

Katarzyna Mojska¹

Transnational Environmental Regimes in the Context of the State's Constitutional Functions

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Słowa kluczowe: transnarodowe reżimy ekologiczne, konstytucyjne funkcje państwa, globalny konstytucjonalizm

Abstract

Environmental governance has been marked by the rise of novel forms of institutions within the last three decades. In this paper, a growing proportion of those institutional innovations is supplied by non-state actors creating specific regulatory structures, referred to as transnational environmental regimes (TER). The purpose of the article is to identify their functional correlations with states, seen through the lenses of the state's constitutional functions. The study is divided into three sections. The first one explains the rationale for analyzing TER in the constitutional context. The second section covers the essence of TER. The third aims at delineating patterns of relations between TER and the constitutional functions of states.

¹ ORCID ID: 0000-0002-3382-7325, Ph.D., Department of International Relations, Faculty of Political Science and Journalism, University of Maria Curie-Skłodowska in Lublin. E-mail: katarzyna.mojska@mail.umcs.pl.

Streszczenie**Transnarodowe reżimy ekologiczne w kontekście konstytucyjnych funkcji państwa**

Tendencją charakterystyczną dla struktur sterowania ochroną środowiska w ciągu ostatnich trzech dekad było powstawanie nowych form instytucji. Rosnącym na znaczeniu źródłem tych instytucjonalnych innowacji są podmioty niepaństwowe tworzące specyficzne struktury regulacji, w niniejszym opracowaniu określone mianem transnarodowych reżimów ekologicznych (TRE). Celem artykułu jest identyfikacja ich funkcjonalnych powiązań z państwami, rozpatrywanych przez pryzmat konstytucyjnych funkcji państwa. Studium zostało podzielone na trzy części. Pierwsza wyjaśnia zasadność analizowania TRE w kontekście konstytucyjnym. Druga dotyczy istoty TRE. W trzeciej podjęto próbę nakreślenia wzorców relacji między TRE i konstytucyjnymi funkcjami państw.

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I. Constitutional Functions of the State as a Context for Transnational Environmental Regimes Analysis

Constitutionalism provides a specific framework for reflection on the functions of the state. On the one hand, constitutions recognize and express – explicitly or not – the state’s essential functions, with the legislative, executive, and judiciary as the sheer examples. Thereby, in a way, they confirm and perpetuate states’ superiority and their primacy in exercising functions of public authority within their sovereign jurisdictions. On the other hand, the significance of constitutionalism as a unique and particularly ambitious form of legalization certainly goes beyond mere legalization of public power². States are not just arbitrary carriers of public power. They are constitutionally subordinated to a myriad of functions taking the form of their responsibilities – obligations and tasks stemming from the neces-

² D. Grimm, *The Achievement of Constitutionalism and its Prospects in a Changed World*, [in:] *The Twilight of Constitutionalism?*, eds. P. Dobner, M. Loughlin, Oxford-New York 2010, p. 9.

sity of pursuing broadly understood public interest and protection of individual's rights and freedoms.

Constitutional functions of the state approached as a context for TER analysis set a point of reference for broader inquiries on the transformation of the "Westphalian constitutionalism"³ model. It has been founded upon a vision of a state equipped with a broad spectrum of functions and exclusiveness for exercising them within the territorial jurisdiction as a fundamental organizing principle of the constitutional order, with a clear division between domestic and international, public and private spheres⁴. This classical, universally recognized framework for organization and legitimization of political power, with the production and implementation of norms in the legal system as its principal function, has been significantly challenged in recent decades⁵.

By no means states lose their significance as the primary law-makers and public goods providers, but circumstances under which states exercise their sovereign rights and perform constitutional functions are changing. This transformation is a cumulative outcome of various phenomena. However ambiguous terminologically, asymmetrical, and uneven – the processes of globalization embracing worldwide interconnections, transboundary environmental, social, and economic issues, and the functional character of networks transcending territorial logic of states – represent the key mechanism putting states' exclusiveness for constitutional functions under strain. Previously, entirely "state-reserved" functions have been increasingly transferred to the "higher levels"⁶ already throughout the second half of the 20th century due to the development of international law, intergovernmental institutions, and integra-

³ M. Below, *The Challenges to Westphalian Constitutional Geometry in the Age of Supranational Constitutionalism, Global Governance and Information Revolution*, [in:] *Global Constitutionalism and Its Challenges to Westphalian Constitutional Law*, ed. M. Below, Oxford 2018.

