

Global Bukowina: Legal Pluralism in the World Society

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"The center of gravity of legal development therefore from time immemorial has not lain in the activity of the state, but in society itself, and must be sought there at the present time." (Eugen Ehrlich, 1936: 390).

I.

Who is right - Bill Clinton or Eugen Ehrlich? Both the US President and the almost forgotten law professor from Czernowitz, Bukowina, in the far east of the Austrian Empire have a utopian vision of a global legal order. In Bill Clinton's New World Order it is the Pax Americana which will globalize the rule of law. His global law will be based on the worldwide hegemony of a political-military-moral complex. In Eugen Ehrlich's 'Global Bukowina', it is civil society itself that will globalize its legal orders, distancing itself as it does from the political power complex in the Brave New World's Vienna. Although Eugen Ehrlich's theory turned out to be wrong for the national law of Austria, I believe that it will turn out to be right, both empirically and normatively, for the newly emerging global law. Empirically, he is right, because the political-military-moral complex will lack the power to control the multiple centrifugal tendencies of a civil world society. And normatively he is right, because for democracy, it will in any case be better if politics is as far as possible shaped by its local context.

Lex mercatoria, the transnational law of economic transactions, is the most successful example of global law without a state.¹ Global Bukowina is reaching far beyond economic law. It is not only the economy, but various sectors of world society that are developing a global law of their own. And they do so - as Giddens has put it - in relative insulation from the state, official international politics and international public law (Giddens, 1990: 70). The internal legal regimes of multinational enterprises are a primarily, strong candidate for global law without a state.² A similar combination of globalization and informality can be found in labour law; here, enterprises and labour unions as private actors are dominant law-makers.³ Technical standardization and professional self-regulation have tended towards worldwide coordination with minimal intervention of official international politics. The discourse on Human Rights' has become globalized and is pressing for its own law, not only from a source other than the

1) See Mertens, Chapter 2 in this volume.

2) See Robé and Muchlinski, Chapters 3 and 4 in this volume.

3) See Bercusson, Chapter 6 in this volume.

states but against the states themselves.⁴ Especially in the case of human rights it would be "unbearable if the law were left to the arbitrariness of regional politics" (Luhmann, 1993: 574ff.). Similarly, in the field of ecology, there are tendencies towards legal globalization in relative insulation from state institutions. And even in the sports world people are discussing the emergence of a *lex sportiva internationalis*. (Simon, 1990, Summerer, 1990).

Thus we see a number of inchoate forms of global law, none of which are the creations of states. In relation to them I wish to develop three arguments:

1. Global law can only be adequately explained by a theory of legal pluralism which turned from the law of colonial societies to the laws of diverse ethnic, cultural and religious communities in modern nation-states. It needs to make another turn - from groups to discourses. It should focus its attention on a new body of law that emerges from various globalization processes in multiple sectors of civil society independently of the laws of the nation states.
2. The emerging global (not inter-national!) law is a legal order in its own right which should not be measured against the standards of national legal systems. It is not - as is usually understood - an underdeveloped body of law which has certain structural deficiencies in comparison to national law. Rather, its peculiar characteristics as fully fledged law distinguishes it from the traditional law of the nation states. These characteristics can be explained by differentiation within world society itself. While global law lacks political and institutional support on the global level, it is closely coupled with globalized socio-economic processes.
- (3) Its relative distance from international politics will not protect global law from its re-politicization. On the contrary, the very reconstruction of social and economic (transactions as a global legal process undermines its non-political character and is the basis of its re-politicization. Yet this will occur in new and unexpected ways.⁵ We can expect global law to become politicized not via traditional political institutions but within the various processes under which law engages in 'structural coupling' with highly specialized discourses.

II.

For his part, Bill Clinton has a master-thinker, whose authority he rightly invokes: Immanuel Kant from Königsberg. Kant's philosophical design Zum Ewigen Frieden (eternal peace), is the legitimate predecessor of the new Pax Americana, even if this latter Pax has now violated some of Kant's fundamental principles - the minor ones, of course, such as the principle of non-intervention (Kant, 1795: 346). For Kant, the globalization of law, a 'transcendental formula of public law', would be the consequence of a legalization of international politics. If the sovereign states were to agree to certain legal principles enshrined in a binding international agreement, a new and just legal order for all mankind could develop (Ibid., 343ff.). America's New World Order is supposed to grow out of these very roots: global law will follow from a globalization of the politics of the United States itself, already subdued under the rule of law. Immanuel

4) See Bianchi, Chapter 7 in this volume.

5) Especially in the re-definition of the global-local distinction, resistance against globalisation. For a discussion of these issues, see Wilder and Schütz, Chapters 8 and 9 in this volume.

Kant would have loved to see the image from his book's title adopted as a symbol of the new order: the shingle of a Dutch inn-keeper on which a cemetery was painted - Eternal Peace.

However, we can see today that history has refuted the political philosophers, Kant and Clinton. Globalization has certainly now become a reality.⁶ It is a dynamic on-going process, but it follows patterns quite different from those which Kant and Clinton would like to see. For Kant, only if the nation-states formed a political federation under a republican constitution would a uniform globalization of many legal aspects of society be possible - for example, a right to hospitality as a ius cosmopolitanum (ibid., 357f.). The modern experience, however, is of a fragmented rather than a uniform globalization. Today's globalization is not a gradual emergence of a world society under the leadership of inter-state politics, but is a highly contradictory and highly fragmented process in which politics has lost its leading role. Despite the importance of international relations and international private and public law, politics and law still have their centre of gravity in the nation-state. There are even strong opposing currents towards the strengthening of regional and local politics. The other social sectors have clearly overtaken politics and law on the road to globalization and are founding their global villages, independently of politics.

