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*Law and Constitutionalism in the  
Mirror of Non-Governmental  
Standards: Comments on Harm Schepel*

ERROL E MEIDINGER  
BUFFALO, NY

## TOUGH TIMES FOR LEGAL POSITIVISTS

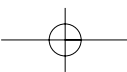
We live in constitutionally perplexing times. A global order is emerging both around us and through us. Many key rules of this order emanate from organisations which are neither encompassed nor controlled by nation states. Their strength stems not from armies but from diffuse types of authority that we struggle to understand. Received conceptions of law and constitutionalism, with their focus on structuring state lawmaking and limiting state powers, are thus of limited use. How are we to comprehend this emergent global order? More particularly, how are we to comprehend law and constitutionalism in this order?

## 'PRIVATE' STANDARDS IN AMERICAN COURTS

Of the many approaches that can be taken to the above questions, Harm Schepel adopts a relatively conservative one. He examines the treatment of non-governmental standards by traditional law courts, specifically US courts. In quite a short space, he reviews a host of judicial decisions in the fields of constitutional, administrative, anti-trust, and tort law, and adds bits from other fields, such as intellectual property.<sup>1</sup> Schepel is not entirely explicit about what he is looking for in the decisions, but his implicit standard is that they should reveal a coherent and logically

<sup>1</sup>H Schepel, 'Constituting Private Governance Regimes', this volume.

Forthcoming in Christian Joerges, Inger-Johanne Sand, Gunther Teubner (eds.), *Transnational Governance and Constitutionalism* (Oxford: Hart Publishing) (2004)



defensible set of rules regarding the legal and constitutional status of private standard-setting in the US legal system. Perhaps embedded in this criterion is the hope that, given US dominance in the post Bretton Woods international order, coherent treatment of non-governmental standard-setting at the US domestic level might point toward coherent treatment at the transnational level, and that law might thus sustain a high degree of unity in the end — but this is conjecture on my part.

Whatever Schepel might have hoped for, he is disappointed by what he finds. Rather than a systematic set of rules for the treatment of private standards, American courts are found to have produced a hodgepodge of conceptions embodied in incomplete, and sometimes inconsistent, rules. Constitutional law, for example, claims to reject private law-making in principle while generally accepting it in practice, typically on expertise or process grounds. Administrative law keeps private standard-setting at a distance, generally requiring agencies to go through a separate decisional step before adopting privately developed standards, but without reviewing the quality of the agency's judgment or giving a substantively persuasive reason for requiring it.

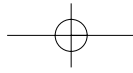
One can quibble with some of the details in Schepel's analysis. It is not necessarily true, for example, that requiring government agencies to review privately developed standards independently is equivalent to 're-enacting the standards process.'<sup>2</sup> Instead, it is plausible to expect that the ensuing agency process will be shorter than it would otherwise have been, and that it will result in rules that fit the situation better while achieving governmental purposes. Similarly, Schepel's conclusion that anti-trust courts generally, but fruitlessly, try to substitute procedural analysis for substantive review in decisions on private standards may conflate 'per se' and 'rule of reason' analyses.<sup>3</sup> In practice, anti-trust courts have gradually retreated from per se analysis in favour of examining the substantive justifications for agreements that might restrain trade, and not merely the procedures through which they were made.<sup>4</sup> And, of course, procedural and substantive analyses are often closely tied to each other, so it would not be surprising if a holding formally based on procedural factors reflected an implicit substantive analysis of the costs and benefits of the agreement.

Still, none of these low-level quibbles answer Schepel's larger point, which is that the US courts have not developed a logically consistent or unified way of treating private standards. This point, I think, must be granted. The question is, what are its implications for law and

<sup>2</sup>*Ibid.*, text preceding n.47.

<sup>3</sup>See above n.1, text preceding n.69.