⁴ L. Viellechner, *The transnational dimension of constitutional rights: Framing and taming 'private' governance beyond the state*, "Global Constitutionalism" 2019, vol. 8, No. 3, p. 645; J.L. Dunoff, J.P. Trachtman, *A Functional Approach to International Deinstitutionalization*, [in:] *Ruling the World? Constitutionalism, International Law and Global Governance*, eds. J.L. Dunoff, J.P. Trachtman, Cambridge 2009, p. 3.

⁵ D. Grimm, *op.cit.*, p. 1; M. Below, *op.cit.*, p. 4.

⁶ A. Peters, *Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures*, "Leiden Journal of International Law" 2006, vol. 19, No. 3, p. 580.

tion processes. Along with the accelerating globalization and proliferation of global problems coupled with the rising prominence of non-state actors, the power of states and the corresponding functions have been “distributed” not only vertically (upward to international and supranational bodies) but also sideways – to non-state actors representing market forces and civil society. Even though the crisis of multilateralism is visible recently, as is the return of competitive geopolitics, and the significant decline in international flows due to the COVID-19 pandemic, still, in the words of Ch. Tornhill, “there are few interactions in any part of society which do not raise normative questions or presuppose principles of normative order that reach beyond their immediate territorial context”⁷. The latter makes a theoretical response to the challenges to the traditional constitutional ordering – the concept and interdisciplinary academic research field of “global constitutionalism” – an essential part of the debate about the present and prospects of constitutional law.

Among various issues in the broad and multi-aspect narrative of “global constitutionalism”, one is particularly significant for this study. It is related to the increasing diversity of actors involved in creating, implementing, and enforcing norms, recognized as the emergence of the “new law makers”⁸. What is essential, some of them are non-state regulators. This agency-related aspect exemplifies mutual connections – overlapping and intersections between “global constitutionalism” and the broader, already well-established paradigm of “global governance”. The second-mentioned reflects both conceptual and practical dimensions – parallel privatization and supranationalization/transnationalization of public power⁹. These combined mechanisms are manifested in partial detachment of public functions from the principle of territoriality and in unfolding structures of transnational, networked forms of governance within which regulatory initiatives with potential implications for the public good are undertaken without, or with non-exclusive participation of states, their institutions, and intergovernmental bodies.

⁷ Ch. Tornhill, *A Sociology of Transnational Constitutions: Social Foundations of the Post-National Legal Structure*, Cambridge 2016, p. 2.

⁸ J.B. Auby, *Global Constitutionalism and Normative Hierarchies*, [in:] *Global Constitutionalism...*, p. 3.

⁹ M. Belov, *op.cit.*, p. 32.

II. The Essence of Transnational Environmental Regimes

TER are already well-noted objects of scholarly interest, written about with the utilization of various terms¹⁰. The term “transnational environmental regimes”, selected for this study, accurately captures the essence of the regulatory initiatives under consideration, especially as seen from the angle of their correlations with the state’s constitutional functions. Firstly, the “transnational” mirrors both their spatial and subjective scope, as these organizations operate in a network mode, “across different levels”¹¹ – carry out cross-border governance, engaging actors of various kinds from two or more states. Secondly, the chosen term corresponds with the extensive literature and tradition of international-intergovernmental regimes analysis, thereby pointing (by the juxtaposition of “regimes” and “transnational”) to the changing patterns of global governance. According to the seminal S. Krasner’s definition, international regimes are “implicit or explicit principles, norms, rules, and decision-making procedures around which actors’ expectations converge in a given area of international relations”¹². Importantly, in the case of TER, a convergence of expectations relating to the regulation of a given environmental issue often happens between entities of a different nature. These specific institutional arrangements may involve, among others, in various combinations and proportions: private actors including enterprises and their associations, non-governmental organizations; and public actors including states, their agencies, and inter-state entities, substate units like cities and re-