Here we obviously follow Wallerstein's critique of international relations but we transform his alternative account of worldwide economies into a concept of worldwide fragmented discourses. Non-political globalization occurs not exclusively via the internal logics of a capitalist economic sector but via the internal dynamics of a plurality of social subsystems (Wallerstein, 1979; Giddens, 1990: 65ff.; Luhmann, 1982) Capital has never allowed its aspirations to be determined by national boundaries: this claim to globality is also made by the other cultural provinces, as Karl Mannheim called the autonomous sectors of society. Not only the economy, but also science, culture, technology, health systems, social services, the military sector, transport, communication media and tourism are nowadays self-reproducing world systems in Wallerstein's sense, successful competitors with the politics of nation states. And while the political process has reached only a proto-globality in international relations, that is, nothing more than inter-systemic relations between national units with rather weak transnational elements, the other social subsystems have already begun to form an authentic global society or, better, a fragmented multitude of diverse global societies.

What does this multi-paced scenario of globalization imply for law? On the global level, Eugen Ehrlich seems to be vindicated in his opinion that a centrally produced political law is marginal compared with the lawyers' law in practical decision-making and especially with the living law of the Bukowina (Ehrlich, 1913). Therefore political theories of law will be of little use in understanding legal globalization, This is true for positivist theories which stress the unity of state and law as well as for those critical theories which tend to dissolve law into power politics. Staring obsessively at power struggles in the global political arena of international politics where legal globalization takes place only partially at best, they will overlook dynamic processes in

6) The term globalization is somewhat misleading. It suggests that a multitude of nationally organized societies are now moving towards a single world society (Giddens, 1990: 12ff.). It is more appropriate, however, to date the existence of one world society from the historical moment in which communication became worldwide. Nation states thus do not represent societies of their own but exist according to a principle of territorial differentiation of one world society. Globalization, as we experience it today, means a shift of prominence in the primary principle of differentiation: a shift from territorial to functional differentiation on the world level (Luhmann, 1982; Luhmann, 1993: 571ff.; Stichweh, 1995; Schütz, Chapter 9 in this volume).

other arenas where global legal phenomena are emerging in relative insulation from politics. The crucial point is that "the structural coupling between law and politics via constitutions has no correspondence on the level of world society" (Luhmann, 1993: 582).

What about theories of autonomous law? Can globalizing dynamics be identified in Ehrlich's Juristenrecht (lawyers' law) (Ehrlich, 1913)? Do we experience something like the globalization of autonomous law, as an extension of Wallerstein's ideas might suggest, into a concept of global system differentiation? Historical evidence is poor. There are few signs of a strong, independent, large-scale, global development of genuine legal institutions, especially international courts (Higgins, 1994). The Den Haag experience is not very promising, and recent attempts to continue the Nuremberg tradition of world tribunals seem to be ending in financial and political disaster. Because of the restrictions of international public law and the regionalism of politics, worldwide legislation is a cumbersome process. A global administration scarcely exists despite the existence of numerous international organizations. Perhaps the most interesting and dynamic phenomenon within law's empire itself is the development of private worldwide law offices, multinational law firms, which tend to take a global perspective of conflict regulation (Flood, forthcoming).

Thus, if neither Ehrlich's state law nor lawyer's law lead the way to legal globalization, his living law seems to be the best candidate: The center of gravity of legal development therefore from time immemorial has not lain in the activity of the state, but in society itself, and must be sought there at the present time. (Ehrlich, 1936: 390). Ehrlich, of course, is romanticizing the law-creating role of customs, habits and practices in small-scale rural communities but, in the current globalization process, his living law seems to take on a different and quite dramatic significance relying on cold technical processes, no longer on warm communal bonds. Since it is not politics but civil society itself that drives us toward a globalization of its various fragmented discourses, the globalization of law is bound to follow as a spill-over effect of those developments. From this, the main thesis follows: global law will grow mainly from the social peripheries, not from the political centres of nation states and international institutions. A new living law growing out of fragmented social institutions which had followed their own paths to the global village seems to be the main source of global law. This is why, for an adequate theory of global law, neither a political theory of law nor an institutional theory of autonomous law will do; instead a theory of legal pluralism is required.⁷

However, there are important differences between the above and Ehrlich's living law of Bukowina. New theories of legal pluralism have turned away from colonial situations and are now focusing on the interrelationship between nation state law and the diverse laws of ethnic, cultural and religious communities.⁸ There will have to be yet another turn if the theories are to cope with worldwide legal pluralism. The new global, living law does not draw its strength from the law of ethnic communities as the old local, living law was supposed to do and the more recent patchwork of minorities law is now supposed to do. Clearly, the lifeworld of different groups and communities is not the principal source for global law. Theories of legal pluralism will have to reformulate their core concepts shifting their focus from groups and communities to discourses and

7) See Robé, Chapter 3 in one volume.

8) Santos, 1984; 1987; Fitzpatrick, 1984; Henry, 1983; 1987; Macaulay, 1986; Griffiths, 1986; Merry 1988; 873ff.

communicative networks (see Teubner, 1992: 1456ff.). The social source of global law is not the lifeworld of globalized personal networks, but the proto-law of specialized, organisational and functional networks which are forming a global, but sharply limited identity. The new living law of the world is nourished not from stores of tradition but from the ongoing self-reproduction of highly technical, highly specialized, often formally organized and rather narrowly defined, global networks of an economic, cultural, academic or technological nature.

