PART FOUR

HORIZONTAL CONFLICTS: THE TENSION BETWEEN
PUBLIC AND PRIVATE TRANSNATIONAL NORMS
RULES OF RECOGNITION: A LEGAL CONSTRUCTIVIST APPROACH TO TRANSNATIONAL PRIVATE REGULATION

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1. Introduction

A large part of the accounting, quality, safety, social and environmental standards that regulate the global economy is set and monitored by private or hybrid associations and networks. These ‘new global rulers’ approach the business of rulemaking according to highly formalized procedures laid down in hefty, detailed and regularly updated tomes of codes, manuals and ‘standards for standards.’ Even if important differences exist between these, there is a surprisingly robust common core of requirements and principles: elaboration of a draft by consensus in a technical committee with a composition representing a balance of interests; a round of public notice-and-comment of that draft with the obligation on the committee to take received comments into account; a ratification vote with a requirement of consensus, not just a majority, among the constituent members of the standards body; and an obligation to review standards periodically. A growing body of work investigates and reflects on


2 See e.g. International Social and Environmental Accreditation and Labelling Alliance, Code of Good Practice for the Setting of Social and Environmental Standards (2010), and the International Organization for Standardization, ISO/IEC Directives, Part 1: Procedures for the technical work (2012). The latter are greatly influenced by, and influence, the regulations of national standards bodies. See for example the American National Standards Institute, ANSI Essential Requirements: Due process requirements for American National Standards (2010); the European Standards Organizations’ CEN/CENELEC Internal regulations Part 1: Common Rules for Standardization Work (2012); the German DIN 820 (2009), and the British Standards Institute, BS 0:2011, A standard for standards: Principles of standardization (2011).
these decision-making procedures under various metrics and concepts of accountability and legitimacy. Although assessments about compliance and effect are far from uniformly positive, there is little doubt about the mechanisms underlying the diffusion of these core principles; standard-setters strive for their standards to be widely used and public recognition is a necessary condition for widespread application. Adherence to fundamental principles of administrative process, in turn, is a necessary condition for public recognition.

However ‘legitimate’ the private regulatory process is, private standards are usually denied the status of law. Their relevance and legal effect come filtered through what have been termed ‘mechanisms of degradation’; standards are either incorporated into the legal system as law by


5 A striking example is the recent effort of ISO to distinguish its work from that of the ISEAL Alliance on the basis of its adherence to WTO disciplines. "Any organization can claim to have developed a ‘standard’...but not all standards are created equal." ISO, International standards and ‘private standards’; Geneva 2010. Compare, just for fun, Columbia Specialty Co v Breman (1949) 90 Cal App 2d 372, 378: "Manifestly, any association may adopt a ‘code’ but the only code that constitutes the law is a code adopted by the people through the medium of their legislatures.”

reenacting the rulemaking process as legislative process, or they are reduced to mere facts—Tertium non datur.

The problem with this bright-line jurisprudence is that, to turn a phrase, it ceases to make demands on the world. One can hardly place normative requirements on the production of facts, even ‘legal facts.’ And applying a coat of constitutionally approved veneer to private rulemaking may conceal cracks in the wall, but does nothing to improve construction. This contribution will try and advance a legal constructivist approach to private transnational governance. Analytically, the argument is that the law/non-law distinction is itself a legal operation, which does not necessarily unfold according to the traditional constitutional hierarchical criteria of authority and validity. Normatively, the argument is that legitimate

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7 The most perennial example of this is surely still the Kansas Supreme Court in State v Crawford 177 P 360, 361 (Kan 1919) (“If the Legislature desires to adopt a rule of the National Electrical Code as a law of this state, it should copy that rule, and give it a title and an enacting clause, and pass it through the Senate and the House of Representatives by a constitutional majority and give the Governor a chance to approve or veto it, and then hand it over to the secretary of state for publication.”).

8 The most prominent example of this strategy is the Appellate Body’s refusal to read a procedural requirement into the definition of ‘international standards’ in the WTO Agreement on Technical Barriers to Trade. EC- Sardines, WT/DS 231/AB/R, 26 September 2002. See below. On the role of standards in the WTO regime, see e.g. Filippo Fontanelli, ‘ISO and Codex standards and international trade law: what gets said is not what’s heard’ 60 International and Comparative Law Quarterly (2011) 895, and Steven Bernstein and Erin Hannah, ‘Non-State Global Standard Setting and the WTO: Legitimacy and the Need for Regulatory Space’ in Journal of International Economic Law (2008) 575.


