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Breaking Frames Economic Globalization and the Emergence of *lex mercatoria*

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Abstract

Globalization processes imply the self-deconstruction of the hierarchy of legal norms. Thus, legal pluralism is no longer only an issue for legal sociology, but becomes a challenge for legal practice itself. Traditionally, rule making by 'private regimes' has been subjugated under the hierarchical frame of the national constitution. When this frame breaks, then the new frame of legal institutions can only be heterarchical. The origin of global non-state law as a sequence of recursive legal operations is an 'as if', not only a founding myth as a self-observation of law, rather the legal fiction of concrete past operations. This fiction, however, depends on social conditions outside legal institutions, on a historical configuration in which it is sufficiently plausible to assume that in earlier times, too, legal rules were applied.

Key words

■ frames ■ globalization ■ legal autopoiesis ■ *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)

I

In 1991 the Cour de Cassation de Paris took a decision which invoked the double meaning of our title. 'Breaking frames' is about the violence that the frame of law and the movement of law exert upon each other. The delimitation of law breaks the law, while the law breaks its delimitations. In the case *Primary Coal Incorporated v. Compania Valenciana de Cementos Portland*, the Court had to decide whether or not 'les seules usages du commerce international, autrement

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dénommés *lex mercatoria*' should be allowed to break the traditional frames of international private law. Should the national court recognize *lex mercatoria*'s 'private justice' as a new positive law with transnational validity? Could such an ambiguous normative phenomenon which is 'between and beyond' the laws of the nation states and at the same time 'between and beyond' law and society be applied by arbitration bodies according to the rules of the law of conflicts? Does it contain distinct rules and principles of its own?[1] However the judges decide about *lex mercatoria*, it means breaking frames. Either the rigid frames of private international law are breaking transnational phenomena into a shattered multitude of national laws, or the dynamics of the global market are breaking the narrow frames of national law and push for the recognition of a global law without the state.

Obviously, 'frame' in this context means something different from its traditional sense of separating an image from the world. Frame in the sense of *parergon* is more than a simple static boundary between two legal orders or between law and non-law. Instead, frame as the paradox of a *cloture ouvrante*

> . . . is the transitory, and processual, oscillating zone of the in-between, between the internal and external, between the proper and its other, foreign (improper); it becomes the zone where translation (in its narrowest and its widest sense) takes place: parergon as the place which gives a place for the translation. (Dünkelsbühler, 1991: 208)

To be more concrete, a paradigmatic case of *lex mercatoria* would involve a multinational enterprise striking a huge investment contract with a developing country. The parties to the contract cannot agree on the applicable law: the enterprise fears the interventionist tendencies of the host-country law while the host government cannot accept the neo-liberal framework of the multinational home country. After several years of investment, the goverment of the developing country asks for an adaptation of the contract to the conditions of the world market which have drastically changed in the meantime, and invokes the principle of unequal bargaining power as an expression of 'ordre public'. The arbitrators come up with a bold decision. They apply neither the law of the home country, nor that of the host country, but the *lex mercatoria*. In addition, they discover that this *lex mercatoria* contains a far-reaching *clausula rebus sic stantibus* and provides for mandatory rules of *ordre public*. Thus, they uphold the claim of the developing country. How could a national judge deal with such a scandalous decision?

Now, the judge of the national court turns to the scholarly authorities in international commercial law and is surprised to be drawn into a violent 'war of faith': French professors zealoulsy assert that a secret 'societas mercatorum', a well organized and close-knit association of merchants, exists on today's world markets and acts as a legislator of *lex mercatoria*. With cold contempt, their British and American counterparts declare this commercial freemasonry a 'phantome of Sorbonne professors'.[2]

Our judge being aware that his question of the legal nature of *lex mercatoria* is one of the rare cases where legal practice directly depends on legal theory, turns

to the Académie Européenne de la théorie du droit, Brussels, and asks for a learned opinion on the following questions which he drew directly from the legal theory textbooks:

1 In order to decide whether or not *lex mercatoria* is positive valid law, can you identify a *Grundnorm* on the global scale? if not, at least a worldwide ultimate rule of recognition?
2 What are the secondary rules which would recognize the primary rules of *lex mercatoria* and distinguish them from mere professional social norms?
3 What are the foundations of *lex mercatoria* and which year do you determine as its date of origin?

To his great embarrassment, our judge finds that at the Brussels centre, his heroes Hans Kelsen, Herbert Hart, Maurice Hauriou, Max Weber, Theodor Geiger, and Eugen Ehrlich are being treated with mild contempt as defunct theorists, while the new heroes, most of them non-lawyers – French post-structuralist philosophers, American professors of English and law, and Chilenean biologists – seem no longer to be interested in his trivial questions. First, they suggest that he deconstructs *lex mercatoria*. They want to make him believe that this proto-commercial law is nothing but a hidden paradox, a simultaneous game and non-game, serious and non-serious, law and non-law. Then, they analyse global markets as a chaotic field with *lex mercatoria* as its fatal attractor. Worse, they reveal its secret relations to the inconscious and the sacred principle of filiation. Worst of all, they denounce the lawmaking of international businessmen as continuous auto-erotic activities, etc. But who cares for our judge's sober, real-world questions?

