VOLUME 2 ISSUE 1

CSR LRN Newsletter

7 January 2013

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Contact us with your suggestions and comments at katpe@asb.dk

Corporate Social Responsibility Legal Research Network

Dear members, dear colleagues,

The CSR Legal Research Network has closed its first year after being founded in December 2011. During this year we managed to establish a framework for functioning of the network: we have launched the website and the mailing list, started to publish a newsletter, and welcomed 13 new members. Currently, we have 31 members from 13 different countries from across all the continents. We would like to encourage you to take the advantage of the diverse member base of the network and use the communication channels to exchange information and discuss topics of interests.

Our next challenge is to organize an event where we could all meet again. We are working hard on preparations for a conference in spring 2013. As for the last year event, we try to seek funding for partial support of (at least) PhD students' participation. Some more specific information will, hopefully, be available later in January or February.

It is our wish for the upcoming year to continue working with your help on making the network a lively discussion platform and facilitating communication and research connections among us, the network's members.

Happy New Year and hope to see you all soon!

Please, circulate this newsletter among your colleagues.

New publications

Implicating public companies in the equal pay debate

Roseanne Russell
Lecturer, Cardiff Law School, Cardiff University
International Journal of Discrimination and the Law, June 2012, vol. 12 no. 2, pp. 81-98.
Abstract:
The pay gap between men and women remains high and most acute in the private sector, in which large public companies dominate. Following the recent fortieth anniversary of the enactment of the UK's Equal Pay Act, there have been renewed efforts to solve the pay gap. Some have highlighted the 'business case' for equal pay. This article makes the case for equal pay to be treated as a corporate concern but argues that reforms appealing to the 'business case' are unlikely to lead to sincere progress. It analyses the UK's corporate foundation of 'enlightened shareholder value' captured in section 172 of the Companies Act 2006, and key aspects of the internal governance structures of UK public companies. The central argument introduced is that contradictions between the causes of the pay gap and corporate aims and structures undermine the genuine pursuit of pay equality. The article concludes by arguing that a more secure platform for reform may be found by exploiting the flaws in the shareholder value paradigm and arguing for a revised model based on principles of feminist legal theory, rather than appealing to the business case for equal pay.

Building Blocks for Global Climate Protection

Richard B. Stewart
New York University School of Law

Michael Oppenheimer
Princeton University, Woodrow Wilson School of Public and International Affairs

Bryce Rudyk
New York University, Guarini Center on Environmental and Land Use Law

Working paper series, December 7, 2012, available at SSRN: http://ssrn.com/abstract=2186541.
Abstract:
The paper presents an innovative institutional strategy for global climate protection, quite distinct from, but ultimately complementary to the stalled UNFCCC climate treaty negotiations. The building blocks strategy relies on a variety of smaller-scale transnational cooperative arrangements, involving not only states but sub-national jurisdictions, firms, and NGOs, to undertake activities whose primary goal is not climate mitigation but which will achieve greenhouse gas reductions as an inherent byproduct. This strategy avoids the inherent problems in securing an enforceable treaty to secure the global public good of climate protection by mobilizing other incentives — including economic self-interest, energy security, cleaner air, and furtherance of international development — to motivate such actors to cooperate on actions that will also benefit the climate. The paper outlines three specific models of regime formation (club, linkage and dominant actor models) which draws on economics, international relations, and organizational behavior to create transnational regimes that are generally self-enforcing and sustainable, avoiding the free rider and compliance problems that are endemic in a climate treaty. These regimes will contribute to global climate action not only by achieving emissions reductions in the short-term, but also by creating global webs of cooperation and trust, and by linking the building block regimes to the UNFCCC system through greenhouse gas monitoring and reporting systems. In these ways, the building blocks regimes will help secure eventual agreement on a global climate treaty.