Thus, we can expect global law to have characteristics that are significantly different from our experience of the law of the nation state:

- 1) **Boundaries:** The boundaries of global law, are formed not by maintaining a core 'territory' and expanding on a 'federal' basis as Kant perceived in terms of nation-states, but rather, the boundaries of global law are formed by invisible colleges, invisible markets and branches, invisible professional communities, invisible social networks that transcend territorial boundaries but nevertheless press for the emergence of genuinely legal forms. A new law of conflicts is emerging on the basis of inter-systemic, rather than international, conflicts (see Teubner, 1993: Ch. 5; forthcoming).
- 2) **Sources of law:** General legislative bodies will become less important with the development of globalization. Global law is produced in self-organized processes of structural coupling of law with ongoing globalized processes of a highly specialized and technical nature (see Teubner, 1991).
- 3) **Independence:** While in nation-states, at least in some of them - the legal process has developed a rather high degree of institutional insulation, global laws will probably remain, for the foreseeable future, in a diffuse but close dependency upon their respective specialized social fields with all their attendant problematic side-effects of which strong exposure to outside interests and a relative weakness of due process and the rule of law are important examples. Obviously, this creates a strong need for legal change.
- (4) **Unity of the law:** For nation-building in the past, unity of the law was one of the main political assets - a symbol of national identity and simultaneously a symbol of (almost) universal justice. A worldwide unity of the law, however, would become a threat to legal culture. For legal evolution the problem will be how to make sure that a sufficient variety of legal sources exists in a globally unified law. We may even anticipate conscious political attempts to institutionalize legal variation, for example, at regional levels.

III.

A war of faith is raging in the field of international economic law. Since the sixties, international lawyers have fought a thirty years' war over the independence of a global lex mercatoria. Is (Stein, 1995: 179 ff) positive law in its own right? Or is it an ensemble of social norms which can be transformed into law only by the juridical decisions of the nation-states involved?

This is a vicarious war. The controversy has model characteristics. It is important not only for the law of global trade itself but also for other fields of global law which are emerging in relative insulation from official international politics (see Section I

above). For these new areas of global law without the state, lex mercatoria stands as the paradigmatic case. In its long history stretching back to the old medieval law merchant, it has accumulated a rich experience as an autonomous non-national body of law.⁹ What kind of lessons will lex mercatoria teach to other bodies of global law?

The debate on lex mercatoria is one of the rare cases in which practical legal decision-making becomes directly dependent upon legal theory. But it is astonishing how poor its theoretical foundation actually is. The entire debate is trapped in the categories of those defunct legal theories which legal practitioners seem to remember from their undergraduate jurisprudence courses. But if key concepts of contemporary legal theory are introduced, are there insights to be gained for lex mercatoria and other forms of global law without the state?

On the one side we find lawyers (mainly French) for whom the new lex mercatoria qualifies as an emerging global legal order. For them, this positive law has its sources in worldwide commercial practices, unitary directives, standardized contracts, activities of global economic associations, codes of conduct and the awards of international arbitration courts. This legal order, they claim, is independent of any national sovereign.¹⁰

These advocates of lex mercatoria have developed theoretical arguments the poverty of which is only matched by the conceptual narrowness of their counterparts. One line of thought tries to revitalize theories of customary law (Goldman, 1986: 114). But what are their operational criteria for the discovery of empirical evidence of consuetudo longa? No adequate conceptualization of opinio juris on the global level is provided, no attempt to demonstrate the legitimacy of customary law under modern conditions of legal positivism (see Esser, 1967; Freitag, 1976; Zamora, 1989). A second line of thought attempts to utilize early twentieth-century, Italian and French-style institutionalism (Romano, 1918; Hauriou, 1933). They construe a droit corporatif of global economic actors, vaguely resembling medieval merchant law (Goldman, 1964; Fouchard, 1965, 1983; Kahn, 1982). This institutionalist vision perceives a close-knit world community of merchants' - a societas mercatorum - almost as a formal organization. Some compare it to a Rotary Club, others to the old merchant's guilds and endow it with solidarity and an 'inner law of associations', with a disciplinary code and organizational sanctions such as blacklisting and exclusion from membership. For the competitive dynamics of today's world markets such a corporatism on the global scale seems somewhat antiquated, to put it mildly. A third line of thought has developed the adventurous construct of 'contrat sans loi', of 'self-regulatory contracts' which are supposed to exist without any basis in national or international law. This construct is, however, bound to fail when it tries to reconcile itself with the traditional doctrine of legal sources. National laws are supposed to grant freedom of contract in the form of the choice of non-national global law (Schmitthoff, 1964; 1982; Cremades and Plehn, 1984: 328ff).

On the other side we find mainly British and American lawyers who evoke the sovereignty of the nation state in order to attack lex mercatoria as 'law fiction', as a 'phantom' conjured up by a few speculative Sorbonne professors.¹¹ Their arguments

9) For its history, see Baker, 1979; Berman, 1983: 3ff.; Meyer, 1994: 48ff.

10) Goldman, 1964; 1979; 1986; 1993; Fouchard, 1965, 1983; Kahn, 1982; 1992; Loquin, 1986; Osman, 1992.

