

Introduction

In the last two decades we have witnessed a proliferation of new forms of self-regulation by multinational corporations (MNCs), as well as social regulation by private actors such as nongovernmental organizations (NGOs) and financial institutions. Among these new forms of regulation, usually referred to, collectively, as "soft law," are corporate codes of conduct, sustainability indexes, international standards, and certification programs. A fundamental question that has emerged from this rather new phenomenon is: How does soft law interact with the more traditional tools of regulation, referred to in the literature as "hard law"?

Traditionally, the old and new forms of regulation were described and analyzed in terms of sharp dichotomies such as state v. non-state, mandatory v. voluntary, and organized centralized regulation v. uncoordinated private initiatives. The merits and effectuality of soft and hard law were also hotly contested by two opposing camps. Some scholars remained true to mandatory, centralized state regulation and dismissed the non-state voluntary initiatives as mere lip service at best, and as covering up actual injustices (also known as "greenwash") at worst. Other scholars, emphasizing states' incapability or unwillingness to regulate and control MNCs, have welcomed the regulatory overtake by NGOs and MNCs. An important feature of this literature is that whether these new forms of regulation have been dismissed or welcomed, both camps have overlooked the connections, relations, and interactions between hard law and soft law.

More recent trends in the proliferating literature about soft law have revealed a much more complex and nuanced picture. Many studies have shown that states have not, in fact, been made redundant and remain a significant regulatory player, while corporations are not omnipotent. Moreover, they have pointed to interesting hybrids that have emerged between soft law and hard law in which public and private actors cooperate as well as contest each other's regulatory solutions. The collected articles in this issue take part in and advance this new scholarly trend of overcoming the hard/soft dichotomy. They offer the concept of a terrain, a continuum along which hard and soft are not always or necessarily on opposite sides, but rather overlap, interact, and influence each other in intricate and complex ways. Some authors urge us to neglect the notion that hard command-and-control law is inherently more powerful than soft law and point to the fact that soft law is no longer purely voluntary, and is thus no less, sometimes even

more, binding than states' traditional regulation. Others contest the notion of states' withdrawal from the regulatory sphere by exploring the various ways in which states still influence MNCs' conduct and self-regulation. Recognizing hard/soft hybrids helps in identifying the dynamics that have been formed between multiple actors, such as states, corporations, social organizations, financial institutions, worker organizations, and consumers.

The questions discussed in this issue are diverse and deal with many aspects of the "hard law/soft law terrain," among them: Which actors in the production chain are responsible for workers' welfare and for environmental protection? How do state-based hard law and private soft law interact and influence each other? In what cases is the hard/soft hybrid more evident and what is its nature? How do soft law initiatives evolve and how are they shaped in correspondence with hard law? When are soft law mechanisms effective?

The issue focuses on these questions in the context of labor rights and the protection of the environment. These two fields share a similar critique of traditional (hard) regulatory measures and lie at the center of the newly emerging private forms of regulation. The focus on labor and the environment allows an in-depth analysis of each, but also facilitates a comparison between the two subject matters. Thus, throughout the collected articles the authors engage with questions regarding the similar and different forms of regulatory hybrids in each of the fields. The questions raised include the following: Does the state preserve more power, control and dominance in either of the fields, labor or environment? In which of them do we find a stronger coherence between hard and soft law? Which goals are unique to soft/hard hybrids in each field and which are common? Which soft and hard measures are more typical in labor rights and which in environmental protection? These questions are discussed in the articles, through both theoretical and empirical lenses. The first four articles offer a broad analysis of the hard law/soft law terrain, while the latter five articles focus on specific soft law mechanisms, mostly in the form of case studies that illustrate and explicate broader phenomena.

In the issue's opening article, Kevin Kolben analyzes three prominent governance theories, namely systems theory, responsive regulation, and new governance. He questions their aptness for explaining the evolving field of transnational private labor regulations (TPLR). Both — governance theories and TPLR — are inherently related to the regulatory gap described above; both of them offer, whether in theory or in practice, new forms of decentralized and nongovernmental regulations. However, Kolben argues that without careful modification and adaptation, prominent governance theories are unable to properly and normatively address the goals of labor

regulation and industrial relations, especially in developing countries. This is due both to the fact that those theories have been developed in the context of developed countries' regulatory systems in non-labor fields, and to the extreme decentralization of the state suggested by them. The article therefore presents an "integrative" approach: re-centering the state while at the same time recognizing and leveraging the important function that private regulation plays.

Yossi Dahan, Hanna Lerner, and Faina Milman-Sivan theorize another aspect of private labor regulation, while raising the question: Who is responsible, in this age of globalization, for remedying workers' unjust conditions? They propose an analytical framework for allocating responsibility for the protection of workers' rights in the global labor market. The article focuses on the normative concept of responsibility and its implications for the elaboration and enforcement of international labor standards. Examining the unique characteristics of the global labor market, the article argues that a "shared responsibility" exists between a complex network of agents and institutions that take part in global production and services: employers, private companies, consumers, states, and international institutions. The article analyzes the practical implications of the different conceptions of collective responsibility, and proposes four principles to guide the allocation of responsibility for remedying the unjust conditions of workers in the world, based on measures of connectedness, capacity, benefit, and contribution.

