Controlling the New Rulemakers: A Much-needed Constitutional Framework for Outsourced Regulation

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Cedric Jenart, *Outsourcing Rulemaking Powers – Constitutional Limits and National Safeguards* (Oxford University Press 2022)

Introduction

There is, suggests Hans-Wolfgang Micklitz, 'agreement that the state is changing, but … disagreement as to how and in what direction it is developing'.[1] There is no doubt about the first part of this quote: states are indeed changing. The twenty-first century has been characterised by both the 'redefinition of the role of the state and the functions of … private' actors as well as the consequent 'vanishing' of the public-private law divide.[2] States increasingly exercise their powers according to governance models where they act as enablers, partners or mere spectators of non-state-centric and/or private

[1]H.-W. Micklitz, 'Rethinking the Public/Private Divide', in M. Poiares Maduro et al. (eds.), *Transnational Law: Rethinking European Law and Legal Thinking* (Cambridge University Press 2014) p. 271 at p. 306.

[2]Ibid.; P. Zumbansen, 'Neither "Public" nor "Private", "National" nor "International": Transnational Corporate Governance from a Legal Pluralist Perspective', 38 *Journal of Law and Society* (2011) p. 50; M. Rosenfeld, 'Rethinking the Boundaries between Public Law and Private Law for the Twenty First Century: An Introduction', 11 *International Journal of Constitutional Law* (2013) p. 125; J. Barnes, 'An Expanding Frontier of Administrative Law: The Public Life of Private Actors (a Functional Approach)', 24 *European Public Law* (2018) p. 596 at p. 596-600.

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action. Those models entail some degree of outsourcing of public powers to non-state actors.[3]

Where traditionally courts or administrations would implement and enforce legislation, we now see numerous public powers – executive, individual decision-making, delivery of public services, management, incentivising, indicative, consultative and punitive powers – being outsourced to actors outside the structure of central state governments.[4] Even rulemaking, a function traditionally attributed to parliaments, is increasingly outsourced: globalisation and the growing need to regulate complex technical issues have led to numerous changes in processes of regulation.[5] One noteworthy change is the adoption by legislatures of so-called 'principles-based' legislation, which specifies certain principles and 'ends' to be achieved but does not determine how those ends will be implemented technically.[6] That determination is made by norms whose drafting is outsourced to independent and autonomous actors of public, private or even hybrid nature. These actors – who become (outsourced) rulemakers – are autonomous in the sense of not being *politically* accountable to the direct scrutiny of the citizens of a given state represented in parliament (p. 1).[7] This is unlike governments and their ministers, who are elected or directly controlled by Parliament.

It is not easy to make sense of this. To echo the second part of the opening quotation, there is still no clear understanding of how and according to which rules state legislatures and governments may outsource their powers to autonomous bodies. There is also no clarity as to the norms that these autonomous bodies must

[3]P. Grabosky, 'Meta-Regulation', in P. Drahos (ed.), *Regulatory Theory: Foundations and Applications* (ANU Press 2017) p. 149 at p. 152-157; C. Colombo and M. Eliantonio, 'The Changing Nature of the Public Administration: Innovations and Challenges for Public Lawyers', 24 *European Public Law* (2018) p. 403 at p. 404.

[4]*See* the book under review, i.e. C. Jenart, *Outsourcing Rulemaking Powers – Constitutional Limits and National Safeguards* (Oxford University Press 2022) p. 5. *See also* J. van der Heijden, 'Friends, Enemies, or Strangers? On Relationships between Public and Private Sector Service Providers in Hybrid Forms of Governance', 33 *Law & Policy* (2011) p. 367; L. Casini, '"Down the Rabbit-Hole": The Projection of the Public/Private Distinction beyond the State', 12 *International Journal of Constitutional Law* (2014) p. 402 at p. 404-406, 409-410; R. Van Loo, 'The Corporation as Courthouse', 33 *Yale Journal on Regulation* (2016) p. 547; M. Kettemann and M. Fertmann, 'Platform-Proofing Democracy: Social Media Councils as Tools to Increase the Public Accountability of Online Platforms' (Friedrich Naumann Foundation for Freedom 2021) p. 7-8, https://shop.freiheit.org/#!/Publikation/1084, visited 3 September 2024.

[5]P. Drahos, 'Regulatory Globalisation', in Drahos (ed.), *supra* n. 3, p. 249.

[6]P. Westerman, *Outsourcing the Law: A Philosophical Perspective on Regulation* (Edward Elgar Publishing 2018) p. 3.

[7]Any similar indications of a page number in brackets are to be understood as referring to the book under review: Jenart, *supra* n. 4.

abide by while exercising outsourced powers. What is at stake is not your run-of-the-mill case of a phenomenon (in this case, the outsourcing of public powers) in need of regulation. Differently, the fact that we are dealing with the ability of non-state[8] (often private) actors to exercise public powers raises broader constitutional questions regarding the public role, power limits, and legitimacy of these outsourced adjudicators, administrators and rulemakers.

With his new book, Cedric Jenart contributes to this much-needed constitutional discussion by focusing, as the book title makes clear, on *Outsourcing Rulemaking Powers*. Until now, many scholars from the fields of economics, political science, and philosophy had explored outsourced regulation on its policy merits and limitations as a rulemaking tool.[9] In this book, Jenart set out to analyse a different, preliminary (legal) question: how can the outsourcing of rulemaking powers be made legally and constitutionally legitimate? And what boundaries must it not cross?

