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Sub-theme 30: Organizations of Organizations

# The new sovereigns: organizations of organizations as constitutional subjects

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**Abstract.** Nation states are no longer the only sovereigns; their role in law-making has been accompanied by non-governmental subjects. We claim that these actors are generally organizations of organizations. This poses several fundamental theoretical questions about the nature of these private entities and the interplay of the legal system, political domain, private interest - and the citizen. We limit our investigation to the shift in law-making towards self-created laws by, and for, organizations of organizations. They are unlike other organizations in their drive to change not just their cognitive and normative environments, but also their regulative environment, which in turn regulates the activities of other actors.

**Keywords:** Organizations of organizations, legal system, private regulation

## Introduction

Traditionally nation states have been seen as the only sovereign subjects entitled to pass laws and delegate this power if necessary. Parliaments as political organizations have been the production plants of law and regulation both at the national and international levels. In short: they have been the main source of new legislation. Other actors, e. g. multinational enterprises and international organizations, have only had an insignificant and, more importantly, an intermediary role, as participants to be heard, not to legislate themselves. Their repertoire

included lobbying, informing, diplomatic and coercive measures and bribery, but constitutional acts were reserved for nation states.

However, the source of new global law is no longer nation-states and institutionalized politics. Instead the dominant sources of global law are now to be found at the peripheries of law; actors that have not traditionally been recognized as subjects of international law, have become in some sense constitutional subjects. These actors are international organizations, multinational enterprises, international trade unions, interest groups and non-governmental organizations as participants in global decision-making (Teubner, 2004a). The connective feature between these actors is that they all consist from number of organizations. They are organizations of organizations.

Literature has established the role of organizations and other such systems in creating law in the international realm (Robé, 1997; Muchlinski, 1997). Globalization creates a notable amount of new requirements for regulation and norms in the international sphere, that national governments or governmental actors are unable, and in some cases unwilling, to fulfil. This has launched a development trend of increasing private regulation passed and enforced by the non-public regimes themselves (Teubner, 2004b). We claim that generally these organizations and systems are not independent actors of some industry or organizational field, but instead they are more constitutive by nature, as they are consortiums of groups of organizations. In other words, we argue for a new starting point for examining organizations of organizations as active players in the field on law. Research on them should re-orientate as the traditional perspective towards organizations risks neglecting some pivotal characteristics of the research subject.

We define these “meta-organizations” (Ahrne and Brunsson, 2005) as follows: they do not consist of individual people, are global or at least international (for example in the European Union context), articulate the interests of their field and gain their position by claiming to represent larger body of interests or an organizational field. They are however not the sum of their organizational parts but often enjoy a certain autonomy – and even drive towards contested outcomes for their members. In this paper, we are interested in organizations of organizations that are capable of producing their own laws, although we recognize that in some cases this is difficult to determine. By producing their laws we mean that they can create norms in their own limited domain. Furthermore, they have the capability to enforce these norms and use coercive measures if necessary. Hence, organizations of organizations become

legal orders as they fulfil the requirements set by Weber (2004); capability to legislate and enforce the norms.

In fact, we speculate that the main purpose of these entities is to create favourable legal environment and norms that benefit the industry in question. One recent example process, which has a number of worrying characteristics, is the round of negotiations related to the Anti-Counterfeiting Trade Agreement (ACTA) treaty. The treaty is a new effort to build a plurilateral legal agreement that countries could join and an autonomous governing body outside such actors as UN (United Nations), WIPO (World Intellectual Property Organization) or WTO (World Trade Organization). The treaty is meant to complement the TRIPS agreement and focus especially on digital goods.

The entire agreement was negotiated in secrecy; all the material related to the negotiations was originally classified and citizens only gained information through leaks. Even members of the national parliaments were required to agree to non-disclosure agreements, a very foreign practice to many parliaments in Europe. At the same time, several lobbyists had access to the drafts through NDA agreements they had made with the USTR (United States Trade Representative), because they were offering their “suggestions to improve the agreement” to the process. These companies include for example Google, Dell, Sony Pictures and interest groups such as International Intellectual Property Alliance (includes the Business Software Alliance), Motion Picture Association of America (MPAA), and Recording Industry Association of America (RIAA) and Pharmaceutical Research and Manufacturers of America. When ready, the agreement will be binding to all countries that join as members and the governing body will have the means to coerce compliance.