Panarchy and the Law

J. B. Ruhl
Vanderbilt University Law School
Ecology and Society 17(3): 31.
Abstract:
Panarchy theory focuses on improving theories of change in natural and social systems to improve the design of policy responses. Its central thesis is that successfully working with the dynamic forces of complex adaptive natural and social systems demands an active adaptive management regime that eschews optimization approaches that seek stability. This is a new approach to resources management, and yet no new theory of how to do things in environmental and natural resources management, particularly one challenging entrenched ways of doing things and the interests aligned around them, is likely to gain traction in practice if it cannot gain traction in the form of endorsement and implementation through specific laws and regulations. At some point, that bridge must be crossed or the enterprise

of putting panarchy theory into panarchy practice will stall. Any effort to operationalize panarchy theory through law thus comes up against the mission of law to provide social stability and the nature of law itself as a complex adaptive system. To state the problem in another way, putting panarchy theory into practice will require adaptively managing the complex adaptive legal system to adaptively manage other complex adaptive natural and social systems, all in a way that maintains some level of social order. Panarchy theorists have yet to develop an agenda for doing so. It is time for lawyers to join the team.

Transnational Private Regulation and the Production of Global Public Goods and Private 'Bads'

Fabrizio Cafaggi

Professor of Comparative Law, European University Institute.

The European Journal of International Law Vol. 23 no. 3, pp. 695-718.

Abstract:

The article focuses on the role of private regulators in the production, access regulation, and protection of global public goods (GPGs). It addresses transnational private regulation (TPR) as a public good in itself and as an instrument to produce and protect GPGs. It makes three major claims: (1) private actors have incentives to produce and protect GPGs, thereby challenging the conventional partition between markets, producing private goods, and states producing public goods; (2) the production and protection of GPGs has to combine procedural and substantive features, making private governance a determinant of the club or public nature of the global good; and (3) ownership, both individual and collective, and contracting can be used to produce and protect GPGs. The article analyses in particular the proliferation of regulatory agreements between private actors or between private and public to regulate production, protection, and access, and shows that their limited legal enforceability is often functional to alternative compliance mechanisms devised through innovative private governance. It concludes by suggesting that the increasing role of private actors in the production of GPGs requires governance reforms of public–private cooperation at transnational level.

Rulejungling: When lawmaking goes private, international and informal

HiiL, Trend report, Based on nine projects with leading researchers on multilevel rulemaking

Report is available at http://www.hiil.org/publication/trend-report-rulejungling.

Content:

HiiL's Trend report analyses where lawyers, courts and parliaments in national states lose control. Innovative processes will have to ensure people still have a say in how they are governed. A truly global and trustworthy rulemaking profession can be part of the answer.

The report is based on the results of nine HiiL Research Projects with leading researchers on multilevel rulemaking:

- The Internationalisation of the Rule of Law: Changing Contexts and New Challenges, Project Leaders: Professor André Nollkaemper, Professor Randy Peerenboom, Professor Michael Zürn
- Informal International Lawmaking, Project leaders: Professor Joost Pauwelyn, Professor Jan Wouters, Professor Ramses Wessel
- Convergence and Divergence of Legal Systems, Project leaders: Professor Pierre Larouche
- National Constitutional Law in a Globalising World, Project leader: Professor Leonard Besselink
- Private Transnational Regulation: Constitutional Foundations and Governance Design, Project leaders: Professor Fabrizio Cafaggi, Professor Linda Senden, Professor Colin Scott
- General Rules and Principles of International Criminal Procedure, Project leader: Professor Göran Sluiter
- Harmonizing Private Law in Europe: A Mission Impossible? National Resistance against the Europeanisation of Private Law, Project leaders: Professor Jan Smits, Professor Martijn Hesselink
- National Judges as European Community Judges, Project leaders: Professor Mark Wissink, Professor Fabian Ambtenbrink, Professor Marc Hertogh
- Judicial dialogue leads to a more coherent transnational legal system, The Changing Role of Highest Courts in an Internationalising World, Project leaders: Professor Ton Hol, Professor John Bell, Professor Andrea Lollini

The report shows that rulemaking is becoming ever more international, private and informal. It analyses how the new rule making processes work and what benefits they have, and which challenges remain. Four major needs for innovation are identified. These needs clearly show: it is time for lawyers at ministries and courts to adjust their strategies. They cannot afford to ignore the impact of modern-style rulemaking on their work processes.