In legal research, such an extensive conceptual study was lacking. Much has been written on some forms of outsourcing which have been well-established in practice, i.e. the delegation of powers to and within the executive branch of national governments[10] or to independent bodies created under EU law.[11] At the same time, there is increasingly more constitutional and administrative legal literature analysing the outsourcing of *executive* and *adjudicative* powers to private bodies.[12] But there is still little work on the outsourcing, at national level, of rulemaking powers to autonomous public, private or hybrid bodies. Granted,

[8]In line with the reviewer's interpretation of the terminology used in the book under review, the expression 'non-state actors' is used here to mean the same as 'autonomous' actors of public, private or hybrid nature, i.e. entities that are independent of the structure of state legislatures and central governments and, consequently, not held in a direct link of political accountability towards a given state's citizenry. For more information on the definition of 'autonomous public, private or hybrid actors', *see* Jenart, *supra* n. 4, p. 17.

[9]S.A. Shapiro, 'Outsourcing Governmental Regulation', 53 *Duke Law Journal* (2003) p. 389; Westerman, *supra* n. 6.

[10]*See* Jenart, *supra* n. 4, p. 1; R. Cass, 'Delegation Reconsidered: A Delegation Doctrine for the Modern Administrative State', 40 *Harvard Journal of Law & Public Policy* (2017) p. 147; M. Oprican, 'Legislative Delegation and Government Accountability in the Light of Constitutional Provisions', V *Conferinta Internationala de Drept, Studii Europene si Relatii Internationale* (2017) p. 310.

[11]E.g. S. Griller and A. Orator, 'Everything under Control? The "Way Forward" for European Agencies in the Footsteps of the Meroni Doctrine', 35 *European Law Review* (2010) p. 3; A. Volpato, *Delegation of Powers in the EU Legal System* (Routledge 2022).

[12]E.g. M. Aronson, 'A Public Lawyer's Responses to Privatisation and Outsourcing', in M. Taggart (ed.), *The Province of Administrative Law* (Hart Publishing 1997) p. 56; D. Stevenson, 'Privatization of State Administrative Services', 68 *Louisiana Law Review* (2008) p. 1285; M.R. Svendsen, 'Constitutional Limitations on the Competence to Entrust the Exercise of Authority to Private Entities', 13 *EuConst* (2017) p. 704; J.L. Mascott, 'Private Delegation Outside of Executive Supervision', 45 *Harvard Journal of Law & Public Policy* (2022) p. 837.

Barnes has observed the existence of these practices and how they shift the exercise of power with public relevance to the private sphere.[13] Relatedly, Curtin and Senden have argued that any public or private actor which wields regulatory power should be held accountable for its exercise.[14] Nevertheless, there had still been no systematic theoretical work on: (i) the different techniques of outsourcing rulemaking powers; (ii) their constitutional limits; and (iii) a possible framework for qualitatively assessing the legitimacy of outsourced regulation. Until *Outsourcing Rulemaking Powers*, that is.

On methodology: a functional conceptual lens and the power of thinking 'inside the box'

Before delving into the substantive findings of this monograph, it is worth nothing some of the prior conceptual work and methodological choices in *Outsourcing Rulemaking Powers,* which also give the book its own unique place in the literature. In this sense, it is useful to recall the book's main aims. Briefly, Jenart sets out to determine how the law may (mainly at a constitutional level) condition the outsourcing of rulemaking powers. That inquiry is subdivided in two main questions. First, what are the constitutional limits posed to outsourcing as the act of transfer of rulemaking power to an autonomous body? And second, what are the safeguards that would ensure that outsourced rulemaking powers are exercised properly and, therefore, legitimately? In order to answer these two main questions, Jenart clarifies in Chapter 1 the key concepts driving his analysis: 'rulemaking powers' and 'outsourcing'.

First, *rulemaking* powers are distinguished from *executive* or *adjudicative* powers. The outsourcing of the latter two powers has been the overwhelming focus of the existing literature.[15] By contrast, Jenart focuses solely on the outsourcing phenomenon with respect to the rulemaking power, defined as the power to 'enact, accept, or establish abstract, general and obligatory norms that have the purpose and effect of altering legal rights, duties, and relations between persons' (p. 5).

Second, the concept of *outsourcing* is unpacked into more or less intrusive forms of power transfers from states to autonomous public, private or hybrid bodies. Specifically, outsourcing is subdivided into three power transfer techniques, distinguishable by the leeway afforded to the actors who receive the outsourced powers. The three outlined techniques are: the classic method of

[13]Barnes, *supra* n. 2, p. 598-599.

[14]D. Curtin and L. Senden, 'Public Accountability of Transnational Private Regulation: Chimera or Reality', 38 *Journal of Law and Society* (2011) p. 163 at p. 169.

[15]*See supra* nn. 4 and 12.

delegation, where the delegator mandates an autonomous body to exercise clearly and strictly-defined rulemaking competences (p. 10); *referral*, where state legislatures or governments refer in their own rulemaking to an external document produced by an autonomous body (e.g. referral of legislation to standards produced by private standardisation bodies, such as the International Organization for Standarization) (p. 11); and *reception*, where there is no prior rulemaking from a delegator or state actor, but rather a recognition as a binding rule of original and self-developed rulemaking initiatives of grassroots professional organisations (e.g. collective labour agreements, or the rules set by sporting associations) (p. 13). However, for any of these power transfers to be qualified as outsourcing, the autonomous body must receive through them an 'official and institutionalized rulemaking function' (p. 8).

This definition of outsourcing is the book's biggest conceptual strength, for two main reasons. First, it offers a much-needed granular template of different possible outsourcing techniques. Outsourcing can take many forms, with specific characteristics, strengths and weaknesses. As will be discussed below, they may be best suited for different purposes, and policymakers might prefer some techniques over others depending on their policy objectives.

