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Part I

INTRODUCTION

CHAPTER 1 The Historical Canvas

Most of the significant globalization of rules occurred in the twentieth century, particularly since 1970. This globalization has proceeded furthest with business regulation because of imperatives such as those of international trade, saving the planet from environmental collapse and regulating nuclear and chemical weapons. Still, most of the rules that have the greatest effect on our lives are extremely local – the rules that regulate our family lives, workplaces and neighbourhoods. The globalization of business regulation has been a historically uneven process. While the globalization of business rules has been mostly partial and recent, the globalization of many of the foundation concepts in the laws that regulate business has been total and existed for centuries. For example, all states have elaborate written laws enforceable by institutions called courts, where outcomes can be tested under the guidance of rules of evidence. Once those laws were carved in stone; now they are universally printed on paper; soon they will be universally accessible electronically. We know of no contemporary national legal system that does not confer powers on a central bank, that does not tax centrally, that does not have a concept of a legally enforceable contract or of crime. Legal systems do vary (though decreasingly so) according to whether business corporations can be conceived as having committed a crime, but they all enforce sanctions against corporations collectively (as distinct from only against their individual owners). So we need to be careful, in detecting differences in the world, not to lose sight of the fact that many of the fundamentals of business regulation are utterly global.

Outside Europe and the US, even at the level of rules, the extent to which states have become rule-takers rather than rule-makers is greater than most citizens think, largely because when governments announce new regulatory laws they are somewhat embarrassed to disclose that the national legislature voted for those laws without having any say in shaping them. As Australian authors, we note, for example, that for years some of Australia's air safety standards have been written by the Boeing Corporation in Seattle, or if not by that corporation, by the US Federal Aviation Administration in Washington. Australia's ship safety laws have been written by the International Maritime Organization in London, its motor vehicle safety standards by Working Party 29 of the Economic Commission for Europe and its food standards by the Codex Alimentarius Commission in Rome. Many of Australia's pharmaceuticals standards have been set by a joint collaboration of the Japanese, European and US industries and their regulators, called the International Conference on Harmonization. Its telecommunications standards have been substantially set in Geneva by the International Telecommunication Union. The Chair (and often the Vice-Chair) of most of the expert committees that effectively set those standards in Geneva are

Americans. The Motorola Corporation has been particularly effective in setting telecommunications standards through its chairmanship of those committees. As a consequence, Motorola patents have been written into many of the ITU standards that we all must follow. This global privatization of public law seems benign to some, though not to the person who asked how many Microsoft engineers it took to change a lightbulb. 'None', was the answer. Bill Gates simply declared darkness the industry standard.

Many chapters show the importance of the Roman empire to the globalization of foundation concepts. The ancient Greek, Chinese, Indian and pre- and post-Islamic Arab empires have left some quite significant traces in various chapters, as indeed have smaller maritime powers such as Rhodes. Diasporas of Italians, Chinese, Jews and Armenians across the globe after the heyday of the empires that had encompassed them are important to global modelling of fundamental concepts like bookkeeping rules and the very idea of the business corporation. Some of the great early modern empires, such as the Habsburg empire, however, have left much less significant globalized legacies, though there are some minor Habsburg traces in the regulation of telecommunications (Chapter 14), food standards (Chapter 16) and even competition law (Chapter 10).

When we say the history of business regulation has been uneven, we refer to the fact that after the sacking of Rome the legacy of Roman law was lost to Europe for almost a millennium. We refer to the reversal of the liberalization of trade rules under the British hegemony of the nineteenth century, the resulting collapse of international trade, the beggar-thy-neighbour policies of early US hegemony and the unravelling of the global financial system in the early 1930s. We see the US Federal Reserve and the Bank of England leading the world down to financial deregulation in the early 1980s, then leading global prudential standards back up through the G-10 after the banking crises of the mid 1980s. In reverse, the US Federal Communications Commission led the world into an international regime to control communications in space in the 1960s, then dismantled it piece by piece in the 1980s.