Calls for papers

Special Issue "Measuring the Impact of Public-Private Governance for Climate Change"

A special issue of Climate (ISSN 2225-1154)

http://www.mdpi.com/journal/climate/special_issues/climate_governance

Deadline for manuscript submissions: 24 May 2013

Guest Editor: Dr. Jack Barkenbus, Climate Change Research Network, Vanderbilt Institute for Energy & Environment, Nashville, USA, Website: http://www.vanderbilt.edu/vcems/barkenbus.html, E-Mail: jack.barkenbus@vanderbilt.edu, Interests: climate change; sustainable development; energy; clean technology

Special Issue Information:

Dear Colleagues,

By all accounts, the top-down governance approach to dealing with climate change (i.e. nation-states negotiating an international treaty) has been a failure to date. This does not mean, however, that other forms of governance—involving public, private, and non-governmental actors—have been abandoned. Indeed, what might be termed "bottom-up" governance to address climate change appears to be thriving.

While it is relatively easy to list and characterize the multitude of efforts now underway, it is imperative that we begin to assess their impact and effectiveness. This special issue is devoted to highlighting articles that seek to measure the impact of individual or multiple governance initiatives, involving public, private, and non-governmental actors (and combinations thereof). No *a priori* method for assessing effectiveness is implied. If the claim, for example, is that we are establishing a societal norm through certain activities, questions must be asked, how do we know it and how do we measure it? Are there ripple effects from individual initiatives that can be traced and measured? Are the impacts from one sector, for example, transferring to another sector, and what are the mechanisms for such transfers? Clearly, it is time to step back from the dazzle of burgeoning governance structures and begin to assess what they mean.

Dr. Jack Barkenbus

Submission

Manuscripts should be submitted online at www.mdpi.com. Submitted manuscripts should not have been published previously, nor be under consideration for publication elsewhere (except conference proceedings papers). All manuscripts are refereed through a peer-review process. A guide for authors and other relevant information for submission of manuscripts is available on the Instructions for Authors page. *Climate* is an international peer-reviewed Open Access quarterly journal published by MDPI. Please visit the Instructions for Authors page before submitting a manuscript. The Article Processing Charge (APC) for this special issue will be waived for well-prepared manuscripts. English correction and/or formatting fees of 250 CHF (Swiss Francs) will be charged in certain cases for those articles accepted for publication that require extensive additional formatting and/or English corrections.

Keywords:

climate governance, public-private governance, partnerships, civil regulation, transnational governance, collaborative governance, private governance, private sustainability governance, "bottom-up governance", global carbon governance

International Conference on Corporate Social Responsibility and Sustainable Development

9 – 11 April 2013, Malang, Indonesia

Jointly Organized by the Brawijaya University and the Utrecht University

http://hukum.ub.ac.id/csrconference/

Submission of Abstract: 15 January 2013

Submission of Completed Papers: 15 March 2013

Closing Date for Registration and Payment: 30 March 2013

BACKGROUND

Corporate Social Responsibility (CSR) has become an important issue in developing countries where industrialization and foreign investment become the foundation of economic growth. CSR cannot be regarded as a form of philanthropy that is voluntary but it is a real obligation to the community and the surrounding environment that are manifested in various forms.

The purpose of the conference is to bring together scholars of law from worldwide to interact, share ideas and build collegiate networks which may facilitate dialogue and research collaborations. In addition to the paper presentations, there will be keynote speakers from distinguished guest lecturers. We hope that the research forum will be widely used to bring together collaborators in various projects.

SUB-THEMES

Within the conference theme, we will, as far as possible, group papers within broad subject areas, and will allocate the panels for each parallel session on this basis. Examples of subject areas that can be chosen as sub-theme will include but are not limited to, CSR/Sustainable Development in Criminal Law, CSR/Sustainable Development in Environmental Law, CSR/Sustainable Development and the Indonesian Constitution, CSR/Sustainable Development in Corporate Law, CSR/Sustainable Development and the Rights of Indigenous People, CSR/Sustainable Development in the Agrarian Law, CSR/Sustainable Development and the Islamic Law, CSR/Sustainable Development in the International Law, CSR/Sustainable Development in the International Trade Law, CSR/Sustainable Development and Good Corporate Governance, CSR/Sustainable Development in the Mining Law, CSR/Sustainable Development in the Maritime Law, Comparative Studies on CSR in Different Countries, Legal Cases of CSR, CSR/Sustainable Development in Forestry Law, Sustainable Development and Human Rights.