Second, Jenart rightly relies on a functional rather than formalistic definition of 'outsourcing'. Namely, he refuses to distinguish techniques of outsourced rulemaking based on the nature of the body (public or private) that receives that power (p. 18). Instead, a power transfer will be classified as 'outsourcing' if the autonomous body receiving and exercising a rulemaking power is, irrespective of its public or private nature, *de facto* affecting the legal sphere of individuals while in the absence of direct political accountability (understood here as scrutiny from the people represented in a parliament). In this sense, *Outsourcing Rulemaking Powers* sets itself apart from those works that analyse power transfers to public or private parties according to different conceptual frameworks, meaning that such power transfers are analysed through the lens of public or private law concepts and principles depending on, respectively, the public or private nature of the body receiving a given power.[16] Relatedly, there is also a clear demarcation from the literature that argues for different forms of control and, particularly, a higher scrutiny of private bodies compared to public ones.[17] What matters for Jenart is that certain autonomous bodies receive an institutionalised

[16]E.g. H. Krent, 'The Private Performing The Public: Delimiting Delegations To Private Parties', 65 *University of Miami Law Review* (2011) p. 507; S. De Somer, *Autonomous Public Bodies and the Law: A European Perspective* (Edward Elgar Publishing 2017).

[17]Griller and Orator, *supra* n. 11; S Lierman, 'Besturen Zonder Grenzen. Over Grijze Zones En Blinde Vlekken' [*Governing Without Borders. On Grey Areas and Blind Spots*], Oratie KU Leuven (Intersentia 2015); Mascott, *supra* n. 12; R. Griffin, 'Public and Private Power in Social Media Governance: Multistakeholderism, the Rule of Law and Democratic Accountability', 14 *Transnational Legal Theory* (2023) p. 46 at p. 62.

rulemaking function and exercise it without direct political accountability in the sense described above; and that combination ultimately unifies the concept of 'outsourcing'.

One is, however, left wondering whether Jenart's extremely insightful functional approach could not have been taken further. This is due to the conceptual limitation of outsourcing, in the book, to those instances where a transfer of rulemaking powers is recognised as official or otherwise institutionalised by legislatures or central state governments. This excludes less institutionalised power transfers where there is no formal state intervention explicitly attributing or recognising official rulemaking powers to autonomous actors. In particular, there are certain cases – such as big tech governance – where states abstain from regulating a certain field in detail and tacitly defer that regulation to powerful autonomous private bodies that have government-like resources and structures. State regulation confirms this deferral by merely setting principles and procedures that frame and limit norm creation by those actors and/or whose implementation necessarily requires the creation of norms by the autonomous private bodies as addressees of regulation.

Looking at the example of big tech governance, certain digital platforms (the greatest example being that of social media networks) have acquired such an influence in public life – by mediating public discourse, political communication and economic exchanges – that their private governance mechanisms constitute publicly relevant forms of rulemaking.[18] Despite the public relevance of what digital firms regulate, states do not excessively dictate how those firms should go about it. Rather, they refrain from regulating technological use in detail, and cooperate with digital firms on a number of issues (e.g. law enforcement, tackling misinformation or protecting privacy rights) thereby deferring to the norms set by these firms' (increasingly government-like) policies and infrastructure.[19] Indeed, emerging national or supranational legislation on digital governance defers to and thus legitimises digital firms' private ordering mechanisms that govern online traffic, user experience, social interactions, and public discourse.[20] At best,

[18]D Keller, 'Who Do You Sue? State and Platform Hybrid Power Over Online Speech', *Hoover Inst. Aegis Paper Series, Paper No. 1902* (2019), https://www.hoover.org/sites/default/files/research/docs/who-do-you-sue-state-and-platform-hybrid-power-over-online-speech_0.pdf, visited 3 September 2024; A Bradford, *Digital Empires: The Global Battle to Regulate Technology* (Oxford University Press 2023) p. 2-5.

[19]H Bloch-Wehba, 'Global Platform Governance: Private Power in the Shadow of the State', 72 *SMU Law Review* (2019) p. 27 at p. 28-30; P Gowder, *The Networked Leviathan: For Democratic Platforms* (Cambridge University Press 2023) p. 7-12.

[20]K. Klonick, 'The New Governors: The People, Rules, and Processes Governing Online Speech', 131 *Harvard Law Review* (2017) p. 1598 at p. 1631-1635; N. Suzor, 'Digital Constitutionalism: Using the Rule of Law to Evaluate the Legitimacy of Governance by Platforms', 4 *Social Media Society* (2018) p. 1 at p. 3-4; F. Pasquale, 'Digital Capitalism – How to Tame the Platform Juggernauts', *Friedrich-Ebert-Stiftung - Division of Economic and Social Policy* (2018), https://library.fes.de/pdf-files/wiso/14444.pdf, visited 3 September 2024.

legislation will set broad standards and principles that digital firms will have ample discretion to concretise through rulemaking. For example, in regulatory schemes such as the EU's General Data Protection Regulation or the recent Digital Services Act, it is for digital firms to assess and mitigate the risks of their services to data protection and other fundamental rights and public values. In the process, they will create the rules that govern the use of their services and translate certain values, principles and legal obligations into their technologies, related self-conducted risk assessments, content moderation policies, and terms of service.[21]

There is no denying the functional regulatory role that digital firms *de facto* assume in these regulatory schemes: they effectively exercise rulemaking powers that have been transferred by the imposition of legal obligations onto them as addressees of state regulation. Platform users are thus subject to the rulemaking powers of private bodies with significant implications for the protection of their rights and other public values. Through exercising those rulemaking powers, these private actors alter individuals' legal spheres and have an influence on regulating matters of public relevance, such as civic discourse, persons' bodily and mental integrity, and human rights protection. They thus accumulate publicly relevant powers in the absence of direct links of political accountability to any state citizenry represented in a national parliament.