Our judge is courageous. He delves into a book with the exotic title *Law and the Game Paradoxes*. After having struggled his way through 175 pages of hyper-complex formulations, he suddenly utters a sigh of relief: §5 of section II of chapter III entitled 'Internality and externality' discusses precisely what he was looking for in the search of *lex mercatoria*. Indeed, he reads that his *lex mercatoria* is only part of a whole array of similar global phenomena: 'droits transnationaux produits par divers groupes, religieus, sportifs, économiques, sociaux, humanitaires'.[3] And he finds extensive answers to his three questions: the definition of law (question of identity), legal pluralism (question of the limits of law) and the foundation of law (question of the origin).

II

From the 'théorie ludique du droit' our judge learns why in his search for the legal nature of *lex mercatoria* it is wrong to look for the *Grundnorm* or the ultimate rule of recognition. Like any other myth of foundation, these formulas of modern positivism do nothing but hide the basic circularity of law, the paradoxes of self-reference on which law is ultimately founded. In this central aspect, 'la théorie ludique s'appuye sur la théorie autopoiétique'. With respect to the

founding paradox of law, Kerchove and Ost have constructed their game theory of law faithfully and more or less openly upon Luhmann's autopoietic theory of law (14f., 185ff.).[4]

But then comes the difficulty. When the question arises about how to cope with the founding paradox of law, they warn our judge: do not follow Luhmann's rigid 'systemo-functionalist positivism' with its exclusive and autarchic self-determination via a unique binary code (9f.). They urge him to avoid both Scylla and Charybdis, formal logics as well as systems theory. They criticize lawyers like Fletcher (1985) who still believe in the constraints of formal logics, treat legal paradoxes as fallacies of legal thought and insist that lawyers should and could 'resolve' them. Equally, they criticize theorists like Luhmann who believe one can 'circumvent' paradoxes by rigid techniques of deparadoxification. In their view, Luhmann marginalizes paradoxes, creating new 'obstacles épistémologiques', escaping from the 'entre deux'. Instead, they show our judge a totally different way of coping with legal paradoxes. Your Honour, you have 'resolutely to accept the paradoxes' (14)! Instead of hiding them wherever possible, you have to bring them out to the fore, to make them 'vibrate' in order to do justice to the 'entre deux' (15, 95ff, 185ff).

The judge – vibrating half-reluctantly, half-willingly with the legal paradox – now asks the *théoreticiens ludiques* whether or not *lex mercatoria* should be considered as positive law. Accompanied by a 'sourire énigmatique' (99), the game theoreticians' answer is a gentle but decisive 'Oui et non, bien entendu' (111).

Judge, can't you cope with ambivalence? On the one hand, *lex mercatoria* clearly is non-law. As a bundle of commercial customs, it belongs to the 'vaste ensemble de normes, 'conçues' et 'vecues' au sein du corps social, auxquelles les juges sont toujours susceptibles de conférer des effets juridiques' (180f). On the other hand, *lex mercatoria* clearly is law. As an expression of international general principles of law, it would be one of those 'operateur clandestins de juridicité' (181). Consequently it is, of course, both at the same time: 'inside and outside, juridical and meta-juridical' (181).

Abruptly calling a halt to the vibrations, the judge makes a last desperate attempt. He asks the game theorists for a criterion, an indicator, an operator that would help him to draw a clear line between law and non-law. The answer is quite flattering for him. Whether or not *lex mercatoria* is law is a question of the 'identity of law'. This identity is determined by 'l'intervention du juge à la fois l'indice et l'operateur principal de la juridicité' (179). In plain English: It could be you! The criterion is you! You are caught in a circle: The rule determines the decision and the decision determines the rule. But rejoice! The circle is not vicious, it is virtuous. It helps you to escape the trap of indeterminate decisionism as well as that of a rule-determinism. How does that happen? The way out is as you might expect from a *théorie du jeu*: Just do it! Play!

III

What am I doing here? Am I attempting to criticize 'the legal game' by ridiculing it? By no means, since this would amount only to self-criticism and self-ridicule. In reality, I take the 'legal game' very seriously. I am convinced that it offers a promising paradigm for the analysis of law, particularly because it provides a double framework for fruitful analysis, the narrower frame of social games and the wider frame of play of differences.

In its narrower frame as a non-serious activity outside the real world, 'game' offers law a powerful metaphor. Importing fresh meaning to the field of analysis, it brings out elements of the law that are usually suppressed by more serious (if not pompous) talk about the realm of law. The game brings to light the fictitious, the suspended, the theatrical, the mythical, the inventive, and the playful. Kerchove and Ost break out of the constraints of traditional 'serious' legal analysis when they thoroughly, patiently and carefully exploit the game metaphor. As one can see from their studies, they are rewarded by new insights into the law and the legal process. All I propose to add here is to exploit the negation potential of the metaphor as well. What are the differences that distinguish the concrete social practice of law from concrete social games?