10 Martti Koskenniemi, ‘The Fate of Public International Law: Between Politics and Technique’ 70 Modern Law Review (2007) 1, at 23 (criticizing legal pluralism for ‘the ways in which it ceases to make demands on the world.’).


12 In the European Union, the IAS Regulation obliges all publicly traded companies in the European Union to prepare their accounts in accordance with international accounting standards issued or adopted by the International Accounting Standards Board, a private international body. Articles 2 and 4, Regulation 1606/2002 on the application of international accounting standards, (2002) OJ L 243/1. These standards end up as Community law in the form of Regulations if the European Commission ‘endorses’ them, acting on the opinion of the regulatory committee on the view of a non-governmental advisory group which, in turn, gives its perspective on the work of a private body which then gives its opinion on the actual standards produced by the IASB. Ibid., Article 6(2); and on the Commission decision setting up a Standards Advice Review Group to advice the Commission on the objectivity and neutrality of the European Financial Reporting Advisory Group’s (EFRAG’s) Opinion, (2006) L 199/3.
global governance is largely a function of the interaction of normative orders. If there is any merit to this approach, it stems from three main features. First, it draws on the main strengths of ‘legal pluralism’ by recognizing that ‘lawmaking’ is not limited to the public institutions recognized as such by the historical frame of law and state. Second, it resolves one of the persistent problems of legal pluralism by taking the concept of ‘law’ seriously and not reducing it to mere fact devoid of all normative aspiration. Third, it should manage to overcome the painful divorce between ‘the question of law’ and ‘the question of legitimacy’; in a legal constructivist approach, the sociological question of law’s recognition of extra-constitutional rule-making is indissolubly linked with the normative inquiry into the conditions of legitimate lawmaking beyond the state. The argument evidently owes an enormous debt to various strands of the work of Gunther Teubner, culminated in Constitutional Fragments. Legal pluralism, reflexive law and a constructivist epistemology of law constitute elements of ‘societal constitutionalism’, rendered here in a debased and systems-theoretically suspect version that insists that law production by private associations should be politicized from within by the operations of normative orders which recognize or deny each other as law according to criteria intrinsic to law.

The argument unfolds as follows. Section 2 will draw on components of economic sociology associated with Karl Polanyi’s concept of ‘embeddedness’ to unhinge the idea that ‘the global market’ is a normative void that territorially bounded, emasculated states are struggling to regulate. Section 3 will attempt to sketch some consequences related to this for the function of law. Section 4 will then address ‘the question of law’ under conditions of legal pluralism, which section 5 will seek to make more concrete.

2. THE EMBEDDED MARKET

Freer Markets, More Rules, the title of Steven Vogel’s classic work evokes a central paradox of the denationalized economy where neoliberal globalization comes not with the unleashing of market forces through massive...
deregulation, but with the expansion of regulatory rules and agents. This is usually seen as a result of changes in the nature and exercise of political authority on the economy: as the State ‘retreats’, it leaves ‘a gap’ to be filled with a myriad of public and private regulators both within and without States. The lack of hierarchy and legal unity, then, leads to new forms and mechanisms of regulation that go under the name of ‘governance’. Coordination problems of governance in the transnational realm, in turn, are to be solved by ‘orchestration’.

It might be useful to change perspective and instead of asking why and how society wants—or needs—to regulate markets, we could ask why and how markets need to be regulated. After all, we are all Polanyians now: it seems nowadays almost acceptable even among economists to propound that “markets are not self-creating, self-regulating, self-stabilizing, or self-legitimizing.”

The new institutional economics has labored one important aspect of this: markets need institutions, in North’s famous formulation, as ‘rules of the game’. Without these—property rights, contract, third-party enforcement, and, importantly, also ‘informal rules’—markets could not exist. Polanyi’s concept of the ‘embeddedness’ of markets is

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16 One of the better expositions of these ‘transformations of global governance’ is Sol Picciotto, Regulating Global Corporate Capitalism (Cambridge, Cambridge University Press, 2011), Chapter 1.


21 This new institutionalism is particularly influential in issues of law and economic development. See e.g. Kenneth Dam, The Law-Growth Nexus: The Rule of Law and Economic Development (Washington, Brookings, 2006), and Robert Cooter and Hans-Bernd Schäfer,
sometimes held to refer to no more than “one of the more tiresome attempts to reinvent an 18th century wheel,” the fact that markets need social and institutional support. Other times, the concept is used as a (historical) variable to measure the degree of ‘marketness’ in society, and when coupled with Polanyi’s equally famous thesis of the ‘double movement,’ the argument then is that all conscious efforts to ‘dis-embed’ will sooner or later be countered by political efforts to ‘re-embed’ the market. One version of this simply equates ‘re-embedding’ with ‘re-regulation’; whereas another would hold the countermovement of ‘re-embedding’ to be a functional necessity for the market society itself in that it maintains or rebuilds the social cohesion and integration without which the market could not exist in the first place.