It is a mistake to see history in terms of the rise of powerful states like Russia and Germany unifying regulatory laws across a large swathe of national territory, then later working with European states toward European harmonization/mutual recognition and ultimately with all states toward global convergence. Not only was this cumulative story interrupted by Russia in 1917 and East Germany in 1945 changing to a radically oppositional regulatory order, but harmonization within states as a building-block of harmonization across states is not what happened. Considerable inter-state harmonization of weights and measures, for example, was negotiated in the ancient world to facilitate trade, particularly between North Africa, the Middle East and southern Europe. Across the Indus Valley of the Indian subcontinent in 2300–2000 BC, there was a 'wealth of standardized weights and measures' (Mann 1986: 106). No *nation* had unified weights and measures laws until the nineteenth century (Mann 1986: 423); the International Bureau of Weights and Measures was established in 1875. In the second millennium, when Egypt was the leading gold producer, gold appears to have operated in the manner of an international currency. The vast ancient Chinese civilization probably has the longest history of coinage and, through the invention of paper money, helped unify what remains today more than a fifth of the world's people. In contrast, the English nation-state did not possess a uniform coinage until the 1160s, nor France until 1262.

We think Michael Mann (1986) is right that the building of capitalist regulatory institutions in medieval Europe is generally underestimated, just as the significance of the northern Italian

Renaissance is somewhat overplayed. The shared identity of Christendom was the important element in the pan-European medieval harmonization of so many of the fundamentals of business law (see the discussion of the law merchant in Chapter 7). There was northern Mediterranean leadership toward 'general recognition of norms regarding property rights and free exchange. These were guaranteed by a mixture of local customs and privileges, some judicial regulation by weak states, but above all by the common social identity provided by Christian Europe' (Mann 1986: 504). Honouring contracts was a Christian thing to do, and it obtained specificity of meaning in the informal context of this shared merchant identity rather than as a result of canon or state law, which followed business custom more than led it.

A summary might be that the most important conceptual legal foundations of globalized business regulation were laid in ancient Rome and medieval Western Europe. The most important institutional organizational foundations were laid in the three decades after Bretton Woods (1944–74). Most of the limited actual harmonization and mutual recognition of rules has been accomplished since 1974.

Since that date we find that regulation of the environment, safety and financial security have ratcheted up more than they have been driven down by globalization. Normatively, one can have the view, as we do, that the environment, consumer product safety, occupational health and safety and transport safety are appallingly underregulated in most of the world. But globalization cannot be blamed for this state of affairs.

While ratcheting-up is more common than races-to-the-bottom in the regulation of safety and environment, the opposite is true of economic regulation. In domains of economic regulation beyond those that anchor financial security (e.g. capital adequacy standards for banks), we find that ratcheting-down has been the dominant dynamic – globalizing deregulation. The striking exception to this dynamic in economic regulation has been intellectual property, which has been ratcheted-up.

Among the environmental, safety and financial security domains that have been ratcheted-up are chemicals regulation, oil spills at sea, ozone-depleting substances, whaling, acid rain, nuclear safeguards and safety, occupational health and safety, discrimination in employment, freedom of association, child labour and slavery, the regulation of prescription drugs, illicit drugs and tobacco, food standards, safety at sea, motor vehicle standards, air safety, prudential regulation, accounting standards, regulation of corruption, securities and money-laundering.

Among the other domains of economic regulation where the dominant dynamic of the past quarter-century has been more one of deregulation are licensing restrictions on financial institutions, exchange rate controls, tax competition driving rates down and eliminating taxes, some (limited) driving-down of corporate law standards through corporate law havens and competition toward limited liability, reduction and elimination of tariffs, technical barriers to trade, restrictions on the free movement of investment, labour markets and professional services (beyond the domain of core security standards), breaking up of cartels and restrictive business practices, telecommunications and the economic regulation of air transport.

While the globalization of business regulation has been non-linear, in this book we have been able to reach some conclusions of general import about the process. In struggling with our data to reach these conclusions we realised an ethical dilemma lurked within them. We concluded that a basis for the strong dominating the weak, the rich defeating the poor in the world system, was their superior capacity to control and use knowledge. We hoped that we were enhancing knowledge of what makes global business regulatory systems tick. So we decided to pursue

knowledge that would be illuminating to social scientists, and to place that knowledge in a framework that would be most useful to the weaker players of global regulatory games – citizen groups and developing countries. Hence, after listing (Chapter 5) the forty-four empirical conclusions that we regard as the most important, Chapter 6 foreshadows the strategic thinking of the final chapter about how our insights might be deployed to enhance the sovereignty of ordinary people, particularly those in poor, undemocratic nations. Before doing that, Chapters 2–4 outline the objectives, concepts and method of our inquiry. Part II applies this method to thirteen cases that we regard as the most important domains of business regulation. Part III analyzes the lessons from the large sweep of empirical materials discussed in Part II.