11) Mann, 1968; 1984; Kassis, 1984; Mustill, 1987; Delaume, 1989; Highet, 1989; see also Bar, 1987: 76ff.; Sandrock, 1989: 77ff.; Spickhoff, 1992.

are based on the nineteenth century notion of the unity of law and state: so-called 'national' law is unthinkable! On this viewpoint, any legal phenomenon in the world necessarily has to be 'rooted' in a national legal order; it needs at least a 'minimal link' to national law. Lex mercatoria will never develop into an authentic legal order because it does not regulate an exclusive territory with coercive power. Commercial customs by themselves are incapable of creating law; they can only be transformed into law by a formal act of the sovereign state. The same is true for standardized contracts; they should be subordinated to the political control of national legal orders. Private associations, in turn, may create their quasi-laws, but such 'laws' are without binding force. Finally, according to this view, international arbitration cannot develop an authentic body of case law with precedential value because arbitration awards can always be questioned by resort to national courts and by the 'exequatur' procedures within the nation states. Only the received doctrines of the classical law of conflicts, private international law, are capable of adequately dealing with any international legal conflict in economic affairs. If legal globalization is really necessary, then, the view asserts, the only legitimate sources are international treaties and conventions under the authority of international public law.

The bitterness of the controversy indicates that we are nudging at a taboo, deeply rooted in practices, doctrines and theories of law. It demonstrates the tremendous resistance that Ehrlich's global Bukowina has to face in a legal world still conceptually dominated by the nation state. How deeply the taboo is rooted is demonstrated by the almost apocalyptic tone of the critique of lex mercatoria:

"It is difficult to imagine a more dangerous, more undesirable and more ill-founded view which denies any measure of predictability and certainty and confers upon the parties to an international commercial contract or their arbitrators powers that no system of law permits and no court could exercise" (Mann, 1984: 197).

Indeed, lex mercatoria breaks a double taboo about the necessary connections between law and state. First, it does so by suggesting merely 'private' orders (contracts and associations) produce valid law without authorization from and control by the state. From Savigny on words, contract has been denied the dignity of a legal source and, perceived as a mere factual phenomenon, it has been shifted to the domain of empirical sociology (Savigny, 1840: 12). Since lex mercatoria is contract without law it is a lex illegitima in this sense. Second, lex mercatoria breaks yet another element of taboo by claiming to be valid outside the nation state and even outside international relations. How can authentic law 'spontaneously' emerge on a transnational scale without the authority of the state, without its sanctioning power, without its political control and without the legitimacy of democratic processes? Where is the global Grundnorm (Kelsen, 1960)? Where is the global 'rule of recognition' (Hart, 1961: 92ff.)?

IV.

How would contemporary sociological theory of law deal with lex mercatoria and with other forms of global law without the state? Of course, legal theory cannot 'bind' legal practices of lex mercatoria in their determination of what is legal and what is not. And there are, of course, many legal theories that come up with idiosyncratic definition of

what law is.¹² There is, however, one type of legal theory that makes itself explicitly dependent upon legal practices. It observes law as a self-organizing process that autonomously defines its boundaries. This is called second-order observation (Luhmann, 1993: 61), and it observes how legal practices themselves observe the world. The theory does not attempt to delineate what is inside and outside the law but produces instead instruments of observation. It observes the observations of legal practice. In its turn legal practice might gain by being informed about these observations.

Such a theory would not outrightly reject positivist accounts that make the existence of lex mercatoria dependent on the formal legal acts of a nation state. The war of faith could come to a peaceful end - on the condition that the 'global reach' of law is no longer treated as a question of doctrinal definition but as an empirical question which allows for variation. Our definitive question would be: where are concrete norms actually produced. In national politics and in international political relations? In judicial processes within the nation-states and in international courts? Or in global economic and other social processes? The hypothesis also seems to be well founded in legal experience that a global economic law is developing along all three dimensions.¹³ Of course, this presupposes a pluralistic theory of norm production which treats political, legal and social law production on equal footing. (Teubner, 1992; Luhmann, 1993: 100ff., 320ff.; Robé in this volume).

However, taking into account the fragmented globalization of diverse social systems, this theory would give different relative weights to these norm productions. A theory of legal pluralism would perceive global economic law as a highly asymmetric process of legal self-reproduction. Global economic law is law with an underdeveloped 'centre' and a highly developed 'periphery'. To be more precise, it is a law whose 'centre' is created by the 'peripheries' and remains dependent on them.¹⁴ Lex mercatoria, then, represents that part of global economic law which operates on the periphery in direct 'structural coupling' with global economic organizations and transactions. It is law stemming from paralegal rules which are produced 'at the margin' of law, at its boundary with economic and technological processes (Braeckmans, 1986).

This would allow us to identify numerous phenomena within a global commercial law which - in accordance with traditional positivist theories - have a clearly national and international basis. Attempts at the unification and harmonization of commercial law by international treaties, as well as by national agencies and courts that adapt their municipal law to global requirements, would be cases in point. But what about lex mercatoria propria, the more difficult case of a pluralist law production on a non-political and non-national basis?

The phenomenon to be identified is a self-reproducing, worldwide legal discourse which closes its meaning that boundaries by the use of the legal/illegal binary code and reproduces itself by processing a symbol of global (not national) validity. The first criterion - 'binary coding' - delineates global law from economic and other social processes. The second criterion - 'global validity' - delineates global law from national and international legal phenomena. Both criteria are instruments of second-order observation as mentioned above. They observe how the law observes itself, in our case

12) Mertens, Chapter 2 in this volume.

13) See the Classification of international economy: law by Schanze.

14) For the internal differentiation between centre and periphery, see Luhmann, 1993: 320ff.

how a global law observes itself in its environment of national legal orders and global social systems.