<sup>4</sup>See, generally, TA Piraino, Jr., 'Reconciling the Per Se and Rule of Reason Approaches to Antitrust Analysis', 64 *South California Law Review* at 685 (1991).



constitutionalism in transnational governance? Here, I take a slightly different tack from Schepel, although, ironically, I may find more to work with in his analysis than he does. Schepel concludes that the US courts' treatment of private standard-setting in the fields reviewed is sufficiently incoherent and disjointed to offer little reason to believe that what his introduction terms 'the law' (the accumulated decisions of courts)<sup>5</sup> deals effectively with private standard-setting. Yet, at the same time, he sees a functional imperative that they must learn to do so, since traditional legal institutions are incapable of generating the manifold standards required by the global economy, and since private *fora* enjoy certain deliberative and decisional advantages over state ones. In the end, he concludes, despite the doctrinal disarray described in his paper, that courts will find appropriate ways of policing private standards systems and incorporating them into the law. This will happen, he says, because it must happen. But how much progress has actually been made toward this end?

#### PLURAL LAW MAKERS, PLURAL PRINCIPLES

For many readers of this book, it will be a truism that law emanates from multiple sources, some of them outside the state.<sup>6</sup> If we take this proposition seriously, how authoritative and conclusive can we expect state courts' treatment of law produced by other law makers to be? After all, state courts will have a difficult time acting as absolute arbiters while simultaneously acting as competing law makers. Nearly two centuries ago, the US Supreme Court Chief Justice, John Marshall, addressed a version of this question in deciding among two competing claims to land, one deriving from tribal authority and the other from federal authority. In affirming the federal claim over the tribal one, Marshall observed that

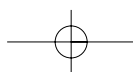
'[c]onquest gives a title which the Courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim.'<sup>7</sup>

However, that was not the end of the matter, and Marshall knew it would not be. The validity of Indian claims could not be authoritatively disposed of by the Supreme Court in one fell swoop. The authoritative principles of

<sup>5</sup> Above n.1, text following n.25.

<sup>6</sup> For example, HLA Hart, *The Concept of Law*, 2nd edn. (Oxford, Oxford University Press, 1994); B de S Santos, *Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition* (New York, Routledge, 1995).

<sup>7</sup> *Johnson v M'Intosh*, 21 U.S. 543, 588 (1823).



property law, thus, could not be exclusively and conclusively authored by the US courts, even the highest one, when competing plausible sources of property law were present.

Analogous limitations apply to the court decisions reviewed by Schepel. While the state-based legal system which they represent is easily the most powerful one in most situations, its capacities are nonetheless limited. The limits are not merely ones of coercion, but also of analytical capacity and legitimate authority. Since no single law-maker can supply or enforce all of the law that Schepel asserts is called for by the expanding global economic system, the various law-makers are, in effect, dependent on each other to achieve effective legal governance. The question is, how are their relationships with each other co-ordinated? One possibility, of course, is that there is very little co-ordination among competing legal systems. And, clearly, there are overlaps and confusion among them. But if the confusion becomes too great, as Schepel's functionalist criteria indicate, essential ordering functions will not be fulfilled.

As noted above, while Schepel focuses primarily on the doctrinal disorder of the court decisions that he reviews, one can also see an intriguing degree of order in them. How one views the materials depends on one's analytical perspective, of course. By working primarily within the conventional analytical framework of the legal professoriate, Schepel is in effect applying a particular aspirational standard — logical coherence of rule systems. This standard is aspirational for two reasons. First, it reflects the preferred work of law professors — systematising rule systems — which is normally done on relatively developed legal systems. Even there, it has the great advantage of never being finished! Second, the plausibility of such work is ordinarily premised on the existence of a single legal system. Where the system analysed is actually one of several, and must treat the others in both conceptual and strategic ways, it is probably unrealistic to expect comprehensive logical consistency.

Multiple legal systems could conceivably be co-ordinated in various ways. An obvious possibility is through division of jurisdiction, perhaps according to subject matter. While a few areas do seem to follow this pattern, most seem to contain multiple rule-making and adjudication systems. However, the overall situation is not chaotic, but relatively orderly. Rules are made, actors proceed, and their actions are effectively co-ordinated — all with surprisingly few claims of regulatory confusion. If the explanation for this situation is neither the existence of a master logic in the state legal system, nor an effective division of labour, what is it?