In both these understandings of embeddedness, the rules work on the market from the outside: whether their aim is to institute or to tame markets, rules and institutions thus understood leave intact an analytically distinct sphere of economic activity where the laws of neoclassical economics apply. But as a mechanism to coordinate economic activity,
‘the market’ in that neoclassical sense is by no means as omnipotent as we tend to think. How do actors attach value to a product in relation to others? How do actors solve ‘the problem’ of that eternal contradiction of economics and capitalism—that if markets were perfect, no one would make a profit? How do actors deal with information asymmetries and opportunism? Part of the answer, in adhering to the topic at hand, lies in standards. The larger point is, to use Fred Block’s (in) famous phrase, that markets are always and everywhere embedded, embedded in civil society, seen as “a concrete set of social relationships, cultural understandings, and institutional and organizational forms that shape the possibilities for economic action.” The market is a social institution.

Thinking about markets this way should unsettle the way we think about economic regulation. It dissolves stark distinctions between the ‘free market’ and political interventionism, between (public) law that corrects markets and (private) law that facilitates exchange. And it helps us understand that there is no such thing as an ‘unregulated market.’ If markets are always already embedded, political intervention into markets is not a question of filling a void, but of interaction with the wider normative universe that constitutes markets. The ‘embedded market’ may also help simply to shift focus. Instead of concentrating on ways to incorporate and discipline ‘the market’ into a pre-defined political community and its law, it could be worthwhile to realize that ‘the market’ is, of functional necessity, a norm-generating social institution that should itself be turned into a political community.

30 Fred Block, ‘Understanding the Divergent Trajectories of the United States and Western Europe: A Neo-Polanyian Analysis’ Politics & Society (2007) 3, at 5. For his effort to trace the ‘always already embedded market’ to Polanyi himself, see Fred Block, ‘Karl Polanyi and the Writing of The Great Transformation’ Theory and Society (2003) 1, at 24 (explaining how Polanyi discovered the concept of the ‘always embedded economy’ but was not able to ‘name’ his discovery.)
3. The Function of Law in the Global Economy

Regulatory law “must remain linked to legislative programs in a transparent, comprehensible, and controllable way,” dixit Habermas. That, of course, is a non-starter for transnational governance regimes. It could even be argued that it has been a non-starter in domestic settings for quite some time now. The ‘transmission belt’ theory of US administrative law, for example, was effectively demolished by a pre-global Richard Stewart back in 1975. Administrative law, he demonstrated, is hardly about constraining the exercise of regulatory power within the bounds set by the will of the people, but rather about the “provision of a surrogate political process to ensure the fair representation of a wide range of affected interests in the process of administrative decision.” Outside of the hierarchical frame of law and state, it seems reasonable to ask why this ‘surrogate political process’ could not, in principle, be orchestrated in private bodies as well as public bodies. With Alfred Aman, there may be something to be said for a ‘new’ administrative law that seeks “to help create a meaningful politics around the decisions of private actors.”

Habermas will have nothing of it, however. In his enthusiasm for the parliamentary complex, he relegates private governance regimes to the “impulse-generating periphery,” and dismisses the idea of the “inner constitutionalization” of corporative actors as “vitiating the idea of government by law.” The suggestion here is that we reverse our thinking.

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33 Jürgen Habermas, *Between Facts and Norms* (Boston, MIT Press, 1995) at 441. In fairness, he readily admits that “there is no patented recipe for this.”
34 See e.g. Jean Cohen and Charles Sabel, ‘Global Democracy?’ 37 *New York University Journal of International Law and Politics* (2005) 763, at 765 (Principal-agent models that deeply shape our ideas about legitimate and effective delegation of authority are ‘irrelevant’ in global administrative space.). See also Julia Black, ‘Constructing and contesting legitimacy and accountability in polycentric regulatory regimes’ 2 *Regulation & Governance* (2008) 137.
37 Jürgen Habermas, *supra* note 33, at 442.
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What if we perceive formal legal systems as the ‘impulse-generating periphery’ to global private governance regimes, and the idea of government by law is found to be expressed exactly in law’s capacity to ‘constitutionalize’ private transnational rulemaking?39

