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Transnational standards in the domestic legal order: authority and legitimacy

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ABSTRACT

Transnational standard-setting bodies, which guide the conduct of states and non-state actors in multiple fields of global governance, affect the content of domestic law in a manner that may reduce domestic input. This journal symposium approaches the evolving interactions between transnational standards and domestic legal orders through questions of authority and legitimacy. Jaye Ellis' piece sheds light on the role of law in mediating democratic legitimation and scientific rationales. Vesco Paskalev examines how food safety standard-setting advances the notion of epistemic subsidiarity, and thereby leaves autonomous decision-making space for state authorities. Finally, Ka Lok Yip's article highlights variables in the field of humanitarian law which facilitate and hinder the domestic acceptance of guidance and standards.

KEYWORDS Transnational standards; domestic law; expertise; authority; legitimacy

1. Theme of the present symposium

The ostensible decline of sovereign states in global governance was accompanied by the expansion of transnational standard-setting bodies. These bodies are composed of scientific and technical experts without the authority to render formally binding decisions. The International Organization for Standardization (ISO) develops industrial standards. The Basel Committee on Banking Supervision provides capital requirements. The Forest Stewardship Council (FSC) establishes principles and criteria for forest products, and the European Food Safety Authority (EFSA) provides independent scientific advice on risks associated with the food chain.¹ Consider also the International Committee of the Red Cross (ICRC), which provides guidelines on how humanitarian law ought to be applied.²

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¹ See the papers by Jaye Ellis and Vesco Paskalev in this journal symposium on the standard-setting role of the FSC and EFSA, respectively.

² See the paper by Ka Lok Yip in this journal symposium.

The consequences of the standards, recommendations and guidance put forward by these bodies become particularly visible when the standards are absorbed into domestic law. Domestic permeation blurs the distinction between domestic (ie, internal) and external legal orders, giving rise to significant evolutions in how the two orders interact. Domestic legislatures, ministries, judges, industries and the general public may invoke transnational standards in statutes, administrative instruments, judicial decisions and wider legal practices. This blurring actively promotes, if not obliges, regulatory convergence across states. At the same time, domestic diffusion of transnational standards may come at the expense of input from domestic constituencies.³

Against this background, the symposium explores the evolving interactions between transnational standards and domestic legal orders from the perspectives of *authority* and *legitimacy*. While the concepts of authority and legitimacy have no uniform definition, *authority* in this symposium broadly encompasses an entity or individual's capacity to induce deference from others. Authority in this sense rests on recognition given by others.⁴ *Legitimacy*, in turn, concerns itself with a broad normative evaluation of authority. Given that the regulatory significance of transnational standards often depends on domestic acceptance, it is crucial to examine the source and composition of the transnational standard-setting bodies' authority, and whether such authority is legitimate.

2. Authority and legitimacy

Authority is a concept ascribed primarily to a decision-maker, as opposed to the content of its decisions. In this regard, authority is in principle 'content-independent'.⁵ Where a decision can be said to have authority, the decision's 'authority' may be mere manifestation of the decision-maker's authority. For the sake of this symposium, one must highlight that the concept of authority has primarily developed by situating a sovereign state as a decision-maker. The concept of authority is traditionally nurtured in a national context, a context in which rulers and ruled have relatively clear-cut roles and act within the confines of the same legal and political orders.⁶

To transfer the notion of 'authority' to a transnational context may 'cut across and blur' the basic distinctions—those between rulers and ruled, and

³ In particular, transnational 'science-based' standards are often formulated without the involvement of those private entities and individuals on whom the standards have visible consequences. It is problematic to adopt such standards without critical scrutiny by domestic constituencies. I analysed this problem in my previous work: see Machiko Kanetake, 'The Dual Vulnerability of Transnational, Science-Based Standards in the National Legal Order' (2016) 7 *Transnational Legal Theory* 470.

⁴ See Ingo Venzke, 'Between Power and Persuasion: On International Institutions' Authority in Making Law' (2013) 4 *Transnational Legal Theory* 354. Venzke suggests that a certain degree of voluntary recognition distinguishes authority from mere coercive power. See also Kanetake (n 3) 354–73. Authority, which rests on recognition, is simultaneously constrained by discursive practices that constitute such authority.

⁵ See Nicole Roughan, *Authorities: Conflicts, Cooperation and Transnational Legal Theory* (Oxford University, 2013) 20–21.