With this definition we pay tribute to the 'linguistic turn' in sociology and apply it to the concerns of law and society. Accordingly, rule, sanction and social control, the core concepts of classical sociology of law, recede into the background. Speech acts, *énoncé*, coding, grammar, transformation of differences, and paradoxes are the new core concepts utilized in the contemporary controversies on law and society¹⁵. They promise a deeper understanding both of *lex mercatoria* and global legal pluralism.

'Sanction' is losing the place it once held as the central concept for the definition of law, for the delineation of the legal from the social and the global from the national. Of course it has played an important role in the tradition, in John Austin's theory of law (commands backed by sanctions) (1954: 13ff) in Max Weber's (1978) concept of law (administration by legal professionals), in Eugene Ehrlich's (1913) distinction of legal and non-legal norms, and in Theodor Geiger's behaviouralism (alternative compliance/sanction)(1964: 68ff). In contemporary debates, sanctions are only seen as one among many symbolic supports for normativity (for example, Luhmann, 1985: ch. II.3) In these debates, the symbolic reality of legal validity is not defined by sanctions.

In the *lex mercatoria* debate, the fact that this kind of law is dependent upon the sanctions of national courts has been used as an argument against its authentically global character (for example, Kassis, 1984: 332ff; Bar, 1987: 80f; Schlessis, 1989: 152ff). If a specialized legal discourse, such as the commercial one, claims worldwide validity then it does not matter where the symbolic backing of its claims by means of sanctions comes from, be it from local, regional or national institutions. It is the phenomenological world constructions within a discourse that determine the globality of the discourse, and not the fact that the source of the use of force is local.

Similarly 'rules' lose the strategic position they once had as core elements of law (Kelsen, 1960; Hart, 1961). In the switch from structure to process, the central elements of a legal order are *énoncés*, communicative events, legal acts and not legal rules. It has proved hopeless to search for a criterion delineating social norms from legal norms. The decisive transformation cannot be found in the inherent characteristics of rules, but in their insertion in the context of different discourses. Rules become legal as communicative events emerge using the binary code and producing microvariations of legal structure.

Again, in the *lex mercatoria* debate, the fact that its rules are rather indeterminate has been used as an argument against its independent existence. (Langen, 1973; Berman, 1983: 51; David, 1977: 17; Bar, 1987: 79). But the determinacy of rules is a misleading criterion. The existence of an elaborate body of rules is not decisive. What matters is a self-organizing process of mutual constitution of legal acts and legal structures (for more details, see Teubner, 1992).

'Social control' is likewise insufficient for our task of identifying, within *lex mercatoria*, elements of a legal discourse of its own. Today's legal pluralists tend to

15) Despite the differences between various post-structuralist legal theories it is striking to observe how much their analytical tools resemble each other. For post-modern theories, see Lyotard, 1987; Derrida, 1990; Arnaud, 1990; Ladeur, 1992; Douzinas and Warrington, 1994; for discourse theory, see Jackson, 1988; for critical theory, see Habermas, 1992; Wiethölter, 1989; and Lenoble and Berten, 1990; for systems theory, see Luhmann, 1993; Schütz, 1994; for game theory, see Kerchove and Ost, 1988, 1992.

replace the lex proprium with social control (Griffiths, 1986: 50, fn.41). In their account of lex mercatoria as a form of social control they include within legal pluralism global commercial customs and practices as well as transactional patterns and organizational routines of multinational enterprises. They even go so far as to include purely economic exigencies and the sheer pressures of power in global markets. However, if legal pluralism entailed everything that serves the function of social control it would be identical with a comprehensive pluralism of social constraints of any kind (Cohen, 1983: 101).

Why should legal pluralism be defined only by the function of 'social control' (Griffiths, 1986: 50) and not the function of 'conflict resolution' as theories of private justice would suggest (Henry, 1983)? Why could the function of 'coordinating behavior', 'accumulation of power', or 'private regulation', which theories of private government would emphasize (Macaulay, 1986) not be taken to define legal pluralism? And why not 'discipline and punish' which would tend to include any mechanism of disciplinary micro-power that permeates social life (Foucault, 1979; Fitzpatrick, 1992)? Each of these functions would bring the diverse social mechanisms in global markets and multinational organizations into the realm of legal pluralism. Functional analysis of this kind is not suited to providing criteria for the delineation of the legal and the non-legal in lex mercatoria.

Now, if we follow the linguistic turn we would not only shift the focus from structure to process, from norm to action, from unity to difference but, most important for identifying the lex proprium, from function to code (see Ladeur, 1992; Luhmann, 1993: Ch. 2; Teubner, 1993). This move brings forward the dynamic character of a worldwide legal pluralism and at the same time delineates clearly the 'legal' from other types of social action. Legal pluralism is then defined no longer as a set of conflicting social norms but as a multiplicity of diverse communicative processes in a given social field that observe social action under the binary code of legal/illegal. Purely economic calculations are excluded from it as are the sheer pressures of power and merely conventional or moral norms, transactional patterns or organizational routines. But whenever such non-legal phenomena are communicatively observed under the distinction directrice legal/illegal (Luhmann, 1992) they play a part in the game of legal pluralism. It is the implicit or explicit invocation of the legal code which constitutes phenomena of legal pluralism, ranging from the official law of the state to the unofficial laws of world markets.

To avoid misunderstanding, I hasten to add that the binary code legal/illegal is not peculiar to the law of the nation state. This is in no way a view of 'legal centralism' (Griffiths, 1986: 2ff.). It refutes categorically any claim that of the official law of the nation states, of the United Nations or of international institutions enjoy any hierarchically superior position. It creates instead the image of a heterarchy of diverse legal discourses.

