RULEJUNGLING: CHALLENGES FOR THE JUSTICE SECTOR

How to cope when rulemaking goes private, informal and international?

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The many rule makers safeguarding civil aviation

International organisations:

International Civil Aviation Organisation (ICAO)

Regional organisations:

European Aviation Safety Agency (EASA)
EUROCONTROL
European Civil Aviation Conference (ECAC)
European Air Navigation Planning Group (EANPG)

Transnational private, industry-based and profession specific organisations:

International Air Transport Association (IATA)
Association of European Airlines (AEA)
European Regions Airline Association (ERA)
European Low Fares Airline Association (ELFAA)
African Airlines Association
Association of Asia Pacific Airlines
Civil Air Navigation Services Organisation (CANSO)
International Business Aviation Council (IBC)
International Air Carrier Association (IACA)
International Federation of Air Line Pilots' Associations (IFALPA)
Arab Civil Aviation Commission (ACAC)
Airports Council International (ACI)
Airport Association for Benchmarking (TAAB)
Registered Traveler Interoperability Consortium (RTIC)

Others (private regulators):

International Coalition for Sustainable Aviation (ICSA)
International Coordinating Council of Aerospace Industries Associations (ICCAIA)
Canadian Aerial Applicators Association (CAAA)
Airport Association for Benchmarking (TAAB)
Registered Traveler Interoperability Consortium (RTIC)

National civil aviation associations:

British Business and General Aviation Association (BBGA)
Canadian Business Aviation Association (CBAA)
European Business Aviation Association (EBAA)
German Business Aviation Association (GBAA)
National Business Aviation Association (NBAA)
Australian Business Aircraft Association (ABAA)
Associação Brasileira de Aviação Geral (ABAG)
Business Aviation Association for India (BAAI)
Business Aviation Association of Southern Africa (BAASA)
EBAA-France (EBAA-F)
Italian Business Aircraft Association (IBAA)
Japan Business Aviation Association (JBAA)
Middle East Business Aviation Association (MEBAA)
Russian Business Aviation Association (RBAA)

National aviation authorities:

Airport Management Services Establishment of Algeria
Australian Civil Aviation Safety Authority
Directorate General of Civil Aviation of Ecuador
Japan Civil Aviation Bureau
Dutch Ministry of Infrastructure and the Environment, Inspectorate for Transport, Public Works and Water Management

Who ensures that we have a safe flight?

National legislators? Or perhaps?

International organisations:

International Civil Aviation Organisation (ICAO)

Or is rule making power delegated to?

National aviation authorities:

Airport Management Services Establishment of Algeria

Australian Civil Aviation Safety Authority

Directorate General of Civil Aviation of Ecuador

Japan Civil Aviation Bureau

Dutch Ministry of Infrastructure and the Environment, Inspectorate for Transport, Public Works and Water Management

Or are the rules and standards set by?

Regional organisations:

European Aviation Safety Agency *(EASA)*
EUROCONTROL
European Civil Aviation Conference *(ECAC)*
European Air Navigation Planning Group *(EANPG)*

Transnational private, industry-based and profession specific organisations:

International Air Transport Association (IATA)
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![HiiL innovating justice]

Or are these private bodies calling the shots?

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What we set out to research:

What is role of national state in present (international) rulemaking environment?

Our method: 9 major research projects

1. **Trends in rule of law**
2. **National constitutional law in globalizing world**
3. **Convergence and divergence of legal systems**
4. **Informal international law making**
5. **Private transnational regulation**
6. **Rules of international criminal procedure**
7. **International rulemaking in private law**
8. **National judges applying EU law**
9. **Highest courts and internationalisation**

Ensuring quality and coherence

- **Tendering among research groups internationally: teams lead by professors from Netherlands, UK, US, Italy, Germany, Switzerland, Belgium**

- **Bringing results of 9 research groups together in Trend Report**

- **Supervision by Programatic Steering Board**

- **Interviews and consultation with experts from 46 countries in 6 continents**

What we found?

Rulemaking goes private, international and informal

- **Private**
    - Stakeholders set standards
- **International**
    - Cross border
- **Informal**
    - Leaders meet and agree

Rulejungling

- **Many, many rule makers**

- **Local, national, regional and international**

- **Courts, arbitration tribunals, regulatory agencies, complaint commissions, supervisory bodies, experts and media all play their part in ensuring compliance**

- **Companies increasingly commit themselves unilateral policies**

- **Less formal, more private, less hierarchical, more competitive and more contractual**

Which rulemakers have most influence?

- **In general, state-based legislation is becoming less prominent**

- **Rulemaking by multilateral treaties between states is in retreat**

- **Guidelines, aimed at achieving clearly stated goals, are now more frequent than binding rules.**

Possible explanations

We need

- **Quality standards**
- **Safety requirements**
- **Ways to deal with the possible impact of activities on other persons**

New rulemaking approaches become more attractive:

– Most relevant stakeholders can be invited

– Issues to be regulated are similar across the world

– Best expertise can be mobilized

– Rulemaking in these networks does not require formal consent from participants, easier to achieve results

– Open networks can learn more quickly about effects

– Stakeholders prefer private negotiated solution

– If deadlock in one rulemaking body

What is still the role of state based rulemaking?

- **Formal laws by regulators, police, forced sale of assets and detention are still needed**

- **Are increasingly used as option to create incentives for adequate private rulemaking and organizing compliance**

- **"You solve the problem together or be legislated"**

Many reasons for distrust

- **Participation by citizens, consumers and employees and transparency are often not guaranteed**
- **Those involved in rulemaking do this mainly to advance their own interests**
- **Risk of regulatory capture**

But also reasons for trust

- **Competition also works among rule makers**
- **If deadlock in parliament or UN, other rule making body takes over**
- **Accountability is asset for most companies and other organizations**
- **Rulemaking takes place in shadow of court of public opinion**
- **International regulatory profession is emerging: people who feel responsible for rules that serve people**

Relevance for Asian situation?

Suggestions:

- **Rulemaking by decree or by party is one more way of solving issues: more competition among rule makers can be good**

- **Greater risk of regulatory capture: rules for benefit of rule makers not for population**

- **To what extent do Asian leaders allow and recognise private, international and informal rulemaking?**

What are the consequences for

- **Members of parliament**

- **Legislation professionals**

- **Courts and lawyers**

- **Highest courts**

- **Legal education**

See summary version of report

What is needed according to experts

1. **Citizens and companies: can we design a principle of better regulation, so that they can invoke private, informal and international rules if they are clearly better than domestic laws?**

2. **More effective and innovative rulemaking procedures for parliaments**

3. **Better processes for participation: users, consumers, citizens**

4. **Guidelines for transparency of networked rulemaking**