A plausible hypothesis can be derived from an alternative reading of Schepel's paper. In this reading, although the courts have not produced a logically unified system of rules for non-governmental law-making systems, they have, in dealing with them, articulated and applied a limited number of principles which effectively structure the field. At the

simplest level, three basic principles organise the decisions described in Schepel's paper: (1) expertise, (2) deliberation, and (3) market promotion.<sup>8</sup> The principle of expertise requires that rule-makers speak with credible empirical knowledge of the field for which a rule is being made. If they cannot do so, no amount of procedure will protect or validate the rules that they produce. The principle of deliberation requires that rule-makers follow procedures which demonstrate careful consideration of all the relevant issues and viewpoints, and explain their decisions with regard to them. In the absence of such a procedure, no amount of expertise will protect or validate the resultant rules. Finally, the principle of market promotion requires rules to be structured so as to promote markets to the greatest degree consistent with the legitimate aims of social and environmental protection. Clearly, the relationship between market promotion and social and environmental protection is contested, and will vary with a number of circumstances. Equally clearly, the set of principles described here may be seen as consistent with 'neo-liberal' policy prescriptions. The point of the description, however, is not to promote neo-liberal policies, but, instead, to reflect how entrenched they appear to be in US law and possibly in the larger law-making arena.

The principles of expertise, deliberation, and market promotion are obviously neither identical nor mutually entailed, and cannot be reduced to a single master principle, much less a rule. They operate cumulatively, each having the capacity to invalidate non-governmental rules. And they seem to be effectuated largely in the negative. Rules which egregiously violate any of them are highly vulnerable, and are likely to be set aside, by either the courts or other authorities. Their affirmative requirements remain somewhat open and contested, and are subject to continual definition and revision in adjudication and other law-making processes, as outlined in the deliberation section below. Finally, despite dealing with largely separable concerns, the principles can, in some cases, conflict with each other, thus creating the kinds of uncertainty noted by Schepel. However, although these conflicts do arise, they do not appear to be a central feature of the system.

The reading proposed here can be extended into a larger model in which the principles, perhaps together with others,<sup>9</sup> effectively regulate

<sup>8</sup>It could be argued that this account leaves out the role of tort law with regard to standard-setting. This is not the case, however. The main role of tort law has been to serve as a conduit for private standards into the corpus of court administered law. It does so primarily by making non-governmental standards that meet the three criteria described above mandatory for actors in the fields to which they apply. While the possibility that non-governmental standard-setting organisations might be liable in tort will obviously affect their activities in some cases, it does not serve as an organising governance principle in the field.

<sup>9</sup>A number of more abstract principles may be operating as well, such as liberty, equality, democracy, and perhaps most pressingly, fairness. These do not emerge directly from Schepel's analysis, however, and remain relatively diffuse and indeterminate at global level.

plural law-making bodies so as to make their workings sufficiently compatible to achieve functional governance. If there are a multitude of 'global villages' as Teubner suggests,<sup>10</sup> they are likely to contain multiple law-making institutions, all of which are subject to a general set of global principles, while, at the same time, trying to clarify and modify them. Thus, 'the law' is simultaneously seen as *making rules* and as *being made by them*. This reading is consistent with a number of broader theoretical perspectives, such as regime theory,<sup>11</sup> discourse theory,<sup>12</sup> and legal systems theory,<sup>13</sup> but the materials discussed in Schepel do not necessarily point toward one theory as opposed to the others.

The perspective outlined here may, of course, be seen as naive. Anyone who suggests that law is ordered by principles which are both immanent in and controlling of the law-making process has a considerable burden of persuasion to carry, a burden which cannot be met in this short piece. However, the next few sections pose several questions which are helpful to clarifying this perspective.

#### DELIBERATION

Some of the most striking parts of Schepel's paper discuss the nature of deliberation in standard setting bodies. Early on, he notes that

'standardisation procedures have developed into a remarkably consistent set of truly global principles of 'private administrative law.'<sup>14</sup>

The key requirements are the publication of drafts, the consideration of external comments, and the making of decisions based on consensus. This model is increasingly being adopted in government processes as well. Thus, a global discussion of the proper way to develop rules is underway. This discussion sweeps across public and private *fora*, seemingly bringing them together in an expanded discursive space. As this paper is completed, for example, a global NGO-based group called the International Social and Environmental Labelling Alliance (ISEAL) is conducting a public discussion on 'good practices' for global standard-setting open to everyone around the world.<sup>15</sup> It draws upon and seeks to accommodate

<sup>10</sup>G Teubner, 'Societal Constitutionalism,' this volume.

<sup>11</sup>For example, SD Krasner, (ed), *International Regimes* (Ithaca, Cornell University Press, 1983).