Standards enable coordination of economic activity. To be able to perform that function, however, standards need to be woven into other institutions and recognized by public authorities and legal systems in a multitude of ways and settings.40 Standards are adopted, incorporated or referred to by private and public agencies at various levels of governance; they end up in transnational supplier contracts and in local public works contracts; and they feature in unilateral codes of conduct and in multilateral treaties. They determine who gets insurance at which terms, what can be sold under what name, and what can be manufactured at what cost. Recognition comes with contestation. Like it or not, courts and regulators will have to ask questions of these norms. Do they reflect industry custom, ‘the state of the art’, ‘acknowledged rules of technology’, ‘reasonable consumer expectations’, and other hinge clauses? Do they encourage or stifle innovation and competition? Are they ‘objective’ and non-discriminatory? The answers to these questions will almost invariably turn on the procedure through which the standards at issue were set or adopted. And so European public procurement law may well generate ‘impulses’ for the Forest Stewardship Council, and a product liability case in Mississippi, or a competition case in Australia may well induce the ISO to sharpen its internal regulations.41

It could be argued, of course, that this decentralized system of recognition and contestation merely separates ‘good’ standards from bad standards, and that its collective normative pull leads perhaps to better standard-setting procedures and, at most, buys some ‘legitimacy’ or ‘accountability.’ The distinction between ‘good’ standards and bad does not obviously have very much to do with the distinction between law and non-law. And yet.

4. LAW IS WHAT THE LAW SAYS LAW IS

With a bewildering array of interacting normative orders in transnational fields, scholars have found good reason to (re-)ask some fundamental questions about the nature of law. And it seems we are all legal pluralists now—not just socio-legal scholars and legal theorists confronting the transnational,42 but international lawyers confronting a lack of unity and hierarchy43 and private international lawyers coming out of their ‘clos-
ets.’44 Law as social practice, of course, springs from many sources, and it is perhaps in the subversive nature of the legal pluralist to dismiss the juristic idea of the unity of law and state as mere ideology that makes very little sociological sense.45 It is in this vein that Paul Berman can dismiss “the whole debate about law versus non-law” as “largely irrelevant.”46 But if everything is law, nothing is. The risk is that we strip the concept of law of all normative aspiration and, indeed, “cease to make demands on the world.”47 The task, then, is to ‘find’ a concept of law wide enough to accommodate norms stemming from beyond recognized state-based


45 See Roger Cotterrell, Law’s Community (Oxford, Clarendon, 1995) 306 (attributing to legal pluralism “intellectualised nostalgia for the neighborhood norms and customs of the pre-modern world planned out of existence by the lawmaking activities of the state.”)


47 Koskenniemi, supra note 10.
sources while maintaining the analytical and normative purchase of the category.

Part of this effort is a search for attributes that depend neither on the King’s Head or his Bodies.48 A lot of wonderful work has been done to achieve this, much of it drawing on Lon Fuller’s principles of procedural legality.49 Benedict Kingsbury draws on Jeremy Waldron’s notion of ‘publicness’, by which is meant “the claim for law that it has been wrought by the whole of society, by the public, and the connected claim that law addresses matters of concern to the society as such.”50 Publicness is immanent in law, so that the assertion of ‘lawness’ carries with it the burden: in choosing to claim to be law, or in pursuing law-like practices dependent on law-like reasoning and attractions, or in being evaluated as a law-like normative order by other actors determining what weight to give to the norms and decisions of a particular global governance entity, a particular global governance entity or regime embraces or is assessed by reference to the attributes, constraints and normative commitments that are immanent in public law.51

But ‘publicness’ is also constitutive of law and is woven into the very concept of law. Kingsbury does this by adding a stipulation in the ‘rule of recognition’ that only rules and institutions meeting the requirements of publicness immanent in public law can be regarded as law.52 In establishing the law/non-law distinction as immanent to law, Kingsbury moves somewhat closer to Gunther Teubner’s work than he would seem to be comfortable with.53

49 See e.g. Jan Klabbers, ‘Law-making and Constitutionalism’ in Jan Klabbers, Anne Peters and Geir Ulfstein, The Constitutionalization of International Law (Oxford, Oxford University Press, 2009) 8; and Jutta Brunnée and Stephen Toope, Legitimacy and Legality in International Law (Cambridge, Cambridge University Press, 2010). David Sciulli’s work, supra note 38, is based on both Habermas and Fuller.
52 Kingsbury, supra note 50, at 30.
53 Kingsbury discusses and ultimately dismisses Teubner’s work as normatively unattractive. Kingsbury, supra note 50, at 52 et seq.
There is, to be sure, a fair amount of circularity at work where authority is a function of validity as much as validity is a function of authority. But that is, in a way, the constructivist point. The law recognizes norms as law if they are law. That recognition is a legal operation, carried out, not on the basis of a checklist of external criteria, but on the basis of criteria that are immanent in and constitutive of law. Every act of recognition is, hence, always also an act of constituting law and legal institutions.