However, we welcome papers on other sub-themes related to the CSR and the Sustainable Development, and the 'Miscellaneous' category means that it is not necessary for a paper to fit within any specific subject area in order to be accepted.

CALL FOR PAPERS

There will be four papers per panel to give presenters and discussants adequate time for fruitful engagement. In preparing abstracts of their proposed papers, we encourage prospective participants to address the conference theme. In addition to the general call for individual papers, we also encourage individuals to organize their own panels by coordinating with colleagues, preferably from other university. This will allow for the panels to be more cohesive and will also foster greater collaboration between academics, which is one of the key aims of the conference.

GUIDELINES FOR THE AUTHORS

http://hukum.ub.ac.id/csrconference/guidelines-for-authors/

Mandatory corporate social responsibility (CSR) reporting system in Denmark: gateway to new dimensions of reporting?

By **Daniel Gergely Szabo**

PhD student, Department of Law, Business and Social Sciences, Aarhus University, Denmark

In late 2008 the Danish Parliament adopted a revolutionary law that required the largest Danish companies to report on their social responsibility. In all fairness, Denmark was not the first country in Europe to mandate CSR reporting in some form, but to date the Danish reporting law sets disclosure requirements that most specifically target CSR, and it also establishes the broadest and most comprehensive CSR-related disclosure system in Europe.

The Danish reporting law defines CSR broadly as a concept that has to do with human rights, societal, environmental and climate conditions, and combating corruption. The structure of the law also reflects this broad understanding of CSR and sets requirements in a rather open fashion. The disclosure is based on three pillars. Firstly, companies are required to disclose the policies, standards, guidelines or principles they have in relation to CSR. Secondly, they have to disclose how these policies are realized. Thirdly, the companies also have to disclose the results they have in the financial year from working with CSR and their future expectations working with it. It is quite obvious that the Danish reporting law is intended to accommodate information about as many different CSR activities as possible. To keep the reporting even more open, it also does not go further in specifying in which format and to what extent CSR should be reported on. Instead, the law requires an audit of the management's review and within that the CSR report, which should ensure the adequate quantity and quality of the disclosed information.

Another peculiarity of the Danish CSR reporting law is that it makes a legal connection to the UN Global Compact and the UN principles for responsible investments (PRI) in Danish law. Companies reporting under these regimes may even refrain from reporting under the Danish law. The agenda of the Danish regulator by this clause was to encourage companies to sign up to these UN initiatives, work together with them and use their reporting tools.

In general, the reception of the law was very positive. Different national and international organisations expressed their support for the new system of reporting.

According to the two annual impact assessments of the Danish reporting requirements even the companies subject to the reporting requirements expressed a positive attitude and enthusiasm about the law. In line with this, surveys also indicate high compliance with the law. It is also indicated that by the second year the hardships of reporting are of the past and companies report that CSR disclosure is becoming increasingly routine, offsetting some of the costs of reporting.

This would suggest that the law is a success, its effects are generally positive and that it should increase transparency on different CSR issues. However, there is some evidence disputing this conclusion. According to KPMG's latest international survey on CSR reporting, Danish companies albeit producing considerable amount of CSR information lag behind both in information quality and the maturity of the reporting process. This is concluded despite of the fact that more companies report on their CSR in Denmark than ever before and many Danish companies have signed up to the Global Compact and the PRI.

Albeit the Danish CSR reporting law is capable of increasing the quantity of CSR information disclosed, it may be less capable of increasing the reporting quality.

We can only theorize why the effect of the law may be ambiguous. Provided that the conclusions of the KPMG survey are right, there are several possibilities. The lower average quality of the reports may stem from the companies not willing to report without the force of the reporting law. They would most likely not strive to give a comprehensive overview on their CSR, but would only

go for a "passing grade". The law may equally affect companies already reporting before the adoption of the law. Afterwards they may simply stick to the letter of law and be less compelled to go beyond the legal requirements, losing the competitive advantage of "first runners". Further, the slightly higher legal accountability for these reports may also make reporting companies more cautious. Thereby the reporting law may in fact lower their reporting quality. Although the situation could improve over time, seeing that the reporting companies may easily follow a minimalistic compliance approach and that the compliance with the law and hence the reporting becomes increasingly routine for the companies, this is doubtful. Therefore, it seems that albeit the Danish CSR reporting law is capable of increasing the quantity of CSR information disclosed, it may be less capable of increasing the reporting quality and may even decrease it in some situations.