A global merchant's law would belong to the multitude of fragmented legal discourses, whether the discourse is of state law, of rules of private justice or regulations of private government that play a part in the dynamic process of the mutual constitution of actions and structures in the global social field. Nor is it the law of nation-states but a symbolic representation of validity claims that determines their local, national or global nature. The multiple orders of legal pluralism always produce normative expectations, excluding, however, merely social conventions and moral

norms since they are not based on the binary code legal/illegal. And they may serve many functions: social control, conflict regulation, reaffirmation of expectations, social regulation, coordination of behaviour or the disciplining of bodies and souls. It is neither structure nor function but the binary code which defines what is the lex proprium in local or global legal pluralism.

V.

So far we have shown that a theory of legal pluralism is capable of identifying authentic legal phenomena operating on the global level. But the following question is still unanswered: given the absence of a global political system and the absence of global legal institutions, how has it been possible to establish a global legal discourse, based on the binary code of the law and a global symbol of validity without its being rooted in national law? The answer? There is a paradox underlying the creation of global economic law - the paradox of a self-validating contract. Only on the condition that this paradox of contractual self-reference be successfully 'de-paradoxified' can a global legal system in economic affairs get off the ground.

In lex mercatoria it is the practice of contracting that transcends national boundaries and transforms a merely national law production into a global one - numerous international business transactions, standardized contracts of international professional associations, model contracts of international organizations and investment projects in developing countries. However, as soon as these contracts claim transnational validity, they are cut off not only their national roots but their roots in any legal order. This may be fatal. It is not only lawyers who declare contracts without law unthinkable. The idea that any contract needs to be 'rooted' in a pre-existing legal order is not merely a legal axiom. Sociologists too, will protest against contrat sans loi. From the work of Emile Durkheim onwards it has been the great sociological objection to any autonomous contractualism that the binding force of contract needs to be rooted in broader social contexts (Durkheim, 1933: ch. 7). Of a purported contractual lex mercatoria sociologists would ask the famous Durkheimian question: where are the non-contractual premises of global contracting?

Why not in the contracts themselves? Apparently this is a dead end. Any self-validation of contract leads directly into the paradox of self-reference, into the contractual version of the Cretan liar paradox (see Dupuy and Teubner, 1990). In the positive version (We agree that our agreement is valid), it is a pure tautology. In the negative version (We agree that our agreement is not valid) it is the typical self-referential paradox which leads to nothing but endless oscillation (valid - not valid - valid ...) and blockage. The result is undecidability. This underlying paradox is the principal reason why lawyers, as well as sociologists, declare self-validating contracts unthinkable and talk lex mercatoria out of existence.

Social practice, however, is more creative than legal doctrine and social theory. Kautelarjurisprudenz, the practice of international draftsmen, has found a way to conceal the paradox of self-validation in such a way that global contracts have become capable of doing the apparently impossible. Global contracts are creating their non-contractual foundations themselves. They have found three ways of de-paradoxification - time, hierarchy and externalization - that mutually support each other and make it possible, without the help of the state, for a global law of the economic periphery to create its own legal centre.

Empirically, we find the most perfect 'deparadoxification' in those commercial contracts that construct a so-called "closed circuit arbitration" (Cremades and Plehn, 1984) This is a self-regulatory contract which goes far beyond one particular commercial transaction and establishes a whole private legal order with a claim to global validity. Apart from substantive rules it contains clauses that refer conflicts to an arbitration "court" which is identical with the private institution that was responsible for "legislating" the model contract. This is the "closed circuit".

In the first place, these contracts establish an internal hierarchy of contractual rules. They contain not only "primary rules" in the sense established by Hart (1961: 77ff.), which regulate the future behaviour of the parties, but also 'secondary rules' which regulate the recognition of primary rules, their identification, their interpretation and the procedures for resolving conflicts. Thus, the paradox of self-validation still exists, but it is concealed in the separation of hierarchical levels, the levels of rules and meta-rules. Unlike the rules, the meta-rules are autonomous, although both have the same contractual origin. The hierarchy is 'tangled', but this does not hinder the higher echelons from regulating the lower ones (Hofstadter, 1979: 684ff.; 1985: 70ff.; Suber, 1990).

Second, these contracts temporalize the paradox and transform the circularity of contractual self-validation into an iterative process of legal acts, into a sequence of the recursive mutual constitution of legal acts and legal structures. The present contract extends itself into the past and into the future. It refers to a pre-existing standardization of rules and it refers to the future of conflict regulation and, thus, renders the contract into one element in an ongoing self-production process in which the network of elements creates the very elements of the system.

Third, and most importantly, the self-referential contract uses the deparadoxification technique of externalization. It externalizes the fatal self-validation of contract by referring conditions of validity and future conflicts to external 'non-contractual' institutions which are nevertheless "contractual" since they are a sheer internal product of the contract itself. The most prominent of these self-created external institutions is arbitration which has to judge the validity of the contracts, although its own validity is based on the very contract the validity of which it is supposed to be judging. Here, the vicious circle of contractual self-validation is transformed into the virtuous circle of two legal practices: contracting and arbitration. An internal circular relationship is transformed into an external one. In the circular relationship between the two institutional poles of contract and arbitration, a 'reflexive mechanism', as Stein (1995: 164ff) we find the core of the emerging global legal discourse that uses the specialized binary code, legal/illegal, and processes the symbol of a non-national, even of a non-international, global validity. An additional externalization of this reference to quasi-courts is the reference to quasi-legislative institutions, to the International Chamber of Commerce in Paris, the International Law Association in London, the International Maritime Commission in Antwerp and to all sorts of international business associations (Schmitthoff, 1990). Thus transnational contracting has created ex-nihilo an institutional triangle of private "adjudication", "legislation" and "contracting".