How to Read this Book

This is undeniably a big book. One way to read it is to begin with Part I, paying particular attention to the conclusions in Chapters 5 and 6. Then the summary Tables 20.1 (p. 476), 21.1 (p. 508) and 22.1 (p. 532) are worth a look. Next, readers could skim the early, more foundational chapters of Part II (e.g. Chapters 7–12), then pay attention to those parts of Chapters 13–19 of special interest to them. Alternatively, they could read the opening section on the history of the globalization of regulation in Chapters 7–19 and the conclusion in each chapter. Chapters 20–26 (Part III) are important for all readers.

CHAPTER 2 Globalization and Regulation

Overview

Chapter 1 showed that the globalization of business regulation is a process with a long history. Roman legal principles continue to be transmitted through our regulatory traditions even though Roman armies have long ceased marching. In this process both state and non-state actors strive to establish principles of their choosing using the mechanisms at their disposal. In each of our case studies (Chapters 7–19) we present globalization as a contest of principles – a contest, for example, between the principle of harmonization and the principle of national sovereignty. Our study identifies a number of recurrently important principles (summarized in Chapter 21) and mechanisms (summarized in Chapter 22) in global business regulation. The contest among actors (summarized in Chapter 20) is unequal. Actors like the US can mobilize coercion mechanisms that are not available to weaker actors like community groups. Actors with large markets can impose trade sanctions. When staring at defeat in one international forum, they can shift the contest to a more favourable forum (Chapter 24). Yet there is one mechanism that weaker actors can use to shape regulatory outcomes – the mechanism of modelling (Chapter 25). Through devising and proliferating alternative models of regulation, the weak create opportunities for themselves to change existing regulatory orders.

In the thirteen case studies in this book no one actor appears as master of the world. Similarly, there is no master mechanism of globalization. Instead, there are webs of influence (Chapter 23). We divide these webs of influence into webs of coercion and dialogic webs. We find that actors prefer to work through webs of dialogue rather than webs of coercion. Understanding the different strands that make up these webs is fundamental to accomplishing global regulatory change. With this understanding, strategies can be developed for intervening in the webs. Successful interventions are not, as our case studies demonstrate, confined to powerful actors. Dialogic webs offer individuals the possibility of micro action to secure macro change. We do not claim that possibilities for micro action pervade dialogic webs, merely that these webs sometimes allow individuals to bring about globalization sequences that culminate in global regulatory change. There are no simple logics or manuals on how to do this. Much as chess players have to learn to choose fruitful lines of attack from a potentially overwhelming range of complex sequences of moves, so actors faced with the complexity of globalization must learn to identify the web strands that will allow them to influence the process of globalization.

Developing strategies to enhance citizen sovereignty is the subject of the final chapter of this study (Chapter 26). Global regulation does not necessarily rob citizens of their sovereignty and can, under conditions that we discuss, increase it.

Globalization

Three distinct kinds of globalization are relevant:

- 1 the globalization of firms;
- 2 the globalization of markets;
- 3 the globalization of regulation.

Each type of globalization involves, at base, a comprehensive spread of a phenomenon. Global firms are firms which, originating in a specific territory, spread their operations through corporate groups and structures to other territories. Markets are where buyers and sellers meet. In the case of global markets, buyers or sellers from any one territory can meet (physically, through agents or electronically) with buyers and sellers from any other territory to conduct transactions. Financial markets are the standard example of genuinely global markets. The globalization of regulation involves the spread of some set of regulatory norms. The globalization of regulation does not mean that regulation has necessarily harmonized. Most states now have patent law (globalization), but there are many differences in the level of rules between those systems, for example in the scope of what can be patented.

Globalization is a process of degrees. Holm and Sorensen's (1995: 1) definition of globalization as the 'intensification of economic, political, social and cultural relations across borders' nicely epitomizes this claim. A phenomenon does not have to traverse the entire globe before it can be conceived as part of globalization. We can add that the more convergent the phenomenon in question, the stronger the globalization. For example, patent systems that move toward the same set of rules are more globalized than those that simply recognize the same basic principles of patentability.