As a response, the Danish regulator announced another amendment to the CSR reporting law earlier this year. This does not change the method of disclosure significantly, though. It only requires companies to report on human rights and climate impact issues within their report on social responsibility. It is not quite certain why these areas have been highlighted, since the earlier reporting law's CSR definition contains reference to both human rights and climate issues and surveys show that companies are reporting on these issues. It is also unsure how this requirement will affect those Danish companies' reporting obligation that are already signed up to the Global Compact and PRI, and are reporting under these regimes. As the amendment is phrased, it would seem that companies reporting under the Global Compact and the PRI system still have to report on these two issues separately. Thus, it is unsure whether the new law still encourages signing up to the aforementioned international organisations and reporting under their regimes. In turn, it is generally uncertain how this new requirement can enhance CSR transparency.

In conclusion, the effects of the Danish reporting law, even with the new requirement, are unsure. But the example of the Danish reporting law reveals the eventuality that CSR reporting laws may not always be beneficial, and thus serves with an important lesson. It shows that reporting laws need to set clear priorities, reporting requirements and reporting format straight from the beginning. Before enacting them, it also has to be given much thought the disclosure of which CSR issues should be regulated, and which should be not. In general CSR reporting laws should be very carefully thought through. Otherwise regulators will have to deal with costly unintended consequences, some of which may even be opposite to the goals they are supposed to achieve.

Soft or hard, public or private…does it matter?

By **Katerina Peterkova**

PhD student, Department of Law, Business and Social Sciences, Aarhus University, Denmark

A plethora of legal scholarship analyzes the divide between public and private law and between soft and hard law. Many leading scholars develop various theories to capture and explain the differences between those categories. This distinction is also a building block of our legal education; it has been taught in the classes on legal theory around the globe as the basic structural understanding of legal systems and various legal relationships and status of public and private subjects as regulated or regulating entities for decades and even centuries.

However, it has also been challenged both by legal and non-legal scholars. The discourse on the adequacy, usefulness, and mostly reality of the public and private law divide has been coming in waves, with a particularly powerful presence in the American legal realists' theory of the first half of the twentieth century. The latest, and probably strongest, dispute on this topic adding also the soft and hard law and the state-made and non-state law discussions to the conundrum currently occupies the discussion on regulation of global phenomena, such as sustainability and corporate social responsibility issues. There is a vast amount of literature describing the problematic of the dichotomies, but there is only few suggestion of a new conceptual and structural understanding of legal systems that could substitute the private/public, hard/soft and state-made/non-state law divisions and none of these suggestions is convincing enough to displace them in legal theory books.

The question is if the theoretical discussions are of any value; are they merely a theoretical exercise or do they have a practical relevance? Do they add anything to our understanding and thus better regulation of cross-border corporate activities with negative social and environmental externalities?

For example, examining the position of UN Global Compact within the legal system may seem irrelevant on the first sight; establishing how soft the instrument is (does the reporting obligation and sanction make it harder?) or debating whether it is predominantly private initiative (lead by businesses) or public regulation (under the auspices of UN) does not in reality change the level of its observance or participation by companies. Nevertheless, we feel the need to place the regulations we speak about in the different varieties of law (or non-law). Why is that important?

The academic discourse on hard/soft and public/private dichotomies is essential to facilitate comprehension among scholars, provide policy makers and business community with tools to achieve their goals, and to equip students with abilities to solve real life situations.