⁶ Henrik Enroth, 'The Concept of Authority Transnationalised' (2013) 4 *Transnational Legal Theory* 336, 344.

national and international—on the basis of which the term ‘authority’ has been traditionally used.⁷ In a transnational context, rulers and ruled cannot be situated in identical legal orders. Standing in multiple different legal communities, the distinction between the rulers and the ruled becomes muddled. Given the basic differences between national and transnational contexts, trying to identify the existence of authority comparable to that of national governments may not be a fruitful exercise.

What we have witnessed instead in the transnational sphere is a rather different kind of authority. The authority of transnational standard-setting bodies such as the FSC can emanate from their technical expertise, the ostensible industry ‘consensus’, and the pressure for regulatory harmonisation across states and industries. Paradoxically, transnational standard-setting bodies may acquire authority precisely because their recommendations, findings and guidance are presented as if they are politically neutral and non-coercive. Such authority differs from a state’s authority, which is characterised by formal capacity to render binding decisions and enforcement tools. As nicely put by Nico Krisch, authority might take ‘liquid’ forms instead of a fixed shape, which also makes it difficult to grasp, assess and control.⁸

Furthermore, the authority of transnational standard-setting bodies gives rise to a multifaceted question of legitimacy. Despite the fact that transnational standards have an impact on domestic legal practices, both legal orders appear to invite only restricted input from domestic constituencies. At the transnational level, standard-setting processes may disallow formal governmental representation, as contrasted with the conclusion of treaties and the decision-making processes in international organisations. At the domestic level, transnational standards are rarely subject to the parliamentary approval requirements of formal treaty ratification, and executive organs may simply defer to transnational standards and avoid domestic deliberation. The technicality of industry or scientific standards also makes it difficult for the wider public to review the government adoptions of transnational standards.

Overall, there is a strong indication that transnational standards may escape domestic scrutiny at multiple levels. The limited domestic input may lead us to critically assess whether the domestic permeation of transnational standards is normatively problematic.

3. Roadmap

This symposium elaborates upon the nature of authority and the related normative question of legitimacy through multiple fields of transnational

⁷ *Ibid.*, 344–45.

⁸ Nico Krisch, ‘Liquid Authority in Global Governance’ (2017) 9 *International Theory* 237; Nico Krisch, ‘Authority, Solid and Liquid, in Postnational Governance’ in Roger Cotterrell and Maksymilian Del Mar (eds), *Authority in Transnational Legal Theory* (Edward Elgar Publishing, 2016) 25.

standard-setting. Jaye Ellis opens the symposium by considering transnational standards based upon scientific data. Her paper addresses the question of what is required to permit transnational and domestic standard-setters to evaluate the cogency of scientific arguments, conclusions and judgements. Ellis critically captures the way in which legal practices are colonised by scientific rationales and give rise to a problem of democratic legitimacy. In so arguing, Ellis invokes the concept of cogency analysed by William Rehg (in turn based upon Thomas Kuhn's work). Ellis then contextualises this theoretical analysis with specific examples of the standards developed by the FSC and the Marine Stewardship Council.

Vesco Paskalev's paper follows up with an observation on authority and legitimacy in the context of EU standards concerning genetically modified organisms (GMOs). In order to harmonise and strengthen the scientific basis of the regulation of GMO, the EU established the EFSA. While the EFSA, in principle, does not have any formal regulatory power, its expertise-based opinions widely inform regulatory decisions at the EU level—and ultimately at the national level. Paskalev critically evaluates the scientific basis of the EFSA's authority and its institutional settings and puts forward the notion of epistemic subsidiarity, according to which each member state secures the sphere of autonomous decision-making.

Transnational standards are also influential in areas of public international law in which customary law and treaties are well established. Ka Lok Yip's piece investigates how the guidance and standards developed by the ICRC inform domestic legal practices concerning the interpretation of 'direct participation in hostilities'. While the first two papers of the symposium focus on scientific standards, Yip's paper analyses the role of transnational standards in the area of peace and security. Drawing on Franck's theory of legitimacy, Yip explores the possible reasons why domestic courts and administrative bodies employ the ICRC's guidance in their legal practices. Her paper critically assesses, based upon Habermas' model of deliberative democracy, the legitimacy of the domestic acceptance of the ICRC's transnational standards. Yip concludes her paper by reflecting how the use of 'expert groups' to set transnational standards might be made more democratic.

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