In its second meaning, in its very general frame as a 'play of differences', as a recursive process of transforming and substituting differences, I see law as a game in line with several parallel movements that attempt to construct a post-structuralist concept of law. What these movements have in common is to overcome the limitations of law as a static rule system which is so dominant in analytical jurisprudence, pure theory of law, and in institutionalism. In this respect law as 'game' converges with law as 'discourse' (Lyotard, 1983; Jackson, 1988), law as 'discipline' (Foucault, 1975), law as *différance* (Derrida, 1990; Cornell, 1993), law as 'champ' (Bourdieu, 1986) and law as 'autopoietic system' (Luhmann, 1993). It is not by chance that Kerchove and Ost focus on problems which are central to all of them: indeterminacy, recursivity, reflexivity, self-reference and – above all – paradoxes. Legal autopoiesis, law as game and other forms of post-structuralist legal theory have several things in common: the linguistic turn away from positivist sociology of law, the dissolution of social and legal realities into discursivity, fragmentation and closure of multiple discourses, the non-foundational character of legal reasoning, the decentring of the legal subject, the ecclectic exploitation of diverse traditions in legal thought, the preference for difference, *différance* and *différends* over unity, and most important, the foundation of law on paradoxes, antinomies and tautologies. But here the controversies begin (Teubner, 1997b, 2001b). Deconstructivism is obviously satisfied to deconstruct legal doctrine by provoking and horrifying the scholarly community with antinomies and paradoxes. Legal autopoiesis poses the somewhat sobering question: After the deconstruction?

And law as a game? In my interpretation, Kerchove and Ost are trying to find a third way, an *entre-deux* between Derrida and Luhmann. And here is the problem. The *entre-deux* might turn out to be a fatal trap. On the one hand, they

do not share the deconstructivist gesture and want to overcome sheer destructive critique by a constructive attitude. On the other, they condemn systemic deparadoxification as a mere escape from the paradox and as a nostalgic return to origin, truth, legitimacy and power (14f.). Theirs is a heroic attitude: 'accepter resolument les paradoxes'. But do they develop the conceptual weapons to back up their heroism? Can they avoid the serious consequences of facing the legal paradox: blockage or continuous oscillation?

'Dialectics', they proclaim, can be the antidote to the vicious consequences of the paradox, and can bring out its productive potential (24ff., 82ff.). I consider this as the weakest part of their otherwise brilliant œuvre. Remember the time-honoured adage that whenever dialectics is invoked, it covers a blatant lack of analysis. There is a wide cleavage between their programme and its implementation. Their programme of 'dialectics without synthesis' (91) promises that the poles of legal paradoxes can be overcome either by mediation, or by dynamic interaction between the poles (60f.). They announce this programme for their five conceptual pairs: strategy/representation, cooperation/conflict, reality/fiction, regulation/indeterminacy, internal/external. So far so good. However, if one examines the implementation, dialectics boils down to a simple compromise between the two poles. 'Simultaneous presence' is their main solution: if this does not work then they opt for an oscillation between the poles over time.

If one looks at the conceptual pair strategy versus representation, one finds that law is both at the same time, 'à la fois instrumentale et expressive' (133). But the solution of this ambiguity is more than disappointing. The tensions between the two poles are 'resolved' either as a diachronic oscillation between them or as diverse synchronic combinations (132). Similarly the tension between cooperation and conflict is 'resolved' again by their simultaneous presence: 'les interets de chacun sont à la fois convergents et divergents' (142), the social structures are 'à la fois de consensus et de dissensus', the law is 'à la fois "irènologique" et "polèmémogène"' (144). In this way, the tension between cooperation and conflict no longer provokes the search for creative solutions.

Thus, my main problem with theorists who play law as a game is that against their own intentions they just remain in the seductive twilight of their 'entre-deux', in the ambiguous dialectics without synthesis, in the attractive ambivalences of yes and no, inside and outside, law and non-law. Their book is full of those suggestive ambiguities and ambivalences. In Kerchove and Ost's account, the paradox no longer provokes a search for new solutions. They make us believe that we can afford to remain in simultaneous presence and permanent oscillation of its poles. De facto, they renew the old *isosthenes diphonia* of the sceptics which 'due to the equivalence of contradictory things and arguments wants to achieve first a restraint and then put the soul to rest'.[5] There is no 'serious' attempt to cope with the paradox, to take its 'serious' problems – paralysis of action and collapse of cognition – 'seriously'. Everything is play. Here we can feel how the game/play metaphor which otherwise has turned out to be so fruitful does also exert a negative influence. The metaphor supports the somewhat complacent attitude of remaining in the ambivalences of law. As attractive as this aesthetically

and emotionally may be, the results for legal theory and practice are more than ambiguous. If our judge has to decide, then 'anything goes' or political opportunism will dictate the results.