This case illustrates the functions organizations of organizations may serve in the sphere of international law and regulation. The example also offers an interesting contrast to the roles of governments and their citizens in these negotiations. The trajectory of their roles is declining while the importance of organizations of organizations is growing. In what follows we describe this transition theoretically.

### **The emergence of new international law**

The idea of the modern nation state was based on the Westphalian notion of sovereignty. International law was bilateral and appeared between states, not above them. Otherwise the traditional Westphalian structure of international relations would break down. The sovereignty

of the state presupposed that there was no law, even international, above it, as the sovereignty of the states would otherwise be restricted. Based on this idea of the sovereignty of the state within certain territorial limits the constitutional subjects, e. g. monarchy and republic, inherited the monopoly of decision-making and violence. Authority to give resolutions in disputes between commercial partners was centred to courts controlled by the law of the nation state. However, in some cases, especially in disputes where the context was not restricted to national law, there emerged *lex mercatoria*, a merchant law based on the principles of Roman law that regulated bilateral trade.

The structure of international relations has been going through a transformation in the past decades. The development of communication and transport technologies has increased the possibilities for interlinkages between nation states and created new global opportunities. Companies found themselves in a global marketplace and identified new needs for legal cooperation in areas such as standard setting, banking systems etc.

This transition has three distinct characteristics:

- 1) The sheer number of actors has grown exponentially
- 2) Private entities have grown and entered in force to the making of international law
- 3) Non-political settling of disputes happens outside courts

The limits of private interest and the public sphere (of sovereignty) have blurred as private actors have gained foothold in international law. Former peripheries of law have become dominant sources of global legislation. In addition to official courts, disputes are brought to new bodies such as ethics committees and treaty systems.

The formal part of this cooperation actualized as organizations of organizations. Entities planned to represent and serve the interest of their members by taking part in international decision-making. Individual organizations transfer some of the accountability for their actions to these upper-level actors. It is important that no individual organization (or its decision-makers) is responsible for the actions. Thus organizations of organizations have more freedom to pursue the interest of the organizational field as agreed by the member organizations. If they drive an unpopular agenda, they, rather than the individual organizations, serve as a public face. These organizations of organizations can also specialize; they build capacity,

collect industrial knowledge, organize research efforts, and build personal relations to be more effective in driving the interest of the field. But it should be noted that they also serve as the medium which articulates the (sometimes conflicting) interests of their member organizations. To summarize, these are new kinds of organizations of organizations that differ materially from the previous actors.

Theoretically, industrialization and global markets created needs and conditions for new actors. Private enterprises established formal and non-formal cooperation with each other in order to increase their role in their field. At the same time, they have become subjects of the changing field of international law. These methods seem to be successful for the organizations as we can observe from the ACTA negotiations.

But what about the Westphalian notion of sovereignty? We claim that this recent development questions the sovereignty of states as the only origin of law. The consequences of this are discussed in the following.

### **Self-regulation of private interest outside the public sphere**

The needs of the global markets and the tendency of rationalization create new arenas of law-making. In addition to traditional institutions, regulation and norms are also created by semi-public, quasi-private or private actors. This current organizational development has a myriad consequences mainly for, but not limited to the legal sphere. We claim that the global law legislated by organizations of organizations has significant effects on the transparency and accountability of legal order.

Organizations of organizations are unlike other forms of organizations, because they are able to change, not just their environment, but legal framework, constitution, which also regulates the activities of all other organizations. Institutionalism (Scott, 1995) analyses organizational environment by using three pillars of institutions which exert influence on individual organizations: regulative, normative and cognitive. Often recent research has started from the focus on institutional environments “*characterized by the elaboration of rules and requirements to which individual organizations must conform if they are to gain support or legitimacy*” (Scott, 1995, 132). In contrast, we define organizations of organizations from a very different view since their *main purpose is to change the institutional environment’s conditions of the regulative pillar for their benefit*. We move from exerting regulative

influence on the individual organizations into a situation where these organizations are *de jure* privately self-regulated (within certain limits).

