

13. The rule of law in the face of rising private powers

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Introduction

The Rule of Law, as meta-normative framework for most western legal systems, is based on the conviction that the exercise of power needs to be controlled. Traditionally, legal debates on the rule of law focus on the exercise of public power. The Human Rights (HRs) regime resonates with this view, whereby only States are bearer of obligations. As private actors exercise increasingly more power, the rule of law can be seen as a meta-normative framework of use also to constrain public power exercised by private actors. As put by legal theorist, Martin Krygier (2008) 'the scope of the reach of institutions of restraint' of power should be broad enough to include both state and non-state actors. If institutions of restraint 'are to matter, they have to be able to reach those who matter.' In short, the need for control of power does not distinguish between public or private ownership of power. This particular insight may be read also in different manifestations of law, such as antitrust law. For example, the former US senator John Sherman who wrote the US Antitrust Act of 1890 famously stated: 'If we will not endure a king as a political power, we should not endure a king over the production, transportation, and sale of any of the necessities of life.' This conviction led one hundred years ago to the adoption of a series of laws that regulated private power in the national context. Katharina Pistor in her book, *The Code of Capital*, goes back to a 1927 publication by Cohen showing how property and sovereignty (as dominium and imperium) mirror each other. While the tensions between dominium and imperium had been already long ago under the radar, framing the exercise of modern transnational private power is still precarious. The raising inequalities within countries worldwide, as documented among others by Piketty, may be the result - among other things - of the lack of attention by contemporary legal systems (and scholarship) of the need to constrain the exercise of power by private actors. Rather than assume that institutions wielding public power can effectively govern power by private actors, novel ways of conceptualizing a rule of law framework to address power by private actors more directly need to be developed.

Within the wider ESL and EUR this project connects and resonates, among other research, with research into such areas as private actors & international law (with various projects within the ESL-IEUL department), international economic law (prof. Arcuri research project on investment agreements and the rule of law), research into the theory of rule of law and legal pluralism (Prof. Taekema and Prof Van der Burg, with EUR-ISS), and such areas of expertise as law & sustainability, competition law, and international trade and investment law.

Postdoc project

The postdoc on *The Rule of Law in the face of rising Private Powers* will be responsible for developing innovative and interdisciplinary research, which studies the contemporary challenges posed by the increased exercise of public powers by private actors. Effective

control of the exercise of transnational private power has thereby to address two very different challenges: On the one hand, private actors exercise power whose impact on the life of citizens is comparably intrusive as public power ('privatization of sovereignty'). On the other hand, traditional public power is steadily changing its shape and features, with States behaving like market actors. Examples of the above are investment contracts concluded between States and multinational corporations, mainly for the exploitation of natural resources, and the access for foreign investors to investor-State dispute settlement (ISDS). Such manifestation of power is visible at different levels, including through the intensified external action of the EU, as evidenced by the recent conclusion of a number of International Investment Agreements like CETA. Other examples include ways in which transnational regulatory platforms (e.g. International Swaps and Derivatives Association; ISO, etc.) entrust in various ways rights on private actors de facto limiting the policy space of sovereign actors. This state of affairs raises several questions: what are the existing and/or imaginable legal avenues to control power exercised by private actors? To what extent are these avenues already employed? What are the limits and potential of such avenues? What conceptualization of the rule of law may serve to evaluate these legal avenues? Drawing on the rich literature on Rule of Law, critical legal studies and empirical work in transnational socio-legal studies, the postdoc researcher will further develop the conceptual and normative frameworks to analyse and assess such legal avenues and their alternatives. The theoretical research may be complemented with case studies, if the postdoc researcher's own elaboration of the project requires this.