Is there a way out? In particular, is there an alternative to a 'deparadoxification' which in Kerchove and Ost's understanding means nothing but a rigid repression of the paradox? I would be tempted to follow the directions of 'morphogenesis', a conceptual construct which has been proposed in the context of paradoxes:

> Unless one is able to escape a paradoxical situation which is what Whitehead and Russell achieved with the theory of logical types, paradoxes paralyze an observer and may lead either to a collapse of the construction of his or her world, or to a growth in complexity in his or her representation of this world. It is the latter case which could be characterized as morphogenesis. (Krippendorff, 1984: 51f.)

What is the difference between this morphogenesis and the legal players' dialectics without synthesis? My tentative answer is that 're-entry' might be (one of) the new more complex representations of the world we are looking for. In an abstract formulation, re-entry means the reappearance of a distinction in one of the sides of the distinction itself. In the language of Spencer-Brown (1972), what separates morphogenesis and dialectics would amount to the following. Whenever we make an 'observation' we create a double phenomenon, we draw a 'distinction' of two sides and make an 'indication' of one of them. This fundamental operation of observation as distinction and as indication is concealing a paradox. When Ost and Kerchove recommend resolute acceptance of this paradox they deal with it via the 'simultaneous presence' of and 'oscillation' between the two poles. Spencer-Brown would describe their thinking as either continuously 'crossing' between the two sides of the distinction or 'cancelling' the form itself. Obviously, these are non-productive moves.

'Re-entry' in contrast would do something more complex. The original distinction has created a form with two sides. Now, the distinction between the two sides makes a 're-entry' into one of these two sides; it reappears in itself. The distinction itself enters after the indication of one of its sides. Then it is no longer the old distinction. It is the 'representation' of the distinction within one of its poles. It is the 'internalization' of the external/internal distinction. A system makes self-referential use of the distinction between self-reference and hetero-reference. The frame reappears in the picture, the boundary becomes part of the territory. This internal reconstruction of an external distinction might be one among the possible increases of complexity described in the concept of morphogenesis. It does not resolve the paradox in the simple sense of denying it, nor does it playfully accept the infinite oscillations of paradox between the positive and negative value. Rather, 're-entry' transforms and maintains the paradox by reformulating its contradictions as a distinction within a distinction.

IV

Back to *lex mercatoria*. Law or not law – that is the question! According to the traditional doctrine of legal sources, *lex mercatoria*, no doubt, is non-law. It may be anything, professional norms, social rules, customs, usages, contractual obligations, intra-organizational or inter-organizational agreements, arbitration awards – but not law. The distinction law/non-law is based on a hierarchy of legal rules where the higher rules legitimate the lower ones. Normative phenomena outside of this hierarchy are not law, just facts. The highest rule in our times is, after the decline of natural law, the constitution of the nation state which refers to democratic political legislation as the ultimate legitimation of legal validity. Inspite of recurrent doubts, judicial adjudication is seen as subordinated to legislation. And, inspite of even stronger recurrent doubts, contractual rule-making as well as intra-organizational rule-production is either seen as non-law or as delegated law-making which needs recognition by the official legal order. Rule-making by 'private governments' is thus subjugated under the hierarchical frame of the national constitution which represents the historical unity of law and state.

However, globalization breaks this frame. The recurrent doubts can no longer be silenced; they explode in the case of *lex mercatoria* and other practices of 'private' global norm-production (Teubner, 2001a). *Lex mercatoria*, the transnational law of economic transactions, is not the only case of global law without the state. 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, from official international politics and international public law (Giddens, 1990: 70). In the first place, internal legal regimes of multinational enterprises are a strong candidate for global law without the state (see Robé, 1997; Muchlinski, 1997). A similar combination of globalization and informality can be found in labour law; in the *lex laboris internationalis*, enterprises and labour unions as private actors are dominant law-makers (see Bercusson, 1997). Technical standardization and professional self-regulation have developed tendencies toward world-wide coordination with minimal intervention of official international politics. Human rights discourse has become globalized and is pressing for its own law, not only from a source other than the states but against the states themselves (Bianchi, 1997). 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.). In the world of telecommunications we experience the Internet struggling for its own global legal regime. Similarly, in the field of ecology, there are tendencies towards legal globalization in relative insulation from state institutions. And even in the world of sports people are discussing the emergence of a *lex sportiva internationalis* (Simon, 1990; Summerer, 1990).

Due to their anational global character, all these legal regimes cannot be rooted in a national legal order. Ergo: no law. But what is the difference between a national contractual regime and an international one that would justify to call the first one law, the second one a mere fact? Re-enter the paradox which had

been successfully suppressed in the case of national contracts and organizations. Does law as a game help? Law and non-law? Simultaneous presence or oscillation?