¹⁰ P. Pattberg, *Transnational Environmental Regimes*, [in:] *Global Environmental Governance Reconsidered*, eds. F. Biermann, P. Pattberg, London 2012; K.W. Abbott, J.F. Green, R.O. Keohane, *Organizational Ecology and Institutional Change in Global Governance*, “International Organization” 2016, No. 70 (2); P. Pattberg, O. Widerberg, *Transnational multistakeholder partnerships for sustainable development: Conditions for success*, “Ambio. A Journal for Environment and Society” 2016, vol. 45; P. Pattberg, M. Isailovic, *Private environmental governance*, [in:] *Encyclopedia of Global Environmental Governance and Politics*, eds. P. Pattberg, F. Zelli, Cheltenham 2015, p. 281. TER are also referred to as, e.g., “transnational regulatory networks”, “transnational multi-stakeholder partnerships”, “private transnational regulatory organizations”, “private environmental governance arrangements”.

¹¹ K. Negacz, O. Widerberg, M. Kok, P. Pattberg, *BioSTAR: Landscape of international and transnational cooperative initiatives for biodiversity*, Amsterdam 2020, p. 10.

¹² S. Krasner, *Structural causes and regime consequences: Regimes as intervening variables*, “International Organization” 1982, vol. 36, No. 2, p. 185.

gions; with possible participation of other groups and individuals, i.e., scientific experts and indigenous communities. Primary drivers of stakeholders' behavior and structure of interest derived from their essential character may differ significantly (as for business and civil society organizations). However, accomplishing them often turns out to lead via a common, multi-stakeholder environmental governance goal.

The functional essence of TER as institutions of governance is the most fully manifested in the regulatory aspect of their operations, as they engage in rule-making and standard-setting, promotion and implementation of norms, monitoring and verification, adjudication and certification of compliance, and even the imposition of regime-specific "sanctions"¹³. They create transboundary normative structures aimed at steering the conduct of target participants¹⁴ – primarily business enterprises, including powerful multinational corporations. The norms produced by TER are non-obligatory in the strictly legal sense. They are transboundary voluntary (often self-regulatory or co-regulatory) standards, formally devoid of coercive enforcement capacity. As indicated, the transnational character of the environmental regimes under consideration signifies that states and their institutions are non-involved or not the main actors involved in rule-making. Mainly private actors develop norms and rules. They are the main rule-takers also. It makes transnational environmental governance an institutional field to a significant extent run by the private sector for the private sector¹⁵. As such, it is a largely market-driven domain wherein a decision to launch or join particular regulatory scheme results, for business entities, from a need to manage financial, reputational, and legal risks arising from the absence or dysfunctions of mandatory environmental law or from a will to pre-empt an unwanted "hard" regulation. Participating civil society actors, in turn, use transnational governance mechanisms as a channel of influence on business, thereby implementing their statutory goals.

Institutional arrangements falling under the category of TER are numerous and diverse in forms, including voluntary corporate codes of conduct, en-

¹³ P. Pattberg, M. Isailovic, *op.cit.*, p. 282.

¹⁴ K.W. Abbott, *The Transnational Regime Complex for Climate Change*, "Environment and Planning C: Government and Policy" 2012, vol. 30, No. 4, p. 572.

¹⁵ V. Heyvaert, *Transnational Networks*, [in:] *The Oxford Handbook of Comparative Environmental Law*, eds. E. Lees, J.E. Viñuales, Oxford 2019, p. 781.

vironmental management mechanisms, environmental labeling and certification programmes, environmental reporting initiatives, and private-public partnerships. They operate in different environmental and sustainability policy areas, with climate change as a prominent example, e.g., forest and maritime environment protection, biodiversity, air, water, soil pollution, waste control, and the environmental impact of new technologies¹⁶.

As a substantial dimension of transnational environmental governance, TER constitutes a polycentric institutional structure of great complexity. An emblematic example of a particularly ambitious and globally influential (operating in 89 states) networked organization that may be regarded as a transnational environmental regime in the domain of forestry protection is the Forest Stewardship Council (FSC), established in 1993, in the aftermath of states' failure to negotiate an international agreement on forests. Possible risks arising from under-regulation in the forestry sector caused multiple actors of both profit-making and non-profit character to build a global certification scheme – in 2021, over 228 million hectares were certified according to FSC's standards¹⁷. What is significant is that private transnational institutionalization in the forestry sector led by FSC spread to the fishery sector when the Marine Stewardship Council (MCS) was established to model exactly FSC's institutional design. Crucially, climate change and the biodiversity regimes also prove to be progressively co-structured by transnational institutions¹⁸.

