Normative Standards and Global Law-Making

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Abstract
This contribution explores the meaning of ‘global law’ in private law. Private law relationships occur across borders more and more often, but does this also mean that the law governing these relations has become global? It is suggested that in law-making a connection can be made between different levels of regulation (international, national or regional) through the use of normative standards such as the ‘average consumer’ of EU law.

Keywords
private law theory; multi-level regulation

What does global law mean to a private lawyer? The words of Erasmus’ famous adagium ‘the World is my home’ seem true for many of us today and consequently many private law matters have obtained an international flavour. We travel, we work, we marry, we buy, we do business – often within our own country but often also in other parts of the world. That we have become more globally active does not mean, however, that the law governing these private law issues has become global. The majority of transactions and private law relationships are still governed by national laws and only a small part by transnational or harmonised law.1

Global law in relation to private law, therefore, must mean something else; in this short contribution I will explore what meaning it can have for private law. I will focus in particular on law-making in private law. From this perspective, globalisation has had a significant impact on the way that law is perceived. National legislators are no longer central to law-making, in particular in multi-layered systems of regulation such as the EU. New actors and new sources of rules, whether they can be called ‘law’ or not, have

1 For an overview and analysis of instruments of transnational law, see Roy Goode and others, Transnational Commercial Law (two volumes, Oxford University Press 2007).
appeared in the form of transnational or supranational law and perhaps are most visible in self-regulation.

This contribution consists of three parts. Part 1 sketches the development of ‘global law-making’ in private law and proposes a new theoretical model aimed at law-making across different levels of regulation. Part 2 tests the model through a short case study on European consumer law. Part three draws together the lines that were set out in the previous parts.

1. Global Law-Making and Private Law

To start with, the idea of ‘global law’ is somewhat elusive. It is attractive to see it as a new paradigm or perspective on the nature of law in times of globalisation, but it could equally well be posited that it is an analytical tool that helps us understand processes of law-making and legal development in the world without those laws necessarily having a global (or international, or other non-local) nature. The former view relates more to substance, the latter - to form.

The first view demands that we scrutinise the essence of law and ask ‘what is law?’, presuming that the answer to this question differs depending on whether rules stem from national legislation or from other, international, supranational or even private sources. The latter view, by contrast, does not so much ask as to what law is, but seeks to formulate an analytical framework, or organising concept, that helps us understand law in a world where the focus is shifting away from national legal orders. Either view has commendable points and I will, within the limited space of this contribution, not seek to choose between them.

There is, however, an interesting connection that can be made between substance and form in ‘global law-making’ within the sphere of private law. Global law-making – or: post-national law-making, both terms denoting the creation of legal rules in an international or multi-layered legal order – requires a perspective that is markedly different from law-making in national legal systems. Multiple actors can be involved (e.g. legislators but also private parties through self-regulation) who develop rules at different levels of regulation. The substance of these rules can diverge precisely because in this format of law-making several different actors are involved, with different roles and aims. One can think of legislators, courts, regulators, and private parties which self-regulate. The question is how their

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