistic sense of the word.

¹¹ Exemplified in the Dworkinian model of Hercules.

¹² See P Zumbansen in particular.

¹³ Cf. BZ Tamanaha, *A General Jurisprudence of Law and Society* (Oxford University Press 2001) W Twining, *General Jurisprudence: Understanding Law from a Global Perspective* (Cambridge University Press 2009).

4. Towards Global Law?

A 'pluralistic' conception of global law has the decided disadvantage that it lacks unity. It is in danger of becoming a bundle of disconnected facts. From a private law perspective, some degree of coherence, consistency, and system is necessary in order for law to be more than a mere bag of tricks. That does not mean that we have to stick with the traditional positivistic conception: as discussed, that conception never reflected actual practice.

A proper concept of global law should, to my mind, take into account the practice of dispute resolution (the available courts and their practices), as these to a large part set the standard as to what is formally and informally accepted as legal authority. A distinction between legal authority and non-legal authority is unavoidable as otherwise we would be unable to distinguish law from other kinds of rules, such as morality, and cultural or social rules.¹⁴ State-sanctioned dispute resolution is unquestionably authoritative, and thereby provides a basic bench-mark for what is law. Indeed, we do have to look beyond the formal pronouncements and also take actual practice into account.

If we investigate actual practices of courts, we see that law to a large extent is still national law, and that supranational and soft law norms are irregularly taken into account where applicable. There is not really much discussion on the theory that would systematise such a practice, nonetheless the courts appear to manage. More importantly, laymen seem to be completely oblivious to the legal discussions around global law, with the possible exception of ECHR case law.

This suggests that global law is primarily a problem for lawyers. We cannot use our old concept, and have to develop a new one. The problem is one wherein we lack our old, familiar system, and have to operate without one or develop one anew. The puzzle of how to conceptualise a multi-level system of regulation has up to now eluded the sharpest minds of our generation, possibly there is no actual solution. Global law cannot be a system in the traditional sense of the word, and is at present primarily a practice of law wherein lawyers are more aware of global developments, at the expense of detailed knowledge of national law. Global law is an approach, a community and an ideal.

For the future it is not impossible that more systematic tendencies will prevail. A rise of doctrine regarding issues of global law would provide

¹⁴ Cf. The critique of R Cotterrell, *Law & Social Inquiry* 2012 (37/2), 500–514.

additional supports in the absence of the traditional pillars of statute and case law. Although these do exist in global law, they are first of all too diverse and inconsistent, and secondly little developed.

5. The Theory of Global Law

So what does this tell us at the level of legal theory?

Authority in itself is not a problem: lawyers have always juggled sources of varying authority. However, there is to my mind – which I cannot develop here – a certain ambivalence in the kind of authority that supranational law and courts provide, which differs from national courts. Supranational courts are unable to provide the same systematising, unifying role that national courts have been able to in the past: this is due to the sheer volume of questions that could arise. National courts furthermore were only able to do so by resting on loyal lower courts that had the same unifying aim, often with support of a national code. All this is absent in the global arena. Supranational courts explicitly rely on national courts to apply their interpretations of supranational law, but as they cannot rule on the context of national law, they are thereby singularly handicapped in actually providing the proper development of law.

Regarding *legitimacy*: the legitimacy of such varying sources and courts of global law actually appear hardly to be questioned, as far as private law goes.¹⁵ Only supranational law is viewed with distrust as it breaches the national systematic unity. However, this appears due more to the lack of integration of supranational law with national law. A proper developed legal practice of global law in itself supports legitimacy. This does not turn solely on the judge's authority or manner of proceeding, but also in the surrounding institutions. Hence law is not only the set of applicable rules, but also the practice of the law, the legal system, including judges, lawyers who provide advice, and the dissemination of law into general society and culture.

Finally, on the *methodology* of global law. The current diversity of approaches, legal sources and literature is bewildering and makes it impossible for anyone to take into account all possibly relevant materials. The traditional anchors of national sovereignty and hierarchy are now unavailable. I would provisionally suggest that a viable methodology should throw

¹⁵ It appears to be more of an obstacle for public law.

off the ideal of sovereignty and instead assume a model of distributed legal supervision, through a plurality of rules and dispute resolution fora.

The ideal should not solely be consistency or coherence of a system of rules, but rather a balance or equilibrium between the competing ideals or principles that are alive in the network of global law. If we critically examine earlier national practices in the era of codification we see that the legal system always assumed a distributed responsibility for unification and promulgation of the law, through the system of appeal and cassation, and supported by publication of case law, case notes, and doctrine. In order to allow such development in a multi-level legal system, supranational law should not be viewed as being intrinsically sovereign over national law, but instead as part of a larger system of global law, in which it is balanced against systematic considerations of national law. Only in that way can national and supranational courts together work towards greater coherence and consistency.

Once we recognise that actual practice was always more messy than the clean outlines of theory, we may fruitfully revise theory on the existing basis.