Despite its length, this book is narrow in its focus upon the globalization of business regulation. The role of transnational corporations (TNCs) in the international economy is an established field of study. Perhaps the most popular topic in the globalization literature is the globalization of markets. This literature has provoked scepticism. The evidence to which sceptics point is economic evidence relating to lower than expected levels of market integration for a genuinely global economy (Held et al. 1999: 5). It is important to understand that the connections among processes of globalization of markets, regulation and firms are contingent. Even if a particular market turns out not to be globalized, it does not follow that the regulation of that market is not global regulation or that the firms active in that market are not global firms. The examples below reveal the contingent nature of the relationship between the three types of globalization and why scepticism about the existence of one does not warrant scepticism about the existence of the other two.

Market globalization without regulatory globalization. The market for gambling has substantially globalized, with Internet gambling and high-rollers being flown to casinos under special

deals to attract their custom. But at the time of writing the regulation of gambling has not globalized: different states regulate it in completely different ways.

Regulatory globalization without market globalization. In Chapter 15 we see that standards of Good Manufacturing Practices and many other requirements for prescription drugs have substantially globalized in recent years. Yet markets here are not global. In many of the biggest markets, the state is a monopsonistic buyer of most prescription drugs. The state then supplies the drugs to citizens as a welfare benefit. In these regimes states dictate the prices they pay; as a result there is no global price for a product. The product can sell in one market for many times the price it sells in another. There are also cases where regulatory globalization in fact prevents market globalization. For example, if global intellectual property laws allow the prohibition of parallel imports, it follows that intellectual property right holders can price-discriminate between markets by granting the right of importation to an exclusive agent (Walker 1998). The price, for example, that a person pays for books in Australia is nothing like the price that a person pays for the same books in the US, even allowing for transport costs.

Globalization of firms without market globalization. The preceding example reveals how there can be globalization of firms without globalization of markets. In no industry sector are the largest corporations more globalized than in pharmaceuticals. The top twenty firms are quintessential transnationals that have subsidiaries in all the largest markets and many of the smaller ones.

Globalization of firms without regulatory globalization. There are global media companies, such as Rupert Murdoch's News Corporation. There is also a global trade in audio-visual services such as film and TV programs. With some qualifications, the regulation of media remains a national affair. States have different laws on matters such as the allowable concentration of media ownership, the kind of pornography or politics they tolerate in the media and the amount of domestic content they require.

Principles, Mechanisms and Actors

These three concepts are foundational to the theories that we develop. Chapter 4 offers a detailed analysis of them. Each case study is structured around the idea that regulatory globalization is a process in which different types of actors use various mechanisms to push for or against principles. Principles serve as the infrastructure of global regulation – they pattern the complex regulatory superstructures that follow them. Principles are abstract prescriptions that guide conduct. Their relationship to other kinds of norms are discussed in Chapter 4. Mechanisms are tools that actors use to achieve their goals. In this study we limit ourselves to examining the mechanisms that are closely linked to the intentions and goals of actors – the devices that bring about their desires, we might say. Coercion and the giving of rewards are two examples of mechanisms that we analyze. More abstract mechanisms such as evolution or rationality are not part of this study. Our list of actors, as an examination of Table 20.1 (p. 476) will show, is reasonably self-explanatory.

Regulation and Enforcement

Modernity cannot be comprehended without understanding regulation. This is most vividly illustrated in the final two sections of Chapter 15, where we show that the wave of mass addiction to

different drugs is a distinctively twentieth-century phenomenon. We conceive mass drug use in Weberian terms as a calculated attempt by individuals to regulate their bodies¹ – to control pain, lose weight, stimulate, calm, energize, instill confidence, work harder, run faster. National drug control regimes reinforce states' capacities to regulate this bodily self-regulation. Then, since 1909, global regimes appear to regulate national regulatory regimes. Regulation of regulation of regulation. Our objective is to show, in a distinctive way, that there are few projects more central to the social sciences than the study of regulation. Michel Foucault can be read as sharing this objective, though our method is very different from his. It is the regulation of scholarship by the mainstream disciplines of the social sciences that has obscured the centrality of regulation as a topic. The global perspective on regulation we promote not only reframes individuals as subjects as well as objects of regulation (as in the drug case) and states as subjects and objects of regulation (by Moody's, the IMF, the Rothschilds and Greenpeace). Understanding modernity, we find, demands the study of plural webs of many kinds of actors which regulate while being regulated themselves.