Obviously not. Let us then try the 're-entry'. The distinction law/non-law or legal/non-legal (not to be confounded with the legal code legal/illegal!) re-enters law (Teubner, forthcoming). This is possible only if the traditional doctrine of sources of law is reframed. Let me attempt a brief sketch of how this re-framing of legal source doctrine might look. When the frame of rule-hierarchy with constitutionally legitimated political legislation at its top breaks under the pressures of globalization, then the new frame which replaces the old frame of hierarchy can only be heterarchical: it uses the distinction between centre/periphery of legal norm-production. It decentres political law-making, moves it away from its privileged place at the top of the norm-hierarchy and puts it on an equal footing with other types of social law-making. In the centre of the legal system are the courts with their judicial rule-making, while political legislation moves to the periphery, yet still inside the legal system. The distinction centre/periphery, to be sure, does not recreate a hierarchy in the sense that courts now are more important than political legislation. With this distinction, the oscillation is supplemented by re-entry. With centre versus periphery the law repeats, reconstructs in itself the internal/external distinction of law and politics. Legislation loses its centrality as the top of the hierarchy; it becomes peripheral, but retains the status of norm-production internal to the legal system. It is legal rule production in structural coupling with politics.

This re-entry allows for a generalization, an expansion of the distinction law/politics into the distinction law/other social fields. The replacement of frames, from hierarchy to centre/periphery, allows us to recognize other types of social rule production as law production, but only under the condition that they are produced in the periphery of the legal system in structural coupling with external social processes of rule-formation. Here we find – parallel to political legislation – many forms of rule-making by 'private governments' which in reality have a highly 'public' character: technical standardization, professional rule production, human rights, intra-organizational regulation, and contracting. And here our judge will identify his *lex mercatoria*, no longer oscillating between law and non-law, but clearly as positive law which however – and here lurks the paradox – has its origins in its close structural coupling with non-legal rule production.

Would this not amount to a grandiose de-legitimation of law? If we decentre political legislation – which is democratic, after all – and send it to the periphery of law on a par with *lex mercatoria*, intra-organizational rules and technical standardization, are we not betraying the old European idea that any law has to be democratically legitimated if we are supposed to obey? Let me turn this argument around. If we abandon the old practice to obscure the de facto law-making in all kinds of 'private governments' and bring to light that what they are doing is producing positive law which we *nolens-volens* have to obey, then we ask, more urgently than before: What is this 'private legal regime's' democratic legitimation? At the same time, we see how naive it would be to demand a formal delegatory

link of private governments to the more narrow parliamentary process. Rather, we are provoked to look for new forms of democratic legitimation of private government that would bring economic, technical and professional action under public scrutiny and control. That seems to me the liberating move that the paradox of global law without the state has actually provoked: an expansion of constitutionalism into private law production which would take into account that 'private' governments are 'public' governments. And the potentially fruitful analogy to traditional political democracy might lie in the rudimentary consensual elements in contract, organization and other extra-legal norm-producing mechanisms. Is a 'democratization' of these rudimentary consensual elements feasible?

Thus, the answer to the judge's first question regarding the legal nature of *lex mercatoria* is unambiguously positive, inspite of its paradoxical character. *Lex mercatoria* is positive law. This is true not only from a sociological or anthropological perspective of legal pluralism but it should also be accepted from the official standpoint of legal doctrine. Underlying is the assumption that after globalization has broken the old frame of the rule hierarchy, a reframing of the legal sources doctrine as a heterarchy of peripherical norm-production will have to take place.

V

Our judge had a second question. How can we identify legal norms within *lex mercatoria*? It is very difficult to answer this question, and traditional doctrine takes this as an additional proof that the whole thing does not and cannot exist. Legal rules, so the argument runs, are elements of closed legal systems. Beyond their boundaries there cannot be any legal rules. This holds true also to the law/society boundaries. Customs, contracts, intraorganizational rules are social phenomena, not legal rules. And it holds true for the boundary between the national and the global. Any legal rules need to be rooted in the law of the nation state. Outside there are only 'phantoms of Sorbonne professors'.

Kerchove and Ost criticize such rigid concepts of law as being closed against other systems. Legal positivism in its traditional form as well as in its systemo-functionalist sense, they claim, cannot deal with the ambivalences of the 'relative autonomy' of law. Positivism, whether old or new, is too rigid in defining systems, elements, and boundaries. Positivism does not take into account that 'between the legal system and its environment incessant exchanges take place' (180). Phenomena like *lex mercatoria* and other legal forms of customary societies as well as postmodern societes show that the boundaries of law are not tightly closed delimitations, but are ' "frontières floues" et les "zones de recouvrement" entre les règles juridiques et les formes non juridiques de régulation sociale' (118). They propose to redefine the legal system in a paradoxical sense in which system is nothing but a 'frail and unstable configuration, only partially integrated and not totally differentiated from the surrounding systems' (102). They even dare the

bold assertion that the legal system 'contains' always the non-system, and that a legal system 'contains' elements of different systems (102). *Lex mercatoria* is law that simultaneously contains society. It contains legal as well as non-legal actions and rules – luckily for our judge!

No doubt, *lex mercatoria* and other postmodern legal forms create a paradoxical situation since they break the old frame of law, i.e. the stable relation between legislation and adjudication on a national scale. To insist again and again on this point is the great merit of law-as-a-game theory. But we need to ask the question a second time: Do they make productive use of the paradox? Do they find a way out of the oscillations between the legal and the social? In my view, with their formula of 'relative autonomy', they suggest a strange compromise which is something like a 'half-closure' of the law. And regarding the exchange between law and society, they make another strange compromise which allows law and society to 'contain' elements of each other. It is these two strange compromises that undermine their position and ultimately block the 'morphogenesis'.