<sup>12</sup>For example, J Habermas, *Between Facts and Norms* (Cambridge, Mass., MIT Press, 1996).

<sup>13</sup>For example, N Luhmann, *A Sociological Theory of Law* (London and Boston, Routledge and Kegan Paul, 1985); Teubner, above n.10.

<sup>14</sup>See above n.1, text preceding n.22.

<sup>15</sup>ISEAL Alliance, 'Code of Good Practice for Voluntary Standard-Setting Procedures,' <http://www.isealliance.org/programs/index.htm>

standards developed by the World Trade Organisation (WTO),<sup>16</sup> the International Organisation for Standardisation (ISO),<sup>17</sup> and other authorities in a strategic manner. While its potential influence on the larger standard-setting discussion is impossible to gauge prospectively, it cannot simply be written off as irrelevant, as would have happened only a few years ago. ISEAL has an agenda, which is to strengthen the role of environmental and social justice interests in global standard-setting. What is more interesting is that ISEAL and its members find it worthwhile to devote their scarce resources to engaging in the global dialogue over standard-setting.

The meanings within the dialogue of some deliberative criteria, such as 'consensus', have evidently been stabilised at a global level.<sup>18</sup> The big issues now have to do with what kinds of 'stakeholders' must be included in the standard-setting process, what kind of 'balance' is necessary, and to what degree any given standard-setting process must consider the products of other processes. If these discussions progress, it becomes increasingly plausible that a global public law is emerging — a public law that can be reduced neither to conventional state-based public law nor to private law.

#### PRIVATE AND PUBLIC

As the amount of standard-setting carried out in 'private' relative to governmental *fora* has grown, so, naturally, has the public interest in the standard-setting activities of the nominally private bodies. While there has been much discussion of whether they should therefore be subjected to the full panoply of traditional public law requirements, this discussion is partly beside the point. The argument outlined above suggests that, by developing standards which they claim further public goals, non-governmental bodies inevitably subject themselves to expanded legal requirements, regardless of whether they are fully equated to government bodies. Rather than a simple dichotomy, therefore, it may be useful to think in terms of either a public-private continuum, or, at least, an intermediate category. Even here, the expanding deliberative process requirements described above may be changing the nature of private

<sup>16</sup>The WTO provisions on recognised standards for products or processes and production methods are an example. WTO, TBT Agreement, Annex 3.

<sup>17</sup>The ISO's definition of consensus is widely accepted as a given. 'General agreement, characterised by the absence of sustained opposition to substantial issues by any important part of the concerned interests and by a process seeking to take into account the views of all parties concerned and to reconcile any conflicting arguments. NOTE — Consensus need not imply unanimity.' ISO/IEC Guide 2:1991.

<sup>18</sup>*Ibid.*

standard-setting bodies. They have already largely accepted a duty to subject their proposed standards to broad public comment. Now, the private standard-setting arena has been entered by NGO-promoted standard-setting organisations which formally incorporate multiple interests in self-consciously representative decision structures.<sup>19</sup> These, in turn, seem to be forcing trade association-based standard-setting organisations to expand their participation provisions. Indeed, the very idea of setting publicly-oriented standards without broad stakeholder participation is now under challenge. In summary, the nature of 'private' standard-setting has changed considerably in the past decade. And while it has become more 'public,' it also seems to be changing the definition of what it means to be public. This change cannot be understood simply by extending traditional public law concepts to new organisations. Instead, it will require incorporating their innovations into our understanding of public law.

#### CONSTITUTIONALISM

Assessing the implications of transnational non-governmental standard-setting processes for constitutionalism requires a concept of constitutionalism. This is not a simple matter, since the concept has shifted over time, and seems to vary with the concerns of the commentator.<sup>20</sup> In recent times, it has become most closely identified with the nation state, and particularly with limiting its powers.<sup>21</sup> In this mode, constitutionalism has little to say about non-governmental standard-setting. However, this seems potentially perverse, since one of the underlying purposes of constitutionalism is to define the appropriate institutional arrangements for the exercise of public power, especially for the exercise of law-making power. If we reason that, under most constitutions, only states can make

<sup>19</sup>The leading example is the Forest Stewardship Council, which seeks to promote environmentally responsible, socially beneficial and economically viable management of the world's forests. The FSC is governed by a 'general assembly' consisting of economic, environmental, and social chambers, each of which is divided into equally powerful 'northern' and 'southern' chambers. For an overview, see E Meidinger, *Law Journal* "Private' Environmental Regulation, Human Rights, and Community," 7 *Buttalo Environmental Law Journal* 123 (1999). See, also, <http://www.fscoax.org/principal.htm>.