So why not view these powers as outsourced? Indeed, the exercise of rulemaking powers with a lower degree of political accountability seems to be, when one reads the book under review, the main reason behind the inquiry into the outsourcing of those powers.[22] This taps, I believe, into a deeper socially-shared (or at least popular) sentiment expressed in constitutional terms as the idea that no one actor (be it private or public) should exercise significant amounts of publicly relevant powers without being subject to appropriate control.[23] There could, therefore, be merit in

[21]M. Monti, 'The EU Code of Practice on Disinformation and the Risk of the Privatisation of Censorship', in S. Giusti and E. Piras (eds.), *Democracy and Fake News* (Routledge 2020) p. 218-221; P. Van Cleynenbreugel, 'EU By-Design Regulation in the Algorithmic Society: A Promising Way Forward or Constitutional Nightmare in the Making?', in H.-W. Micklitz et al. (eds.), *Constitutional Challenges in the Algorithmic Society* (Cambridge University Press 2021) p. 202-208; G. De Gregorio and P. Dunn, 'The European Risk-Based Approaches: Connecting Constitutional Dots in the Digital Age', 59 *Common Market Law Review* (2022) p. 473 at p. 476-477, 479-488; M. Husovec, 'The Digital Service Act's Red Line: What the Commission Can and Cannot Do About Disinformation', *SSRN Paper* (2024), https://papers.ssrn.com/abstract=4689926, visited 3 September 2024.

[22]*See* e.g. Jenart, *supra* n. 4 p. 3, 'Commentators have highlighted the need for a constitutional framework for regulation that emanates from private actors and from public institutions that *do not have direct political responsibilities*. By providing such a framework, this research responds to a scholarly outcry that has echoed for years' (emphasis added).

[23]R.Á. Costello, 'Faux Ami? Interrogating the Normative Coherence of "Digital Constitutionalism"', 12 *Global Constitutionalism* (2023) p. 326 at p. 334-336. Like Costello, I

applying the outsourcing lens developed by Jenart to these less institutionalised transfers of rulemaking powers, *despite* the lack of their official recognition by states. This would allow an inquiry into not only the limits of outsourcing to private bodies such as digital platforms,[24] but also of a constitutional and good governance framework able to legitimise their exercise of rulemaking powers.

Ultimately, the book's institutionalisation criterion for the definition of outsourcing could have been extended to cases of state deference to private rulemaking. In this way, the book could have engaged also with those cases under a public law framework.[25] Granted, the focus on a state institutional recognition of outsourced rules helpfully excludes from the scope of this research some more informal means of regulatory influence – such as expert drafting, lobbying, or consultation of non-state actors – that do not constitute rulemaking strictly speaking and would have thus made the research too unfocused and potentially unfeasible (p. 8). But there are, I argue, enough similarities between the three outsourcing techniques studied in the book and the non-institutionalised rulemaking in fields such as digital governance to warrant an examination of the latter as outsourcing.

The fact nonetheless remains that Jenart's functional approach is truly insightful and adequate for studying forms of rulemaking that elide formal categories and conceptions of regulatory power. In his approach, Jenart does not rely on extra-legal disciplines that have been used to study the outsourcing of public powers in the past.[26] Going admittedly against the interdisciplinary tide of transnational and comparative legal research,[27] *Outsourcing Rulemaking Powers* studies these new forms of law using a legal doctrinal methodology. This is defined, in short, as a method aiming at systematically exposing the rules governing a particular field with a view to solving ambiguities and gaps in the existing law (p. 30). According to Jan Smits, who the author himself relies on to define doctrinal work, what distinguishes doctrinal legal research from other

use the term 'constitutional' here 'to refer to the broader socially defined norms or values that define the reach and content of those written [constitutional] documents and their moral force within the population' (p. 326).

[24]In the conclusion I cite another possible example, that of sporting associations.

[25]An example of the application of a public law framework to less institutionalised power transfers can be seen in the work of Marco Almada who, in the domain of technological regulation, views this phenomenon as a delegation of public power. *See* e.g. M Almada, 'Regulation by Design and the Governance of Technological Futures', 14 *European Journal of Risk Regulation* (2023) p. 1 at p. 3; and M Almada, 'Delegating the Law of Artificial Intelligence : A Procedural Account of Technology-Neutral Regulation' (Phd Thesis, European University Institute 2024), https://cadmus.eui.eu/handle/1814/77064 (forthcoming).

[26]*See* cited authors at fn. 9 on p. 30-31.

[27]E.g. C. Durose et al., 'Governing at Arm's Length: Eroding or Enhancing Democracy?', 43 *Policy & Politics* (2015) p. 137; R. Michaels, 'Transnationalizing Comparative Law', 23 *Maastricht Journal of European and Comparative Law* (2016) p. 352.

methods is its positioning: researchers place themselves *inside* the legal system and use it as their analytical framework.[28] Jenart argues that doctrinal constitutional legal theory can be surprisingly capable of adapting to dynamic social phenomena and that it might be 'refreshing to think "inside the box"', with the internal positioning typical of doctrinal research, about outsourced regulation (p. 31). In this respect, one cannot but recognise the courage of venturing into doctrinal work in an era where interdisciplinary research is seemingly taking over and even questioning the need for a clear demarcation between disciplines.[29] Even if eventually minoritarian, there will always be a need for comprehensive and rigorous doctrinal research.[30] More importantly for this particular topic, there had not yet been any overarching doctrinal study of the legal limits and norms governing outsourced regulation. That in itself is enough to praise the doctrinal route taken in the book.