III. Mapping the Correlations Between Transnational Environmental Regimes and Constitutional Functions of States

The dynamic proliferation of TER represents one of the key phenomena that stimulate the debate and inspire thinking in terms of “global constitutionalism”. Significantly, “global constitutionalism”, especially in its practical dimen-

¹⁶ Ibidem, p. 774.

¹⁷ FSC website, <https://fsc.org/en/facts-figures> (27.07.2021).

¹⁸ K. Negacz, O. Widerberg, M. Kok, op.cit., p. 17; K.W. Abbott, J.F. Green, R.O. Keohane, *Organizational Ecology and Institutional Change in Global Governance*, “International Organization” 2016, vol. 70, No. 2, p. 9. As for the climate change regime, it has been estimated that there might be at least three times as many private transnational regulatory organizations as intergovernmental bodies.

sion, is far more an “emerging field” – an ongoing non-linear process – than a fixed political outcome – a structure with a clear functional distribution. So is the issue of TER’s impact on the state’s constitutional functions – substantially about blurring the spatial and categorical divisions inherent to traditional constitutionalism: domestic/international and public/private divisions. The former distinction is challenged by the network topology of transnational regimes that combines their simultaneous operations in numerous states with the presence in the international realm and thereby equips them with a unique capability to exercise environmental governance functions within, outside, and beyond states at the same time. The latter dichotomy becomes less sharp when private, non-state entities within TER increasingly act as standard-setters in public authority domains – the process referred to as the emergence of “private authority”¹⁹. Both trends are evident through the overall correlations between TER and the constitutional functions of states.

Among constitutional functions of states that correlate with TER, the regulatory function is primarily important. Albeit not explicitly written into constitutions, this meta-function incorporates major competences of public authority, that is, creation, implementation, and enforcement of legal norms. Two others, interrelated and superimposed on each other, functional areas considered in this study are public goods provision, as related to the “public good” nature of the natural environment and its conservation, and constitutionally recognized functions of environmental protection. Both of the latter are connected to the regulatory meta-function, so is their susceptibility to TER impact.

Certainly, “perfect” obligatory state regulation should not be compared to “imperfect” regulation sourced in TER²⁰. Instead, only by the “imperfect” analogy can possible correlations between states and TER be delineated with caution. It is because the standards originating in TER fulfill normative functions that, following A. Peters’ concept, can be mapped in terms of their relation to hard law at domestic and international levels. Firstly, transnational regulatory schemes can fulfill the “para-legal” function when mandatory

¹⁹ *Private Authority and International Affairs*, eds. A.C. Cutler, V. Haufler, T. Porter, New York 1999.

²⁰ A. Prakash, M. Potoski, *Collective Action through Voluntary Environmental Programs: A Club Theory Perspective*, “Policy Studies Journal” 2007, vol. 35, No. 4.

rules are not present or effectively enforced. Secondly, TER standards perform the “pre-legal” function when they precede the emergence of state regulations. Thirdly, they may complement hard law by, e.g., concretizing technical or managerial solutions²¹. Examples from the mentioned transnational forestry and fisheries certification run by the FSC and the MSC can illustrate this functional interplay. Accordingly, the emergence of transnational forest certification in response to the global deforestation issue, under circumstances of ineffective efforts by states to develop respective binding international agreements, meets the criteria of the “para-legal” function. As for the “pre-legal” character of TER, empirical studies on the effects of certification show that some states, e.g., Mexico and Guatemala, have used FSCs as a benchmark while adopting national legislation²². MSC guidelines, in turn, were adopted by Ecuador as the basis for reforming the state’s fishery policy²³. The third of the indicated functions can be exemplified, e.g., by Sweden, where domestic law provides only a general forest management framework that is significantly complemented and concretized by private certification²⁴.