The crucial difference can be explained best in the words of François Lyotard (1983) whose postmodern theory of language games Kerchove and Ost like to cite but whose central message they tend to ignore. The *différend*, Lyotard's unreconcilable cleavage between language games, means that one language game does not and cannot 'exchange' elements with another one. A language game can only be provoked to 'link up' with a sentence that makes part of the other language game. No exchange takes place; rather, it is a 're-enactment' of differences leading out of the infinite oscillations. Re-enactment is neither translation nor transsubstantiation of the old element, but an independent reaction to something else by which the game creates a new element. It can never do justice to the other language game; it is bound to be a tort. Thus, a language game never 'contains' elements of another game, but only its own elements that 'link up' to elements of the other game. I like to use the metaphor of 'productive misunderstanding' in order to describe how different language games relate to each other (Teubner, 1992). Again we feel the absent presence of the paradox. The 'mis' describes the innovation, while the 'understanding' tells us that it builds on another meaning rather than on thin air.

Such a constructive distortion, such a *différend*, takes place in the case of *lex mercatoria*. The structures of global economic transactions are essentially non-legal: they build on factual chances of action and create new chances of action or of trust in future changes of chances. In ongoing business relations it is wise to keep the lawyers out. They will distort business realities (see Macaulay, 1966). Why? Not only do they replace the search for profit by the *quaestio juris*. Not only do they replace the cost–benefit calculus by the maxim of treating similar cases alike. Worse, they misread factual chances of action as legal 'property', and they misunderstand mutual trust in future behaviour as contractually binding 'obligations', as 'rights' and 'duties'. And if their rigid and formalist claims and counter-claims are re-read in the ongoing transaction, they will destroy precarious trust relations. The difference between economic chances of action and legal

property, and between trust and obligations, is due to their different grammar. The lawyers observe economic action under the code legal/illegal and misread economic processes and structures as sources of law. Vice versa, clever economic actors misread legal norms under the economic code as bargaining chips, as new opportunities for profit-making. We observe not exchange that leads to the mutual containment of law and the economy but a mutual distortion of law and economy. Their elements link up to each other, but nevertheless legal acts remain identifiable as against economic acts and legal norms against economic expectations.

Whenever arbitrators have constructively distorted economic realities by reading legal rules into them, they have actually enacted a new positive law which is unambiguously law and nothing else. *Lex mercatoria* is genuinely part of the global legal system. It contains legal elements and nothing but legal elements. To be sure, the boundaries between the legal and the social are always blurring. But it is the productive misreading by the discursive practice of *lex mercatoria* that relentlessly defines and redefines its own boundaries. The process of 'framing', of drawing the boundary, of self-definition is never finished. It is impossible to get rid of this (Dünkelsbühler, 1991: 210). However, this is no longer the task for the national judge whose 'recognition' of *lex mercatoria* is no longer 'constitutive' for its operational existence.

VI

What about the judge's third question, the origin of *lex mercatoria*? Here, Kerchove and Ost make a remarkable move, something that indeed goes beyond the usual oscillation between the poles of the paradox. As we would expect now, they start by re-interpreting the foundations of law either as *regressus ad infinitum* or as paradox of self-reference (185f.). They continue to assert that there is an interminable oscillation between internal and external foundations of law, positivism and natural law. But then they make a 'dialectical' move which comes very close to our 're-entry' (188f.). They point to an internal, fictitious fixed point, an 'as if' foundation of law. The law acts 'as if' it had been founded at a certain point in time. In this myth of foundation the external foundation of law is reconstructed internally. Morphogenesis can begin to take its course.

I wholeheartedly support this idea. This is a moment when their dialectical method produces the concrete results that their abstract programme promises. I would just like to push the idea somewhat further by making use of the distinction between operation and self-observation of law. A founding myth belongs to the second category: the law describes itself with imagery about how it was founded. The founding myths of *lex mercatoria* might be, for example, the modern renaissance of its origin in medieval merchant law. Or it could be a legislative act as a 'droit corporatif' by the (obviously fictitious) corporation of merchants. But in relation to the hard-core operation of *lex mercatoria*, self-observing founding myths seem somewhat superstructural. They tell us nothing

about the question when recursive operations of a legal system begin and under which conditions they might 'take off'.

The beginning is in the middle! It is like Jacques Derrida's famous *Glas* (1974) in which the text begins in the middle of a story which had already started. Recursive operations cannot begin *ex nihilo*; they can only refer to something that does already exist. They cannot refer to something outside of their chain of recursions, it must be something within this chain to which they refer. And if this 'something' does not exist they have to invent it! Law as a system of recursive legal operations can only refer to past legal operations. The solution again is an 'as if', but not the fiction of a founding myth as a self-observation, rather the fiction of previous concrete legal decisions as the basis for recursive operations.