Outsourcing in treaty and constitutional law: no clear rules, but an established practice

The doctrinal venture in *Outsourcing Rulemaking Powers* is by no means a straightforward one. What is truly refreshing in this book is the sense of true discovery that one gets from reading it. There is no rush from the author to force the discovery of answers to the research question(s). There is also no inclination to create an artificial straitjacket for outsourced regulation from a twisting-and-turning of constitutional legal provisions that, more often than not, were not conceived with these new forms of regulation in mind. As seen in the first chapters, Jenart does not find a satisfactory general framework for outsourced rulemaking in treaty provisions and case law (Chapter 2) or in the traditional constitutional norms on delegation of rulemaking powers in the five countries researched (Chapter 3).[31]

[28]J.M. Smits, 'What is Legal Doctrine? On the Aims and Methods of Legal-Dogmatic Research', in R. van Gestel et al. (eds.), *Rethinking Legal Scholarship: A Transatlantic Dialogue* (Cambridge University Press 2017) p. 207 at p. 211-212.

[29]O. Korhonen, 'From Interdisciplinary to X-Disciplinary Methodology of International Law', in R. Deplano and N. Tsagourias (eds.), *Research Methods in International Law: A Handbook* (Elgar Publishing 2021) p. 345.

[30]Smits, *supra* n. 28, p. 227-228.

[31]There are some exceptions to this, and Jenart finds in these sources some elements that could be part of a more overarching legal framework of outsourced rulemaking. For example, he notes the quite developed case law of the Inter-American Court of Human Rights on the limits to delegation (p. 42, 69, 267); as well as some legal norms in France, Germany, or Belgium that recognise the possibility of delegation of power onto public and private autonomous bodies *but* in specific fields of law and not as a general constitutional possibility (p. 104).

But where does Jenart specifically look for such a framework? While the treaty focus of Chapter 2 is somewhat diversified by the inclusion of the Inter-American Convention on Human Rights next to oft-examined instruments in constitutional and international law studies like the International Covenant on Civil and Political Rights, the EU Charter or the ECHR, Chapter 3 focuses on constitutional legal systems that are common subjects of comparative legal studies: Belgium, France, Germany, the UK, and the US. Jenart justifies the selection of these five countries based on: (i) their involvement in international treaties, which leads to increasing power decentralisation; (ii) their focus on constitutional principles, which is adequate to the research's principle-based approach (more on that below); (iii) their similar approach to delegation and decentralisation via historically interwoven legal cultures; and (iv) the author's capacity to consult their authentic sources (p. 33-37).

Nevertheless, given that the main research aim of the book is to give a doctrinal overview, through a comparative method, of the limits and norms governing outsourced rulemaking, it could have been useful to explore a more diversified set of countries. By staying away from the 'usual suspects', and especially because of their similar approaches to delegation and power decentralisation, the constitutional framework explored in the book could have been enriched. It could have examined more systematically some countries that the book mentions *en passant* and that have different approaches to outsourcing regulation, such as Portugal, the Netherlands, Kosovo or South Africa, for example. This would have benefittd the comparative exercise in two distinct, related ways. First, it would have signalled more strongly the willingness to engage in a much welcomed less Western-centric approach to comparative legal studies.[32] Second, and relatedly, the resulting constitutional framework – which from the book's conclusions seems aimed at applying to outsourced rulemaking in general – has the limitation of mostly being the result of a study of the norms, principles and case law of the same conventional legal systems and courts (especially of France, Germany, the UK and the US). As is all too common, these flagship Western legal systems will then be the basis of the comparative discussion of this new legal issue. A more diversified outlook of outsourced regulation would have thus enriched the book's overall doctrinal inquiry and output.

Coming back to the book's argument, Jenart finds no constitutional or treaty provisions offering an overarching and satisfactory framework for the recognition and regulation of outsourced rulemaking. In Chapter 3, he notes that the five

[32]I echo here the argument made in P. Zumbansen, 'The Rule of Law, Legal Pluralism, and Challenges to a Western-Centric View: Some Very Preliminary Observations', *King's College London Law School Research Paper No. 2017-05*, https://ssrn.com/abstract=2869190, visited 3 September 2024.

countries researched have some form of a non-delegation doctrine in their conventional constitutional framework on decentralised regulation (p. 102). In parallel, however, a remarkable finding ensues. Even in the absence of any constitutional norm recognising and regulating the outsourcing of rulemaking powers, and despite a seeming constitutional resistance to power transfers through non-delegation doctrines, there is an established outsourcing practice in the countries researched. Albeit in different degrees, the political will of national governments to decentralise rulemaking competences into autonomous bodies has moved faster than constitutional norms: outsourced rulemaking exists more and more, even if national constitutions do not explicitly and generally foresee, limit, or regulate such decentralisation of governmental power.

Despite this dissonance between outsourcing practices and their constitutional non-recognition, national courts are very receptive to outsourced rulemaking. Fascinatingly, Jenart demonstrates that constitutional courts accept, to some degree, such outsourcing practices and try to accommodate them in their respective legal orders. In the absence of a constitutional framework explicitly designed to regulate and limit outsourcing, courts have resorted to constitutional principles to develop criteria and standards for the legitimacy of outsourced regulation (p. 105). This is where *Outsourcing of Rulemaking Powers* transitions to the core of its argument, laid out in Chapter 4: that constitutional principles are the most promising source of a framework able to limit these new forms of regulation and make them legitimate.