We have conceived the globalization of business regulation broadly as the globalization of the norms, standards, principles and rules that govern commerce and the globalization of their enforcement. Our starting assumption was that a globalization of rules without a globalization of enforcement would not be a process of great consequence. Empirically, we found this assumption to be false in the course of our research. Globalized rules and principles can be of consequence even if utterly detached from enforcement mechanisms. Rules or principles do not have to be incorporated into state law or international law to have significance. Modelling of self-regulatory principles and the rules of the private justice systems of corporations are crucial to understanding how the globalization of regulation happens. Chapter 23 shows the importance of one globalization sequence that starts with a globalization of business practice, an instance being the way the law merchant in the Middle Ages began to globalize ideas of contract and property (Chapter 7).

The chapter on property and contract covers terrain that Western lawyers would call private law, while the remaining chapters predominantly discuss public regulatory laws. The private/public law divide is not important in our analysis. Our object of study was the modes of regulation of business that our informants said were most fundamental to constraining and enabling business transactions. There are other private law concepts, such as tort, and public law concepts, such as crime, that are relevant in most chapters as tools for enforcing the globalization of rules. Given the way our webs of control analysis evolved, we found it better to include discussion of these recurrently important strands in all chapters.

1 Drug use is simply the most widely used and consequential technology for the regulation of bodies. Others are contraception, exercise, psychotherapy, diet, bulimia, alarm clocks, sex-change operations, ECT, brassieres, meditation, perfume, anger management courses, cosmetic surgery, pacemakers, straitjackets, seat-belts, prisons, workstations, education, electronic bracelets, acupuncture, aphrodisiacs, tanning studios, spectacles, tampons, hypnosis, massage, orthodontics, muzak, corrective running/walking shoes, drill, virtual reality devices, tooth-paste, castration and prayer. Perhaps only castration and prayer, from this list, have not become globalized and regulated by institutions such as churches, corporations, professions and states. Even so, we cannot understand why there are fewer eunuchs now than there were formerly without understanding national and global regulation of slavery (Chapter 6) and we cannot understand why there has been deregulation of prayer by churches, schools and states without understanding constitutional change to separate church and state and the globalization of human rights to regulate freedom of religion. More generally, we show that where deregulation occurs, it is usually associated with the deployment of regulatory technologies for securing deregulation.

CHAPTER 3 Method

Interviews and Informants

The domains of regulation chosen were those that a previous national study (Grabosky & Braithwaite 1986) had identified as the domains covered by the most important 101 business regulatory agencies in Australia. That study warranted some claim to being systematic in its coverage of the most consequential fields of regulation. As the most comprehensive study of the business regulatory agencies of a single nation, it laid a foundation for the sweep of this global study of regulation. Second, sticking with the same domains meant that one of the authors began this study with knowledge from having interviewed top regulators in ninety-six regulatory agencies and read all acts and key policy documents, for at least one country. Third, we could ask those national regulators who were the crucial players at the global level for us to interview.

As our interviews and reading proceeded, new types of actors emerged as important in shaping the globalization of different forms of regulation. Similarly, it became clear that the actors recurrently mentioned some principles in explaining what the globalizers were pursuing or the resisters were resisting. Our interviews therefore made sense of a view that globalization might be understood as a contest of principles. We are not the only scholars to reach this conclusion: for example, Meyer (1994: 128ff) and Teubner (1997) describe the resilient softness of the *Lex Mercatoria* as 'more a law of values and principles than a law of structures and rules' (Teubner 1997: 21). Finally, our informants spoke of what we came to call 'mechanisms of globalization'. The research was able to identify recurrently important mechanisms.

A deficiency in selecting what contemporaries regard as the most important domains of regulation for study today is that we neglect forms of regulation that were more important in an earlier era. For example, the regulation of postal services is not included, yet it was probably the first elaborate form of business regulation to develop. Globalization of this industry's regulation works so smoothly today that we take it for granted. The Persian empire 2500 years ago set up a sophisticated system for regulating mail deliveries (Luard 1977: 11). Roman, Arab and Habsburg (under the entrepreneurship of Franz von Taxis) international regimes followed. In 1670 there was a postal treaty between England and France. In 1863 there was the Paris Conference, which ultimately led to the establishment of the Universal Postal Union, the first intergovernmental organization with a permanent secretariat, in which most of the world participated by the late nineteenth century (Coddington 1964).