5. Constitutive Paradoxes

The distinctions the law makes—between public and private, market ordering and market correcting—may be false but should still be sustained, so Callies and Zumbansen, as ‘constitutive paradoxes’ of a legal order. On that note, we can re-read some paradigmatic case law of private regulation.

Allied Tube, a US Supreme Court case, put the fear of God into the standardization community through the specter of treble damages. Here, a company was accused of ‘packing’ the General Assembly of the National Fire Protection Association (NFPA), a private body, in a successful effort to exclude a competitor’s product from the Association’s flagship standard, the National Electrical Code (NEC). Since the NEC was (and is) adopted by virtually every State in the country as the law of the land, the NFPA argued for governmental immunity from antitrust liability on the theory that the political process should be left alone to determine ‘the public interest,’ this so-called Parker immunity protects public legislation, no matter how anti-competitive. The Court declined on a formal public/private distinction:

The Association cannot be treated as a ‘quasi-legislative’ body simply because legislatures routinely adopt the Code the Association publishes. Whatever de facto authority the Association enjoys, no official authority has been conferred on it by any government.

That leaves the Association with the task of justifying the standard on the grounds that it is conducive to competition and not an ‘unreasonable

55 Graft-Peter Callies and Peer Zumbansen, supra note 6, at 255.
56 Allied Tube v Indian Head 486 US 492 (1988).
57 Parker v Brown 317 US 341 (1943).
restraint of trade.' That distinction subsequently gets dissolved by a procedural requirement of the standard-setting process:

When private associations promulgate safety standards based on the merits of its objective expert judgments and through procedures that prevent the standard-setting process from being biased by members with economic interests in stifling product competition, those private standards can have significant pro-competitive advantages.

As the Court admits, “the issue of immunity in this case collapses into the issue of liability.” Immunity, granted without ado to any formally ‘public’ regulator, has to be earned through procedural guarantees of public-regardingness.58

_Snyder_, a 1996 New Jersey Supreme Court case, topped a string of cases holding standards bodies liable in tort, sending at least one straight into bankruptcy.59 The case had to deal with a death caused by an HIV-contaminated blood transfusion. Fingers were pointed at the American Association of Blood Banks, the trade association of the blood banking industry, for failing to recommend surrogate testing in timely manner. The Court established a duty of care through the doctrine of the Good Samaritan:

Society has not thrust on the AABB its responsibility for the safety of the blood and blood products. The AABB has sought and cultivated that responsibility. For years, it has dominated the establishment of standards for the blood-banking industry. (...) On behalf of itself and its member banks, the AABB lobbies legislatures, participates in administrative proceedings, and works with governmental health agencies in setting blood-banking policy. In many respects, the AABB wrote the rules and set the standards for voluntary blood banks.

For its claims and efforts to be law, the Association will have to bear the consequences. The AABB, of course, immediately tried to turn the Court’s observation to its benefit. Exactly because it played such a major role in public policy, it could not be held to owe a duty of care to private parties on the same rationale that underpins the immunity that benefits government agencies. The Court would have nothing of it, for familiar reasons:

Unlike government agencies, the AABB is not created by statute. It does not act pursuant to a government mandate. Nor is it accountable either to the public or to another branch of government.

And so the issue of immunity, once again, collapses into the issue of liability: the content of the Association’s private law duty of care towards citizens affected by its rulemaking practices is defined by the public law requirements inherent in the very concept of law.

6. **By Way of Conclusion**

Where these cases, in a hopeful reading, could be taken to exemplify a jurisgenerative approach to private rulemaking, the WTO Appellate Body in the case of *Sardines* was surely guilty of pure jurispathos. The WTO Agreement on Technical Barriers to Trade requires States to ‘base’ their technical regulations on ‘international standards’, and provides a safe haven for technical regulations that are ‘in accordance’ with such standards.60 In *Sardines*, the Appellate Body was asked to read a procedural requirement of ‘consensus’ into the definition of ‘international standard.’ Not finding anything much in the text of the Treaty to support such an interpretation, the Appellate Body declined. It hastened to add that:

> the fact that we find that the TBT Agreement does not require approval by consensus for standards adopted by the international standardization community should not be interpreted to mean that we believe that an international standardization body should not require consensus for the adoption of standards. That is not for us to decide.61

But it is.

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60 Article 2(4) and (5) TBT Agreement.