Often institutional theory starts on constraints posed by the environment: for example, nuclear disaster in Fukushima, caused by the tsunami, created a strong pressure in EU for increased security evaluation in power plants. European Commission pushes for new regulation, but the exact details will be in European level discussion during summer 2011. Majority of the participants in the negotiations are organizations of organizations (such as EU and IAEA). Many assume that cognitive and normative pillars of institutional theory would be 'softer', that is easier to change from organizations perspective, whereas the legal environment would be mainly given. However, we argue for a more balanced approach, by taking seriously the opportunities of untraditional actors to shape the legal sphere. Control over the content of the regulative pillar is spreading more widely and legislator's monopoly is failing. This approach complements institutional theory by providing additional variety to the binary opposition between legal and non-legal. Instead of focusing on the given norms, we focus on the debate over the norms.

This changing of the regulative environment begs the question of the mandate for the changes. When even national legislation processes often suffer from problems of guaranteeing representation related to the wants of the citizens, the process is even more problematic for representation when organizations represent (in some way) other organizations. Furthermore these organizations consist of actors driven by private interest and "limited liability". Under normal western democracies one citizen has one vote, which is used to select parliamentary representatives, who also have each one vote when making new laws. In other words, the procedural justice is aimed to guarantee the equality of citizens and it is based on the equality of subjects. In contrast, organizations of organizations set their own processes for representation, which are not based on similar equality, but their stake in the joint venture. Often the large incumbent companies have means to dominate the decisions. To summarize: the derived norms are suspect.

Taking into consideration the very limited number of parties involved in an organization of organizations, one could presuppose that the decision-making must be easier, more transparent and democratic, than in the context of a nation state. Second, members of the organization must have common and homogeneous interest as they have established the organization to secure and promote those goals. That is ultimately the pivotal reason why they

have joined the umbrella organization. However, their interests are not identical, but similar. By this we refer to the fact that different actors of one industry or branch have certain common goals, but they also differ in objectives regarding for example market segments, industry position, customer differentiation and leadership.

In addition, and more importantly, the structure of organizations of organizations is far from neutral and is not a consequence of any real deliberative process in the Habermasian (2001) sense. The structure reflects the industry structure where larger incumbent organizations have more say and occupy the most prestigious positions. In fact the opposite orientations of organizations are more essential than the common ones, but the latter ones are the driving force for formal cooperation. Mediation between organizations having different market segments, industry positions etc. is the fundamental aspect, which eventually shapes the nature of the organization of organization.

Furthermore, the actual negotiation processes are obscured to mask the internal divisions that could weaken the organizations of organizations. This has the side effect of increased secrecy, which in turn may dampen the necessary critiques and may remove due diligence from the leadership. Secrecy is evident also when they negotiate with each other. The needs for maximized secrecy and democratic deliberation remain in obvious tension – as the ACTA negotiations show.

The main downside is loss of accountability and the biased incentives concerning the organization which create the law. The constitutional acts and norms are enacted by the objects of the said legislation, which have quite clear incentives to spin them to their benefit. The democratic ideal of the empowered citizen participating in a deliberative process concerning the law is utterly sidestepped in the process.

## **Conclusions and discussion**

The findings confirm that the focal point of international lawmaking is transferring. New constitutional roles of organizations of organizations undermine the sovereignty of nation states and the traditional Westphalian system, as they are gaining more control over private regulation. This development lacks the deliberative elements expected of constitutive acts and leaves citizens in a bystander role. The interest-based structure of organizations of organizations guarantees that the norms created serve the objectives of their members rather than the common good. To balance the increased corporate power, citizens have built their

own parallel organizations (NGOs such as Electronic Frontier Foundation and international environmental groups) to negotiate as equals.

It is crucial to understand the changes in the regulative environment and how organizations of organizations shape them and therefore research on them is very topical. Our contribution in this paper remains mainly theoretical. Thus we call for more multi-disciplinary and empirical research on the organizing of organizations and especially their interplay with the changing international legal system. One interesting avenue of research would be the consequences of the convergence of law and management.

Institutional theory provides us the lenses to examine the different pillars. We stress the importance of organizations of organizations in transforming the regulative pillar instead of taking it as a given. Organizations are capable of pursuing their goals by changing, not only the cognitive and normative pillars, but also the regulative environment.

We observe a clear trend towards private actors shaping the legal sphere. The most vital outcome of this transition is the cancerous spread of norms and constitutional acts that undermine the rule of law and turn the public legal processes to serve a private interest. Enter the new sovereigns: organizations of organizations.

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