The search for definitions of the different categories of law is endless. It is not only because of the background we come from (civil v. common law jurisdictions) or the legal theory we advocate for (positivism, natural legal theory, realism), but I would say that primarily it is influence by the function of law we look into. For example, judges have to apply existing law on cases ex post according to the rules and procedures they have to observe, therefore their primary interest will be in positive state-made law. Being the guardians of legal certainty, they will generally, unless expressly allowed to, not apply private initiatives or soft legal instruments. From the opposite side, politicians facing new social problems and seeking adequate normative solutions should consider all available regulatory means within the broadest understanding of law, including soft and private law. For instance, the EU has officially acknowledged non-state law and soft law as alternatives to the traditional notion of hard state-made law in the Better Regulation policy, where co-regulation and self-regulation are accepted as possible and at some instances more suitable and effective means of regulation.[1] Thus, judges and politicians will most probably agree nor on the definition of law as such neither on the definitions of law's categories.

Whoever speaks about law is bound in a specific culture and circumstance the law is used in. Therefore, an unavoidable conclusion is that there is not one ultimately correct definition of law and its varieties, but there may be many correct definitions dependent on the context and function the definitions are used for.

By accepting the plurality of possible definitions of law I do not want to say that the search for them is useless. Opposite, I believe that it is an imperative for legal scholars to engage in the discussion and that the discussion can yield positive results both for legal science and for practice.

First and foremost, delimitation of one's theoretical frameworks is necessary to facilitate a productive discourse. It does not need to be the ultimately applicable delimitation, but it needs to be precise enough in order to allow other scholars to comprehend the arguments one puts forward. Secondly, it may not cause any change in corporate behavior to define something as a soft or hard, public or private law, but drawing attention to and repeatedly mentioning these different categories is important in order to acknowledge their existence and possibility to use various, not only public command and control regimes, especially in regulation on global level where an overarching public authority is missing. This acknowledgment then proliferates from research to practice, informs regulators and companies and provides them with new tools to achieve their policy and/or business objectives. Thirdly, in line with the second argument, the discussion should enter into our legal educational systems. Solving global problems by traditional national and international law seems impossible or at least highly impracticable. It is undisputable fact, that the effects of cross-border corporate activities are regulated primarily by private and soft legal instruments. However, you will most probably not hear about them in courses at legal faculties. This gap in legal education may cause that law students are not prepared for solving problems in real world, whether they become policy makers, judges, or business people.

At least for these three reasons, the discussion on public/private, soft/hard, and state-made/non-state law should continue, although without the prospect of reaching its final point.

Footnotes:

1 European Parliament, Council, Commission; Interinstitutional agreement on better law-making (2003/C 321/01), par. 16 et seq.

Upcoming Events

April 9-11 — **International Conference on Corporate Social Responsibility and Sustainable Development,** Brawijaya University
http://hukum.ub.ac.id/csrconference/

May 22-23 — **Fifth Annual Meeting of the Society for Environmental Law and Economics**, Ramat Gan, Israel
http://envlawecon.wordpress.com

June 11-13 — **Nordic Environmental Social Sciences Conference**, Copenhagen, Denmark (more information will be available in January)
http://www.neln.life.ku.dk

October 3-4 — **Science for the Environment – Environment for Society**, Aarhus, Denmark
http://dce-conference.au.dk

Upcoming Deadlines

January 15 — **Global Perspectives on Entrepreneurship: Public and Corporate Governance**
http://www.ssrn.com/update/fen/fenann/ann12132.html
Conference and special issue of Corporate Governance: an International Review – Abstracts

January 15 (March 15) — **International Conference on Corporate Social Responsibility and Sustainable Development,** Brawijaya University
http://hukum.ub.ac.id/csrconference/
Conference - Abstracts (January); full papers (March)

March 31 — **Integrated Reporting**
http://www.emeraldinsight.com/authors/writing/calls.htm?id=4032
Special issue of Accounting, Auditing and Accountability Journal – Full papers

May 24 — **Measuring the Impact of Public-Private Governance for Climate Change**
http://www.mdpi.com/journal/climate/special_issues/climate_governance
Special issue of Climate – Full papers

JANUARY 2013

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Reminder

Let us know if you come across an interesting event, call for papers, or publication in the area of legal studies in CSR, or if you want to share some experience or information, and we will include it in the next issue. You can as well send the information directly to the whole network using the e-mail address ***CSR-LRN@segate.sunet.se***. Please, be aware that you can send such an e-mail only from your e-mail address that you have registered with us.