Vanitha Sundra-Karean is concerned by the decentralization of the state with regard to labor regulation. Using the case of Malaysia, she suggests a judicial, human rights-inspired status theory that would make it possible to constitutionalize private initiatives, thus "hardening soft law." Combining Wesley Hofeld's theory of rights and Ronald Dworkin's theory of interpretation, Sundra-Karean urges the Malay courts to invoke the right to livelihood and use it to incorporate soft law initiatives into tribunal awards and court judgments.

The following article, by Marc Allen Eisner, turns to environmental regulation, contesting one of the common perceptions of private environmental governance as a market-driven phenomenon that firms use in order to achieve cost-based or differentiation-based advantages. Contrarily, Eisner exposes the state's major role in the development of private regulations. He shows that historically, economic crises have stimulated significant regulatory changes that have resulted in an expansion of public regulation and a diminution of self-regulation. Interestingly, the regulatory changes following economic crises were not only economic in nature; major changes may also be found, among other areas, in environmental protection.

Moving to the articles that explore specific soft law mechanisms, Tim Bartley's article corresponds with Eisner's claim regarding states' major influence on the development of private regulation. Looking beyond the "regulatory void" or "governance gap" conceptions of private regulation, Bartley suggests a theory of layering of multiple rules. Through the case of private certification initiatives in the realms of the environment and labor in Indonesia — specifically regarding community rights in sustainable forestry standards and freedom of association in fair labor standards — he demonstrates how conflict and complementarity between public and private standards and actors structure the practice of private regulation. He then develops a framework for empirical research in other countries and other regulatory domains.

Oren Perez explores another soft law regulatory tool: the sustainability indexes. Focusing on private environmental governance, he encourages the readers to forego the binary distinctions between soft law and hard law, as well as between "greenwash" and committed sustainability, and notice the complexity of the emerging regulatory field. Using as case studies the two leading global environmental indexes, FTSE4Good Index Series and Dow Jones Sustainability Indexes (DJSI), Perez shows that the ensemble of several private (soft) regulatory initiatives generates positive and stable enforcement of environmental standards that is no less efficient than public (hard) regulation. However, Perez also points to the limits of such "soft" ensembles, particularly regarding mobilizing radical changes.

Another favorable view of soft regulatory initiatives is offered by Deborah E. Rupp and Cynthia A. Williams. The authors challenge the traditional view of human beings as strictly self-interested players whose behavior is driven solely by calculated cost-efficiency incentives, and propose varied and flexible legal regulatory structures to correspond to this increasingly rampant perspective. The article encompasses the gamut of emotional, psychological and moral incentives that have recently been gaining recognition as important factors in driving human behavior, and incorporates them into soft law regulatory structures. It is suggested that, notwithstanding their acknowledged limitations, the dynamic character of such structures often renders them more efficient tools in regulating human behavior and promoting generally desired behavior than the traditional, strict hard law structures. Finally, the authors demonstrate their suggested theory in the context of global banking and the Equator Principles.

Guy Mundlak and Issi Rosen-Zvi examine a different aspect of the transformation from traditional command-and-control regulation to new governance. Analyzing corporate codes of conduct, corporate social responsibility (CSR) reports, and associated documents concerning labor and

environmental norms of fifteen leading MNCs in the textile, petrochemicals and automobile industries, they seek to explore the "market of virtue" supposedly created by the corporations. Contrary to the common perception that the codes and CSR reports serve to inform consumers regarding the corporations' responsible social and environmental policies and commitments and single them out as being more responsible than their competitors, the authors conclude that these documents in fact do not serve this function. Rather, they raise some hypotheses about the actual function of the codes and reports as being internally oriented, directed at agents within the corporations and at firms' competitors both within and outside the sector. The signaling of virtue is thus intended primarily to encourage other firms to adopt similar CSR measures, and thereby to overcome collective action problems, such as a "race to the bottom."

The last article in this issue turns to yet another soft law mechanism: international standards. Its author, Halina Ward, took part in developing the International Guideline Standard on Organizational Social Responsibility (ISO 26000) for the last five years, and provides us with a rare peek into the process of its making. In her detailed analysis, she examines ISO 26000's principles *vis-à-vis* related norms and laws at the supranational, international and national levels. Ward views the negotiation history of ISO 26000 as a rather successful example of the novel concept of "global democracy," but urges her readers to develop more suitable theoretical frameworks as well as practical tools that would improve future standards-setting processes.

The articles collected here are the product of a conference held at the Buchmann Faculty of Law, Tel Aviv University, in June 2010. The conference was organized by Guy Mundlak, Issi Rosen-Zvi and Ronen Shamir. *Theoretical Inquiries in Law* thanks the organizers for bringing together an outstanding group of contributors, Ruvik Danieli for style-editing the articles, and all the conference participants and commentators. Comments on the articles published in this issue are available online in the *Theoretical Inquiries in Law Forum* (www.bepress.com/til).

The Associate Editor and Assistant Editors

