
Framing and Taming Post-National Rulemaking

Views from Public International Law, European Public Law and European Private Law

15 September 2011

The Royal Netherlands Academy of Arts and Sciences, Old Meeting Room
Kloverniersburgwal 29, 1011 JW Amsterdam

Organized within the framework of the project
‘The Architecture of Post-National Rulemaking’ at the University of Amsterdam Faculty of Law

Post-national rulemaking is not easily captured in one conceptual framework. It can be formal or informal, comes from many different sources, involves a diversity of actors and mechanisms, and is adopted in a large variety of procedures. It takes place in the international and in the European context – under public and under private law.

One of the many conceptual and theoretical challenges surrounding post-national rulemaking is the legitimacy of the process of rulemaking and its outcomes. Traditional conceptions of legitimacy may not easily apply to rulemaking beyond the state. In public international law, rules have traditionally been justified by state consent, but this is only capable of justifying rulemaking in treaty form. Alternative sources of legitimacy have been sought in democracy, participation or expertise, but all of these seem to possess limited explanatory or normative power. In European Union law, theories ranging from representative or deliberative democracy to delegation and regulation have been defended when addressing issues of legitimacy. Yet none is capable of fully grasping the complexity of EU rulemaking. In private law, post-national developments have led to a proliferation of private ‘rulemaking’ which is often claimed not to require any further legitimation. Yet, post-national private law appears to limit party autonomy much further than national private law traditionally did.

In view of differences between international law, European public law and European private law, it may be tempting to give up any ambition to identify a single set of elements of legitimacy applicable to all. However, it is also true that the boundaries between these categories are increasingly fluid. On the assumption that public and private rulemaking, as well as rulemaking in the international and in the European context do have sufficient commonalities, the question remains whether it is possible to find core elements that could legitimize both the process and its outcome.

The objective of the workshop is to discuss these and other issues surrounding the phenomenon of post-national rulemaking. The workshop will address three clusters of questions:

- How should we conceptualize post-national rulemaking? How can post-national rulemaking by public institutions and private or hybrid bodies be compared within the same conceptual framework? Can rulemaking at the European and international level be examined under a single conceptual framework?
 - Is the well-established distinction between public and private law applicable in the post-national sphere? Can we properly speak of rulemaking by private actors? Is private autonomy still the only legitimate base for post-national private law rulemaking?
 - Which elements of the compound construction of legitimacy are irreplaceable and can be applied to international and European, public and private law? What are the core elements necessary to legitimize the effects of post-national rulemaking? Or does the legitimacy of any type of rulemaking ultimately depend on who is affected by the resulting norm?
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9:00 Registration and Coffee

9.30 Session 1: Conceptualizing Post-national Rulemaking

Keynote speech: Nico Krisch, Hertie School of Governance

Discussants: Armin van Bogdandy, Max Planck Institute for Comparative Public and International Law
Stefan Vogenauer, University of Oxford

11:00 Coffee break

11:30 Session 2: Post-national Rulemaking and the Public Private Divide

Keynote speech: Harm Schepel, University of Kent

Discussants: Veerle Heyvaert, London School of Economics
Horatia Muir Watt, Sciences Po

13:00 Lunch

14:00 Session 3: Legitimacy

Keynote speech: Damien Chalmers, London School of Economics

Discussants: Carol Harlow, London School of Economics
Andreas Føllesdal, University of Oslo
Horst Eidenmüller, Ludwig-Maximilians Universität München

15:30 Coffee break

16:00 Session 4: Roundtable

Discussion of the concept paper and outlook

17:30 Reception