Why is this externalization so important for the creation of an authentically global law? The answer is not only because it supports the de-paradoxification of contractual self-validation, but also because it creates dynamics of interaction between an "official"

legal order and a "non-official" one, which is constitutive for a modern legal system. It introduces an internal differentiation between organized and spontaneous law production which creates the functional equivalent of 'state law' and 'contracts' in national contexts (cf. Luhmann, 1993: 320ff.). Thus, arbitration bodies and private legislation change dramatically the role of the international contract itself. Although arbitration and standard contracting themselves are based on contract, they transform the contractual creation of rights and duties into "unofficial law" which is now controlled and disciplined by the 'official law' of the arbitration bodies. Private arbitration and private legislation become the core of a decision system which begins to build up a hierarchy of norms and of organizational bodies. It makes the reflexivity of lex mercatoria possible. (Stein, 1995: 164ff).

In this way the global legal discourse finds itself on the paradox of contractual self-validation and differentiates itself into both an "official", a "non-official". Contrary to the opinions of the defenders of lex mercatoria, it has nothing to do with customary law because empirical evidence shows that it is not based on practices nobilitated by opinio juris (Berman, 1983: 50ff.). Like other forms of non-customary law it is based on decisions of positive law-making. It is positive law in the forms of 'private' legislation, adjudication and contracting. Certainly, there are customs which are incorporated into contracts as 'commercial practices'. They do play a role but a rather limited one.

Nor should lex mercatoria be equated with a droit corporatif. On the world market there does not exist anything similar to an 'corporation' of merchants which could discipline its members. Of course there are formally organized professional organizations, but there is no formally organized 'business community' which could produce an inner law of associations via the mechanism of membership, entry and exit. The formal sources of legal validity are transactions of the world market which is structurally different from a formal organization.

Finally, lex mercatoria has little in common with the contrat sans loi of some international jurists. (Schmitthoff, 1964; 1982; Cremades and Plehn, 1984: 328ff; Mertens, Ch.3 in this volume). Certainly, it shares the assumption that contract is the decisive mechanism of validity transfer, and is neither national law, commercial custom or a kind of global corporatism. However, these jurists still attempt to find the legitimation of the 'self-regulatory contract' in national law:

If national laws permit the parties to a contract to choose the law applicable to their contract, then it is only logical [sic] that they must also permit to make the contractual conditions so complete that there is no room any longer for the application of any national law (Schmitthoff, 1964: 69).

Obviously, this is not 'logical'. To permit a choice of law that is, a choice among existing national laws, in no way includes the permission to create a new law outside any national legal order. The 'comitas' of the sovereign nation states refers to other national laws, but not to an 'a national' legal order. In contrast, our concept of global legal pluralism works on the basis of two assumptions which are more radical than an implied delegation of state power. The first assumption refers to traditional theories of legal sources. The global context, in which no pre-existing legal order can be said to be the source of validity of global contracts, compels us to define contracting itself as a source of law, as a source on equal footing with judge-made law and with legislation. In

our case, contracting is even the primary source of law and the basis for its own rudimentary quasi-adjudication and quasi-legislation. The second assumption refers to theories of legal legitimacy. 'Rules of recognition' need not necessarily be produced hetero-referentially by an independent 'public' legal order and then be applied to 'private' contractual arrangements. What we face here is a 'self-legitimizing' situation, comparable only to authentic revolutions in which the violence of the first distinction is law-creating. 'In ogni violenza vi è un carattere di creazione giuridica' (Resta, 1984: 10; see also 1985: 59ff.). Clearly, the silent revolution of lex mercatoria needs - like any law based on revolutionary acts - 'recognition' by other legal orders. But this is only a secondary consideration. Recognition is not constitutive of the existence of a legal order.

VI.

In measuring lex mercatoria against the standards of national legal orders it would be a grave error to describe the differences as 'deficiencies' inherent in lex mercatoria and conclude that it is of a not-yet-developed legal order on the global scale (Virally, 1982: 385; Siehr 1985: 117). The asymmetries of a weak institutional centre which depend on a strong economic periphery are not a merely transitory matter. They are due to their global environment, that is, due to globalized markets and enterprises with a 'global reach' on the one side and on regional politics with 'international relations' on the other. Thus it can be anticipated that a global economic law discourse will find a dynamic stability of its own and will develop 'eigenvalues' which must be understood in their own right.

(1) Structural coupling with global economic processes:

This is the overriding characteristics of lex mercatoria. It is a law that grows and changes according to the exigencies of global economic transactions and organizations (Braeckmans, 1986). This makes it extremely vulnerable to interest and power pressures from economic processes. Since there is no institutional insulation of its quasi-legislation and its quasi-jurisdiction, the relative autonomy and independence which historically national legal orders have been able to achieve will probably remain something unknown. For the foreseeable future lex mercatoria will be a corrupt law - in the technical sense of the word. At the same time, lack of institutional autonomy makes this law vulnerable to political pressures for its political 'legitimation' (Joerges, 1974: 41; Bonell, 1978).