On the limiting and legitimising power of constitutional principles

As outlined above, *Outsourcing Rulemaking Powers* relies mainly on legal principles to establish what constitutional limits and norms govern the exercise of outsourced powers in the five countries researched. In particular, the book mostly looks at how the Belgian Constitutional Court and Council of State Legislative Section, the French Constitutional Council, the German Constitutional Court, the UK House of Lords/Supreme Court, and the US Supreme Court interpret key constitutional principles when called upon to rule on the legitimacy of outsourced rulemaking. Despite some differences in their constitutional systems and traditions, *Outsourcing Rulemaking Powers* argues that a similar framework of principles can be inferred from all the countries researched.

Chapter 4 looks first at how constitutional principles can establish limits to the outsourcing of power from state governments to autonomous bodies. Here, the constitutional adjudicative bodies' case law points to three limiting principles: democracy; separation of powers; and legality. The principle of democracy is

considered the main constitutional limit to outsourcing. This principle is interpreted as requiring the meaningful participation of the people of a given polity in the governance processes affecting them (p. 121). When rulemaking power 'leaves' Parliament through outsourcing, thereby eroding the representative link maintained between MPs and their electors, there is still a need for the people to somehow control outsourced rulemaking processes. As such, and mainly based on case law from Belgium, France and Germany, the principle of democracy is said to require that: (i) there be an express and concrete transfer of powers; (ii) only for technical and accessory matters, i.e. not policy-oriented; and entailing (iii) any form of *ex post* political control by the state through, for example, ratification (p. 122).

As a complement to democracy, the principle of separation of powers requires, from an institutional point of view, that outsourcing cannot excessively interfere with the other branches of government. Specifically, it cannot excessively affect the unity with which public administration exercises executive functions. At the same time, outsourcing may not affect the unique power of the judiciary to independently interpret the rules elaborated by parliaments and national governments. Jenart, echoing mainly a concern of German doctrine,[33] argues that this could happen if national governments, in order to interpret legal norms, excessively refer to external documents produced by autonomous bodies to an extent that thwarts the judiciary's role as the ultimate rule interpreter in the *Trias Politica*. In addition to this institutional dimension of separation of powers, this principle also requires, from a functional perspective,[34] that outsourcing does not lead to an excessive accumulation of rulemaking power in one single autonomous body.

The third and final limit to outsourcing is the principle of legality, which, similarly to the two abovementioned principles, aims to prevent an excessive concentration of power on autonomous bodies. The latter can never regulate, through outsourcing, essential and fundamental policy matters, which should remain within the regulatory purview of the legislature. This means, conversely, that the only regulatory power that may be outsourced is that of producing detailed, technical and implementing regulation.

Having established the main constitutional limits to the outsourcing of rulemaking powers, Jenart focuses, in Chapter 5, on the legitimacy of the exercise of outsourced powers by autonomous bodies. Namely, he identifies qualitative norms deriving from the principle of the rule of law that the production of

[33]See sources cited in fnn. 79 and 80 on p. 118.

[34]Jenart distinguishes this functional dimension of the separation of powers from the institutional one, because the former 'focus[s]es on the division of governmental functions and not institutions or branches of government' (p. 119).

outsourced regulation should follow in order to be legitimate as such. These qualitative norms are called 'national safeguards' by Jenart (e.g. p. 147). They derive from the principle of the rule of law conceived in its 'thick' version as requiring that the law be 'good', i.e. in line with certain qualitative guarantees that – if followed in the process of rulemaking – will, in turn, legitimise the produced rules. Based on the European Commission's White Paper on European governance,[35] German doctrine,[36] and the Belgian Council of State Legislative Section,[37] *Outsourcing Rulemaking Powers* proposes that the rule of law be concretised by and supplemented with five good governance principles. Specifically, outsourced regulation produced by autonomous bodies must be: (i) transparent, meaning both accessible and intelligible; (ii) have an established position in the hierarchy of rules; (iii) be subject to judicial review (at least *ex post*); and comply with guarantees of (iv) representativeness, and (v) efficiency and effectiveness (p. 148).

It is argued in the book that it is mostly through these five principles that autonomous public, private and hybrid bodies can attain their own legitimacy and that of the rules they produce. (p. 27-28). Specifically, Jenart links each of the five principles with one of three forms of legitimacy: input; output; and throughput legitimacy.[38] He argues that the principle of representativeness ensures input legitimacy, i.e. that a diverse set of interested individuals and communities have participated in the rulemaking process. Furthermore, the efficiency and effectiveness of outsourced rules guarantee output legitimacy, i.e. that the rulemaking process is beneficial *for* the people. Finally, the principles of transparency, a position in the hierarchy of rules, and judicial review work towards building *throughput* legitimacy, meaning a form of legitimacy derived from the quality of the complex processes of decentralised rulemaking.

[35]European Commission, 'European Governance: A White Paper', Communication of 25 July 2001, COM (2001) 428, C 287, https://ec.europa.eu/commission/presscorner/detail/en/DOC_01_10, visited 3 September 2024.

[36]*Inter alia*, the book refers to B.B. Wiegand, *Die Beleihung mit Normsetzungskompetenzen - Das Gesundheitswesen als Exempel* (Duncker & Humblot 2007); and M. Löwisch and V. Rieble, 'TVG § 1 Inhalt und Form des Tarifvertrages', in M. Löwisch and V. Rieble (eds.), *Tarifvertragsgesetz* (Beck 2017) p. 988.