This 'as if' solution takes a detour, supplementing a lack. The lack of identity of a non-state law needs to be supplemented by the participation of an external social in the internal legal:

> It is only the assumption of a (deficiency) as a loss which makes it possible that an original perfection – as unity – can be presupposed, which can be replaced later on. Thus, the (metaphysical logic of the) 'original' identity can be perfectly reconstituted. (Dünkelsbühler, 1991: 212)

This fiction, however, depends on outside conditions. There must be enough non-legal meaning material which law can misunderstand as legal. There must be a historical 'situation in which it is sufficiently plausible to assume that also in former times legal rules have been applied' (Luhmann, 1993: 57). A commercial practice has evolved under the chaotic conditions of the global market, or, should one say, the practice has been imposed by the stronger economic interests. This practice is 'transformed' into law whenever it is pretended that the expectations have a legal character to which legal decision-making can refer. An international contract has been struck outside the frame of national contract law. The strange fiction is that its expectations are law. Organizational patterns and routines have evolved within a multinational organization and the fiction is created that these rules 'are' labour law. An enterprising inhabitant of cyberspace delineates a limited chunk, asks money for access, and pretends to have created property. Arbitrators pretend in commercial disputes that old arbitration cases which have been decided according to equity 'are' precedents for them, and begin to distinguish and to overrule. This is a historical situation where *lex mercatoria* creates its recursivity based on fictitious precedents.

These are the external conditions for the take-off. To repeat, there must be sediments of social communication that can be used by the false memory syndrome of the law. Under the demanding influence of conflicts that press for resolution, the law searches for precedents and falsifies the sediments. No doubt these sediments exist, but the law gives them meaning as 'legal' precedents.

There are internal conditions for the take-off as well. Even if there is enough meaningful material for the legal recursions to refer to, still those recursions need to free themselves from the inhibitions of the paradox of a 'self-validating contract'. How can we agree on a dispute resolution if we disagree on the validity

of our contract? Again, Kerchove and Ost identify this paradox in their discussion of the 'fable of social contract'. And again, they show the infinity of 'jeu de jeu', law of law which shows the impossibility of law as a closed system. And again, I would ask how do we react to the challenge of this paradox. How does *lex mercatoria* 'unfold' the paradox of 'self-regulatory contract', of 'contrat sans loi'?

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 indeed creating their non-contractual foundations themselves. They have found three ways of unfolding the paradox – 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.

In the first place, contracts themselves establish an internal hierarchy of contractual rules. They contain not only 'primary rules' in the sense established by Hart (1961: 77ff.) that regulate the future behaviour of the parties, but 'secondary rules' that 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 unfolded in the separation of hierarchical levels, the levels of rules and meta-rules. The meta-rules are autonomous as against the rules, 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 important, the self-referential contract unfolds the contractual paradox by 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. One 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 contractual arbitration. An internal circular relationship is transformed into an external one. In the circular relationship between the two institutional poles of contract and arbitration, 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 beause it unfolds the paradox 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 modern law. 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 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.

Thus, the global legal discourse founds itself on the paradox of contractual self-validation and differentiates itself into an 'official' legal order and a 'non-official' one. This is a double re-entry. Not only does the legal system at large reconstruct the difference between internal and external as a a distinction between its centre and its periphery. The periphery of law makes in itself a similar distinction between its own centre – arbitration, associational general rulemaking – and its periphery – the legal transformations of economic transactions.

VII

What is the ultimate difference between law as a paradoxical game and law as an autopoietic system? My answer: it is the difference between a philosophical and a sociological observation of law. The difference is revealed in the power that society, culture and history exert upon law's empire. Where philosophical observers discover a free 'play of differences', sociological observers see a history of elective affinities between semantics and social structure (Teubner, 1997b). What does this mean for the paradoxes of the law game?

(1) While the legal philosophers Kerchove and Ost claim to have discovered the paradoxical foundations of law, legal sociologists would make the material basis responsible and not the superstructure. They would assert that it is historical forces in society and culture that make the paradoxes emerge. They create the structural conditions so that law's foundations are suddenly seen as paradoxical, by legal philosophers among others. In our case of *lex mercatoria*, for centuries the above-mentioned contractual paradox, the self-validation of contract as the basis of private contract and organization could remain latent. The reasons for this latency are historical. The nation state, its constitution and its law have

provided the safe distinction between national legislation and adjudication which was able to absorb all forms of 'private law-making'. The emergence of the paradox was not the ingenious discovery of postmodern jurisprudence whose deconstructive techniques reveal to us all kind of ambivalences, apories, antinomies and paradoxes. Rather, it was due to objective social reality – in this case, fragmented globalization. The difference between a highly globalized economy and a weakly globalized politics pressed for the emergence of a global law that had no legislation, no political constitution, no politically ordered hierarchy of norms which could keep the contractual paradox latent (see Teubner, 1997b). Thirty years before *La Condition postmoderne*, and fifty years before *Le droit ou les paradoxes du jeu*, down-to earth practitioners of international commercial law had discovered the paradoxes of *lex mercatoria*. Breaking frames is the business of social forces. Philosphers are not strong enough; they just observe breaking frames.