(2) Episodic character:

Self-reproductive legal systems comprise interactional episodes that are linked to each other in a second communicative circle (precedents, legal doctrine, codification) which is the locus of the evolutionary mechanism of stabilization (Teubner, 1987; 1993: ch. 3). This is lex mercatoria's weak point, since it consists of episodes with rather weak communicative links. We find myriads of highly sophisticated contractual regimes which - as in the case of investment projects in developing countries (see Schanze, 1986) - can be of extreme economic and political importance for a whole region. However, the links between these regimes of contractual feudalism are rather flimsy so that global law's empire slightly resembles the Heilige Römische Reich Deutscher Nation, an uncoordinated ensemble of many small domains, a patchwork of legal regimes. The principal links between them are still supplied by private associations which are responsible for the formulation of model contracts (Schmitthoff, 1990; Stein, 1995: Ch.3).

Arbitration bodies are likewise strong in producing episodes and weak in linking them up with one another. There are some signs of a system of precedents in arbitration matters, beginning with the publication of reasoned arbitration awards and a practice of using old awards as precedence. (Carbonneau, 1985; Paulsson, 1990; Berger, 1992; Stein, 1995: 165ff).

The constant flow of arbitration awards is nourishing a new legal order that is born of and particularly suited to regulating world business. Trade usages and customs as well as professional regulations will attain the status of law as they become embodied in arbitral decision making (Cremades, 1983: 533)

Moreover, there are structural obstacles to the systematic development of an authentic case law, not to speak of a hierarchy of arbitration courts which could provide consistency within the second communicative circle. Thus, the chances that an autonomous legal evolution of lex mercatoria will occur are rather slim. While legal variation and selection mechanisms are indeed in place, its stabilization mechanism is so underdeveloped that in the foreseeable future the development of this law will follow the 'external' evolution of the economic system but fail to develop an 'internal' evolution of its own.¹⁶

In the long run, lex mercatoria may very well develop certain institutionalized linkages of its episodes which would make its own path-dependent evolution possible. However, as one can extrapolate from contemporary tendencies, these linkages will look quite different from their main national counterparts - court hierarchies and parliamentary legislation. As already mentioned, there is an inchoate practice of precedent and stare decisis in commercial arbitration. However, the lack of any institutionalized court hierarchy which could guarantee a certain normative consistency is compensated by an increasing reliance on mutual observation and adaptation of arbitration bodies and by the increasing reliance of the "Big Three" in international commercial arbitration - Chambre de Commerce International, Iran - United States Claims Tribunal, and International Centre for Settlement of Investment Disputes (Stein, 1995: 167). A reputational hierarchy will substitute for an organizational hierarchy. Similarly, the political linkage of adjudicational episodes to legislative-parliamentary bodies which we know from the traditional nation state will not be repeated in global economic law. Rather, the reference will be to the "legislators" of private regimes, the economic and professional associations, and to a whole heterarchical network of international organisations, private and public. From this multiple circular linkages of its episodes, lex mercatoria may gain the ability to develop beyond its mechanisms for variation and selection independent mechanisms for retention, the interplay of which might result in an autonomous path of legal evolution.

(3) Soft law:

The normative substance of lex mercatoria is extremely indeterminate. Instead of refined rules of private law, it consists of broad principles that change in their application from case to case (Mustill, 1987: 174ff; Hoffmann, 1987: 220ff.). This is one of the reasons why some lawyers negate its existence as law altogether (Bar, 1987: 79). From the preceding discussion we know why they are wrong: they are seeking a

16) For a concept of external and internal evolution of law, see Teubner, 1993: ch. 4.

body of rules as the 'essence' of an autonomous legal order, instead of looking for a communicative process that moves the symbol of validity according to the binary legal code. Although there are several attempts to codify ruler of global economic law, the softness of lex mercatoria is remarkable. It is more a law of values and principles than a law of structures and rules (Meyer, 1994: 128ff.) But is softness a vice or a virtue? Again, we should not see this as a deficiency, but as a typical characteristic of global law. It compensates for the lack of global enforcibility; it makes this law more flexible and adaptive to changing circumstances; it makes it better suited to a global unification of law.¹⁷ And it makes it relatively resistant to symbolic destruction in the case of deviance. Stability comes from softness. Lex mercatoria is soft law, not weak law.

VII.

In the long run its depoliticized origin and its apolitical character cannot protect lex mercatoria from a repoliticization. On the contrary: the juridification of economic relations provokes political interference. While it is extremely difficult for any political process in both national politics and international relations to intervene in global economic transactions or in multinational organizations, things change drastically with juridification. Once the contractual mechanism stabilizes the structural coupling between law and the economy, political processes tend to use the result of this coupling for their own purposes. This is observable in the case of lex mercatoria which has been usable to protect itself from the malstrom of international politics. And it will be less able to do so in the future (Joerger, 1974: 41; Boxuell, 1978; Kernell, 1981; Béguin, 1985; Stein, 1995: 247ff).

Re-nationalization of lex mercatoria is one issue. The more the issue of 'competitiveness' of national economies or regional blocks in the global economy comes to the foreground of international politics, the more lex mercatoria will be under pressure to bend to national economic policies. The development of intellectual property law on an international scale is a good case in point (Nimmer, 1992). In any case, lex mercatoria will become an openly politicized sphere of law where the political role of international organizations moves to the foreground.

The North-South divide is the other issue which will not allow lex mercatoria to retain its idyllic private law status. The discussion of the 'New Economic World Order' has already had repercussions on global economic law. The UN codification of sales, the Standard Contracts of UNECE are good examples of the repoliticization of lex mercatoria. However, these mechanisms of repoliticization are still rather external to lex mercatoria itself, the politics of will undergo substantial change only when the inner mechanisms of this global law production process are politicized: when the internal structures and processes of the law-creating mechanism - the law-making bodies in international private associations and the composition and procedures of arbitration boards come under public scrutiny and debate.

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17) See Mertens, Chapter 3 in this volume.

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