[37]Jenart refers in particular to Adv.RvS 39.272/3 van 29 november 2005, § 5 [*Belgian Council of State Legislative Section, Advisory opinion no. 39.272/3 of 29 November 2005, § 5*]; and Adv.RvS 56.941/321 van 21 januari 2015, § 14 [*Belgian Council of State Legislative Section, Advisory opinion no. 56.941/321 of January 2015, § 14*].

[38]V.A. Schmidt, 'Democracy and Legitimacy in the European Union Revisited: Input, Output *and* Throughput', 61 *Political Studies* (2013) p. 2; V.A. Schmidt and M. Wood, 'Conceptualizing Throughput Legitimacy: Procedural Mechanisms of Accountability, Transparency, Inclusiveness and Openness in EU Governance', 97 *Public Administration* (2019) p. 727.

The most important finding of Chapter 5 is that such a structured good governance framework composed of the abovementioned five principles does not exist in the five countries researched. At least, it does not exist in a centralised 'law of rules',[39] i.e. a statute establishing qualitative safeguards that any form of outsourced regulation must follow. And it certainly does not exist in national constitutions. One can only find in the countries researched some fragmented forms of operationalisation of those five good governance principles on specific policy fields.

In particular, the accessibility of outsourced rules is guaranteed in an *ad hoc* fashion in all five countries and, despite certain courts stating the general importance of the law being accessible,[40] they do not clarify what that entails for outsourced rules (i.e. whether and how publication should occur). Furthermore, outsourced rules are not featured in the traditional hierarchy of norms of the five countries, instead being viewed as some form of *sui generis* law. There are also no established requirements for the operationalisation of the principles of representativeness, efficiency and effectiveness. Jenart suggests that, to concretise representativeness, the independence of rulemakers and an increased consultation of stakeholders in rulemaking processes should be ensured. He furthermore proposes that regular impact assessments be carried out to evaluate and improve the efficiency and effectiveness of outsourced regulation (p. 226). But all those initiatives are, in the absence of any governmental obligation to that effect, left to the discretion of the autonomous rulemaking bodies themselves. A silver lining might be the existence of meaningful judicial review of outsourced regulation in the five countries researched. Granted, *ex ante* forms of review of outsourced regulation do not exist in Belgium or France. Moreover, there is a long-standing debate in the UK on the refusal by English courts to review outsourced regulation of private bodies through public law remedies.[41] However, there is some coherence and clarity across the five countries as to the possibility of *ex post* judicial review of outsourced regulation according to a standard that affords a certain margin of appreciation to autonomous bodies.

This scarce implementation of the five principles of good rulemaking should not surprise. Crucially, the principle-based framework of Chapter 5 is a proposal resulting from a certain interpretation of existing legal theory and case law, *not* a full-fledged description of an already existent systematised law of outsourced

[39]C. Jenart and S. De Somer, 'Non-Statutory Rulemaking and the Rule of Law: Towards a "Law of Rules"?', *sui generis* (2017) p. 159.

[40]E.g. Adv.RvS 53.929/1/V van 18 september 2013 [*Belgian Council of State Legislative Section, Advisory opinion no. 53.929/1/V of 18 September 2013*].

[41]D. Pannick, 'Judicial Review of Sports Bodies Law', 2 *Judicial Review* (1997) p. 150; M.J. Beloff, 'Watching out for the Googly: Judicial Review in the World of Sport', 14 *Judicial Review* (2009) p. 136.

regulation. On the contrary, Jenart insightfully transforms a comprehensive assessment of diffuse references to outsourcing in case law, constitutional and infra-constitutional norms, and selected doctrine into a systematic theory of limitation and legitimation of outsourced regulation. This exercise implies some non-neutral methodological and theoretical options (e.g. how to conceive such vague notions as democracy or the rule of law; or from where to gather the five good governance principles used to measure the legitimacy of outsourced rulemaking) that, while doctrinal because they assume an internal perspective of the law, are part of an exercise of normative reconstruction. This powerful and systematic endeavour of *Outsourcing Rulemaking Powers* is at the core of the book's theoretical prowess.

The broader argument of the book – this (re)construction of a principle-based constitutional framework for outsourced rulemaking – is rounded up in its two final chapters. Chapter 6 applies the book's findings to a case study examining the rulemaking powers of the World Anti-Doping Agency (WADA) exercised in the national legal orders under analysis.[42] This case study illustrates both the use of the three different techniques of outsourcing despite the existence of some constitutional limits imposed in the five countries; and the insufficiency of the current national safeguards in place for outsourced regulation. In Chapter 7, Jenart makes two normative propositions to put the book's systematised account of outsourced rulemaking to use.

The first proposal builds upon the finding of the absence of clear, systematic rules on the limits and qualitative safeguards of outsourced rulemaking. The current limitation and legitimation of these rulemaking practices are dependent on courts' ability to accommodate outsourcing to the principles of their respective legal systems on a case-by-case basis. In addition, some autonomous bodies proactively try to adhere to some of the abovementioned principles and qualitative guarantees in their rulemaking processes. This state of affairs is not suited to promote legal certainty and, relatedly, to hold 'outsourcers' and 'outsourcees' politically accountable. As such, Jenart proposes the creation of a constitutional norm recognising the existence of these new forms of law and systematising their limits and legitimacy conditions. Such constitutional provision should be accompanied by an infra-constitutional 'law of rules' that solidifies and firms up the limits to outsourcing and the requirements for outsourced regulation to count as 'good law'.