<sup>20</sup>These have included, among many other things, (1) social ordering (co-ordination, stabilisation, adaptation, and learning) (eg, A Giddens, *The Constitution of Society*, (Berkeley, University of California Press, 1984); (2) social protection (fundamental rights, freedom, difference, communication) (Sajó, *below* n.21; Teubner, *above* n.10); (3) legitimation (eg J Rawls, *A Theory of Justice* (Cambridge, Mass., Harvard University Press, 1971); J Habermas, *above* n.12); and (4) authoritative decisions (conclusive dispute settlement, structuring of authority) (eg HLA. Hart, *above* n.6).

<sup>21</sup>For example, A Sajó, *Limiting Government: An Introduction to Constitutionalism* (Budapest, Central European University Press, 1999).



law, and that no standards or rules are law until they are adopted by a state, the issue of constitutionalism can be side-stepped.

Limiting constitutionalism to the activities of states is an option, but it may not be a particularly palatable one. It will not be palatable if we believe that the world we live in is being fundamentally reshaped by standard-setting and other governance institutions operating outside the ambit of the state. The reason goes to the heart of constitutionalism: to 'constitute' something is to make it what it is, to give it its essential form.<sup>22</sup> Constitutions made in revolutionary moments quite clearly have this character. They can give a human group its essential structure for a long time to come. They then can also define a 'higher' kind of law-making, often governing regular law-making, which retains constitutional stature.<sup>23</sup> But, given the absence of a revolutionary moment in the case of non-governmental standard-setting, are there any persuasive grounds for viewing these processes in constitutional terms? Only if they are, in fact, remaking who we are, only if they are fundamentally restructuring public authority. Here we face a quandary that can only be resolved by time. At present, a plausible case can be made on either side of the question. Two issues counsel for engaging in constitutional discussion, however. First, transnational non-governmental standard-setting is likely to be a critical testing ground for whether non-coercive forms of global social authority can be sustained. Second, it may be one of the key *fora* in which we learn whether a new global 'we' is being created.

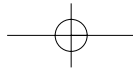
#### THE SOCIAL POSITION OF THE LEGAL SCHOLAR

For the first time in centuries, scholars of law are broadly confronted with questions about their relationship to public authority. The rise of non-governmental standard-setting places the long standing affiliation of legal scholars with state based legal systems in sharp relief.<sup>24</sup> True, legal scholars have often taken critical positions with regard to state law, but the criticism has generally been 'in-house', focusing on inconsistencies, anomalies, or social malfunctions of state-based law. Only in rare situations has the professoriate challenged the state monopoly over law-making.

<sup>22</sup>See, for example, the definitions in the Oxford English Dictionary (compact edition), particularly 'To set up, establish, found (an institution, etc.); 'To make (a thing) what it is; to give its being to, form determine.' (Volume 1 at 529, 1971).

<sup>23</sup>For example, B Ackerman, 'The Storrs Lectures: Discovering the Constitution,' 93 *Yale Law Journal* at 1013 (1984).

<sup>24</sup>Strikingly, little scholarship exists on this subject. For an exemplary study of the relationship between the legal profession and the state, see L Karpik, *French Lawyers: A Study in Collective Action: 1274 to 1994*, (Oxford, Clarendon Press, 1999).

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The rise of non-governmental and transnational standard-setting has the potential to unsettle this relationship. And, over time, how we look at these processes will tell us much about ourselves. On the one hand, legal scholars' relationship to state legal systems is comfortable, well worked out, and well rationalised. On the other, transnational standard-setting processes are increasingly important forms of social ordering, and legal professionals are notoriously responsive to shifts in authority. Moreover, we have the tools to contribute to the process. Yet, how we analyse it will also have implications for who we are. And nothing in the near future is likely to be more telling about legal scholars than how we assess the constitutional implications of transnational, non-governmental standard-setting. For, in doing so, we will have to work out anew what we believe makes us, and what should make us, who we are.