The narrative about patterns of interactions between states and various forms of transnational governance often revolves around the process of power shifting among public and private institutions. However, by no means should it be formulated in zero-sum game rhetoric, as if evident changes brought by transnational actors to the regulatory space denoted the replacement of the state’s sovereign authority and their constitutional functions. Instead, the recent literature, including constitutional studies, focuses on increasingly complex and interwoven institutional landscapes composed of nested, overlapping, and parallel regimes with various – state and transnational – regu-

²¹ A. Peters, T. Förster, L. Koehlin, *Towards non-state actors as effective, legitimate, and accountable standard setters*, [in:] *Non-state Actors as Standard Setters*, eds. A. Peters, T. Förster, L. Koehlin, G.F. Zinkernagel, Cambridge 2009, pp. 500–502.

²² P. Pattberg, *Forest Stewardship Council*, [in:] *Handbook of Transnational Governance. Institutions and Innovations*, eds. T. Hale, D. Held, Cambridge 2011, p. 269.

²³ A. Kalfagianni, L. Partzsch, O. Widerberg, *Transnational Institutions and Networks*, [in:] *Architectures of Earth System Governance. Institutional Complexity and Structural Transformation*, eds. F. Biermann, R. Kim, Cambridge 2020, p. 78.

²⁴ J. Liu, *Smart Mixes in Forest Governance*, [in:] *Smart Mixes for Transboundary Environmental Harm*, eds J. Van Erp et. al., Cambridge 2019, p. 182.

latory institutions contributing to the environmental outcome²⁵. This regime complexity creates various opportunities for states to utilize TER resources and potential strategically to fulfill constitutional functions. In conjunction with the regulatory meta-function, it refers to the public good provision and specific constitutional functions concerning environmental protection. State environmental regulations are derived from power and authority attributed to a state by a given constitutional system. This authority in many states is explicitly recognized in constitutions, ranging from expression of specific tasks and obligations of the state to protect the environment (Constitution of Poland²⁶, Constitution of Portugal) to a more general indication of such duties (Netherlands) or just providing the basis for the state's authority to promulgate environmental protection solutions (Italy)²⁷. As constitutional law imposes rules and duties on states to conduct effective environmental regulation – environmental legislation itself and underlying policy instruments stem from both authority and responsibility of states²⁸. Importantly, however, good regulation (which is assumed to be a public good itself) may, within the limits of a particular legal order, instrumentalize transnational regulatory structures, giving rise to so-called “smart mixes” in environmental governance²⁹. “Smart regulation” denotes combining state law and conventional regulatory techniques, like norm application by administrative agencies, with market-based mechanism and actual implementation run partly by private actors. It means using transnational private regulation to produce public environmental goods.

²⁵ J. van Erp et. al., *The Concept of Smart Mixes for Global Environmental Harm*, [in:] *Smart Mixes...*, p. 5.

²⁶ K. Dunaj, *Protection of the environment under the provisions of the Constitution of the Republic of Poland*, “Przeгляд Prawa Konstytucyjnego” 2015, No. 6 (28).

²⁷ O.W. Pedersen, *Environmental Law and Constitutional and Public Law*, [in:] *The Oxford Handbook of Comparative...*, p. 1072.

²⁸ *Ibidem*.

²⁹ J. van Erp, et. al., *op.cit.*

IV. Conclusion

Having spread dynamically, TER represents one of the most significant and interesting developments in global environmental governance. As they promulgate environmental norms transnationally, beyond, and through formal legal orders, TER is not insignificant to the constitutional functions of states. Functional correlations between TER and states are complex and uneven. Depending on a particular situation – the level of economic development, the concept, normative foundation, and viability of a given state’s environmental policy on the one hand, and the institutional design, legitimacy, and the actual effectiveness of a particular TER on the other hand, they may precede, complement, and sometimes even substitute state regulation. Despite their relatively recent emergence, TER makes already a well-established institutional trend. Moreover, since they continue to proliferate, TER has proven so far to be highly adaptive and resilient to the current slowdown in globalization and geopolitical shift³⁰. That enables us to reasonably and continuously regard TER as a relevant factor in political practice and a matter of interest for the broadly understood constitutional studies.

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