[42]On p. 228, the choice of WADA as a case study is justified both because of it being branded a success story when in the implementation of transnational rulemaking in the field of doping, and due to the increased scrutiny of WADA's executive and rulemaking decisions by different actors in sport governance.

Finally, Jenart makes a proposal directed at policymakers, building upon the book's distinction of three different forms of outsourcing. There should be, as a matter of good practice, a link between the use of different outsourcing techniques and the main objective of a given public policy. Indeed, delegation, referral and reception have different advantages stemming from their inherent characteristics as power transfer tools. A *referral* to standards is more conducive to ensuring the effectiveness of the produced rules as the latter will be made by technical expert bodies (i.e. standardisation organisations); the *reception* of norms made by professional organisations or other similar bodies is the archetype of representativeness as it mirrors the idea of participatory democracy; and *delegation* is the most-suited technique to achieve independence, as the recipients of delegated powers theoretically act autonomously and independently from other interests, including those of the state actors that delegate rulemaking powers.

Conclusion: making it make sense

Political practice often moves faster than the law. That was certainly the case for outsourced regulation. Governments have increasingly transferred rulemaking powers to autonomous bodies as a consequence of supranational cooperation and the technical challenges posed by new objects of regulation. Parliaments and executives did not wait for constitutional permission to start outsourcing rulemaking powers. Courts and scholars alike tried to make sense of outsourcing by assessing its legitimacy against existing legal norms and principles whose elaboration pre-dates outsourcing itself.

Until *Outsourcing Rulemaking Powers,* no one had yet provided a systematic account of the different techniques of outsourcing, as well as an overarching constitutional theory of its limitation and legitimation. The book aimed at and succeeded in doing just that. It produced a constitutional theory for outsourced regulation through a comprehensive doctrinal and comparative approach. While doing so, it provided a powerful example of the value and need for methodologically sound doctrinal work.

For those interested in understanding how publicly relevant regulatory power is increasingly exercised outside the confines of central state governments, this book is a fascinating must-read. It is a perfect illustration of the fact that constitutional law does not always constitute political and regulatory practice. On the contrary, it may have to – as in the case of outsourced regulation – recognise and accommodate new forms of policymaking that have not been constitutionally recognised before and challenge traditional conceptions of state institutional organisation and power. As the book shows, despite the existence of non-delegation doctrines in all countries researched, courts have used constitutional

principles to accept and legally frame outsourced rulemaking. Instead of prohibiting such rulemaking or ignoring its existence, it is indeed crucial that states recognise and regulate these new forms of law in order to ensure their legitimacy and the political accountability of their authors.

And that is where the principle-based framework proposed in *Outsourcing Rulemaking Powers* demonstrates its normative value: by proposing a systematic account of the constitutional limits and qualitative guarantees that outsourced regulation should follow. Jenart argues that such a principle-based framework should be centralised into national constitutions and/or statute.

Ultimately, the book's objective of providing a comprehensive constitutional framing of outsourced regulation could have been advanced in three main respects. These three areas of further engagement with the topic can be the focus of future research. First, in its distinction of different outsourcing techniques, the book could have recognised a fourth one: the 'deference' of regulatory tasks by the state to autonomous private bodies such as big tech firms. This deference occurs through the decision not to extensively regulate certain domains of public life mediated by the private governance mechanisms of these bodies and, instead, impose broader limiting principles and obligations that these actors should concretise through their own rulemaking. It will be interesting to see, in the future, whether and how the principle-based constitutional framework constructed in the book could apply to this and other forms of mostly unscrutinised private rulemaking (could sports governance also fit the outsourcing mould?)[43] .

Second, this monograph could have selected a more diverse range of national legal orders to examine, resisting the temptation of comparative legal scholars to analyse the same traditional legal orders, from where general theories and maxims are then derived and presented as generalisable in a given field. Third and finally, as the book itself mentions, further empirical legal research is needed to examine

[43]The book uses an example of sports governance as its case study for outsourcing, i.e. the case of WADA, *see supra* n. 42. However, in the case of WADA, its outsourced rulemaking powers are given official state recognition by means of international convention (p. 228-242). The question I am asking here, and which I believe merits further research, is whether the outsourcing (or another public law) framework could apply to cases where states choose not to act and regulate the access to sports competitions and athletes' rights and, instead, recognise as legitimate the independence claim of sporting associations regarding their own private rulemaking structures, thereby deferring to the private ordering mechanisms as sources of regulation, which only seldom are brought to scrutiny under public law principles present in their legal orders. *See* K. Foster, 'Is There a Global Sports Law?', 2 *Entertainment and Sports Law Journal* (2016) p. 1 at p. 1-2; J.L. Chappelet, 'The Autonomy of Sport and the EU', in J. Anderson et al. (eds.), *Research Handbook on EU Sports Law and Policy* (Edward Elgar Publishing 2018); J. Weiler et al., 'Only the EU can save football from itself', *Euronews* (12 November 2021), https://www.euronews.com/2021/11/12/only-the-eu-can-save-football-from-itself-view, visited 3 September 2024.

whether the proposed framework of five good governance principles to be followed by outsourced regulation is *actually* conducive to the production of qualitatively good rules.

All this further research, however, depended on the existence of solid conceptual groundwork that would help scholars and policymakers better understand outsourced regulation from a legal standpoint. This book is the necessary stepping stone to produce theoretical, empirical and interdisciplinary work aimed at locating and controlling public power that is, often without political accountability structures in place, outsourced away from states. The state is indeed changing. To read *Outsourcing Rulemaking Powers* is key to making us make sense of it.

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