

The Actors of Postnational Rule-Making

Contemporary Challenges of
European and International Law

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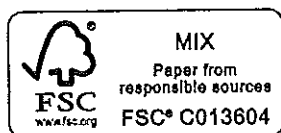
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Foreword

The new rulers: the actors and processes of the global space

Sabino Cassese

The phenomena of Europeanisation and globalisation are calling new actors to the collective decision-making processes at the global level, and are shaping the procedures through which they act in new ways.

Consider the following comments on globalisation by a German philosopher, by a Dutch-Argentine sociologist and by a Swiss-German political scientist, respectively:

By 'globalization' is meant 'the cumulative processes of a worldwide expansion of trade and production, commodity and financial markets, fashions, the media and computer programs, news and communications networks, transportation systems and flows of migration, the risks generated by large-scale technology, environmental damage and epidemics, as well as organized crime and terrorism'.¹

A good part of globalization consists of an enormous variety of micro-processes that begin to denationalize what had been constructed as national.²

[. . .] I suggest that we think of statehood as a product which is produced by the state in association with other actors [. . .].³

1 J. Habermas, *The Divided West*, Cambridge, Ciaran Cronin, 2006, p. 175.

2 S. Sassen, *Territory, Authority, Rights: From Medieval to Global Assemblages*, Princeton University Press, 2006, p. 1.

3 C. Zürcher, 'When Governance meets troubled States', in M. Beisheim-G. F. Schuppert (hrsg.), *Staatszerfall und Governance*, Baden-Baden, Nomos, 2007, p. 11. Zürcher continues by saying: 'It is sufficient to think of who provides security in Afghanistan or Tajikistan, domestic authority in Kosovo or Bosnia, or public services in Mozambique or Burundi. There are also international institutions and organizations in place to assume these functions – think of the UN transitional administration, the international forces in Afghanistan, or of the World Bank's suggestion to set up so called ISAs (Independent Service Authorities) in low income countries under stress (LICUS).'

These processes (denationalisation, communitarisation, Europeanisation and globalisation) bring new agents to the fore within the political arena, and require new procedures.

In studying these new realities, the first step must be to map the area, because, alongside States and international governmental organisations, there is a multitude of new actors, some of which do not have legal personality, such as epistemic communities; bodies that were once active only within States are now also active beyond their own territories. This book illustrates an initial sample of such highly diverse actors, together with their spheres of influence – regional authorities, the Presidency of the Council of the European Union, the European Union, EU lobbyists, the Inter-Parliamentary Union, academia. Preference is given to the European space, but some examples originate from other areas.

The second step is to enquire upon the nature of these new actors. The State is losing its central role, but through its fragmentation, it can ensure that its voice is heard in a different manner. For example, central banks are members of the Basel Committee, a global standard-setter. Global regulatory regimes include networks of national regulators, private regulators such as ICANN, and hybrid bodies such as the International Organization for Standardization (ISO). Behind the scenes, there are further actors, e.g. lobbyists, or the European Union when it acts in the United Nations arena.

The third step in studying this new geopolitical space requires an examination of the relations established by the new actors. While vertical interactions predominate in the State – due to the hierarchy of authorities – in this new space, horizontal relations prevail, as in the case of the EU and ASEAN. Horizontal links are functional to coordination or to other purposes, such as the export of one's own model.

The final problem concerns processes. It cannot be thought that new agents do not find new ways to interact and reach decisions together. In this respect, good examples are the EU's 'trilogue', contractual legislation, and the so-called 'postnational rule-making'. Just as the actors are not formalised, so too are the processes not formalised. 'Un-officiality' is the rule. Processes are complex and informal, and are based on bargaining and negotiation, as in the case of rule-making in the EU.

This book could not possibly cover this entire field, but provides a good set of examples as a starting point for research on the new rulers. Indeed, it is already possible to derive common patterns from the contributions collected herein, and attempt some generalisations.

The first conclusion that can be drawn is that the arrangement is fluid. As indicated in this book, the entire world of actors within this new space is in constant movement; suffice it to consider the EU, which was established by the treaties to be an 'ever closer Union'.

The second conclusion is that there is no eclipse of the State, but rather a restructuring of the State, which sheds the old paradigm of 'the State as a unit', but gains new roles as a disaggregated body.

The third conclusion is that it is a mistake to approach this area with the 'multi-level' paradigm. International and regional organisations, States and non-State actors are mutually interconnected within global governance structures, and follow the logic of collective action.⁴

Global regulation typically does not operate on two distinct, vertically separated levels, international and domestic. Rather, it functions through a web of interactions and influences, horizontal, vertical, and diagonal, among a diverse multiplicity of different regimes and actors [...].⁵

The fourth conclusion is that we need also a new lexicon for these new realities. Because there is no unitary legal order beyond the State – except for a few general principles – it is better to speak of the global 'space' and of global 'regulatory regimes'. Because there are many, diverse and non-uniform actors, it is necessary to resort to the word 'constellation'. The subjects that are active in this space have different features, are not subjected to one national rule, and operate in various legal dimensions; therefore, it is necessary to use a neutral terminology when referring to them (hence the word 'actor'). In any case, these points are made very well in the Introduction, to which readers seeking a more in-depth discussion are referred.

4 P.G. Cerny, 'Globalization and the Changing Logic of Collective Action', in *International Organization*, 1995, vol. 49, n. 4, Autumn, p. 595.

5 R. Stewart, 'The Global Regulatory Challenge to U.S. Administrative Law', in *New York University Journal of International Law and Politics*, 2006, vol. 37, p. 703.