(2) While legal philosophy tells us we are free to 'accept paradoxes resolutely', their contradictions, ambivalences and infinite oscillations, and that we are free to play with them according to 'dialectics without synthesis', legal sociology asks us again to listen carefully to what society, history and culture whisper into our ears. They do not at all tolerate a playful paradoxification of law; they force us to understand it as a provocation for action. The provocation is unambiguous. Draw a distinction! Build new frames! Unfold the paradox! De-tautologize the tautologies! Asymmetrize the symmetries! Identify the eigenvalues in recursive processes! It is the iron law of social self-reproduction that forces people to build new frames if the old ones are breaking.

(3) While legal philosophy encourages the dialectical imagination to play creatively with the legal paradoxes and allows for almost infinite possibilities to cope with them, legal sociology is more rigorous and selective. Again it is society, culture and history that will determine the conditions of plausibility for new distinctions that unfold the legal paradox. Thus, it remains to be seen whether legal pluralism will be socially accepted as a plausible basis for a theory of legal sources.

(4) Finally, while legal philosophy tells us that it will be able to fight all attempts to return to a paradox-free past, legal sociology suggests rather a historical process, almost a rhythmical movement, of de-framing, re-framing and de-framing. In our case of *lex mercatoria*, we can feel even today where society will break tomorrow the new frames of an a-national and a-political law. How can such a 'private' global law avoid its re-paradoxification by 'public' political processes on a global scale? Would this breaking frames of private global law in turn not provoke new distinctions of constitutional law of the world society (see Teubner, 1998, 2000)? Whether the newly built frames are breaking again is a matter of social practice. Frames do not break by themselves, it is history that breaks frames, provoking us to build new ones.

However, the sociological distinction of semantics and social structures that I am using here is in itself paradoxical, and legal philosophers will have no problem in deconstructing this distinction. I accept this. If they are tried, philosophers will always have and should always have the last word.

Notes

1 Cour d'Appel de Paris 1.9.1988, Nr. 5953, *Revue de l'arbitrage* (1990: 701–12), 13.7.1989 *Revue de l'arbitrage* (1990: 663–74) Lagarde, Cour de Cassation de Paris 22.10.1991, *Revue de l'arbitrage* 1992, 457–61 (Lagarde).

2 Pro: Goldman (1964, 1979, 1986), Fouchard (1965), Kahn (1982, 1992), Osman (1992), Stein 1995. Contra: Mann (1968, 1984), Kassis (1984), Mustill (1987), Delaume (1989) Highet (1989), Bar 1987: 76ff.), Sandrock (1989: 77ff.), Spickhoff (1992); for a recent sociological analysis, Dezalay and Garth (1995).

3 Kerchove and Ost (1992: 184). Whenever the text gives page numbers in parenthesis only it refers to this text.

4 This is the reason why Luhmann (1993: 15, n. 15) expresses doubts about whether Kerchove and Ost's 'théorie ludique' differs in substance from his constructivist systems theory. Then it comes as a certain surprise how polemically Ost (1994) is attacking system theory. Is there a hidden law which rules that the closer theories are, the more violently they attack each other?

5 Sextus Empiricus, *Grundriß der pyrrhonischen Skepsis*, Frankfurt (1968: 94, quoted in Welsch, 1995: 320, n. 34).

References

Bar, Christian von (1987) *Internationales Privatrecht I*. München: Beck.

Bercusson, Brian (1997) 'Globalizing Labor Law: Transnational Private Regulation and Countervailing Actors', in G. Teubner (ed.) *Global Law Without a State*. Aldershot: Dartmouth Gower.

Bianchi, Andrea (1997) 'Globalization of Human Rights: The Role of Non State Actors', in G. Teubner (ed.) *Global Law Without a State*. Aldershot: Dartmouth Gower.

Bourdieu, Pierre (1986) 'La force du droit: éléments pour une sociologie du champ juridique', *Actes de la Recherche en Sciences Sociales* 42: 3–19.

Cornell, Drucylla (1993) *Transformations*. London: Routledge.

Delaume, Georges R. (1989) 'Comparative Analysis as a Basis of Law in State Contracts: The Myth of the Lex Mercatoria', *Tulane Law Review* 63: 575–611.

Derrida, Jacques (1974) *Glas*. Paris: Galilée.

—— (1990) 'Force de loi: le "fondement mystique de l'autorité"', *Cardozo Law Review* 11: 919–1046.

Dezalay, Yves and Garth, Bryant (1995) 'Merchants of Law as Moral Entrepreneurs', *Law & Society Review* 29: 12–27.

Dünkelsbühler, Ulrike (1991) 'Rahmen-Gesetze und Parergon-Paradox: Eine Übersetzungsaufgabe', in H.U. Gumbrecht and K.L. Pfeiffer (eds) *Paradoxien, Dissonanzen, Zusammenbrüche: Situationen offener Epistemologie*. Frankfurt: Suhrkamp.

Fletcher, George P. (1985) 'Paradoxes in Legal Thought', *Columbia Law Review* 85: 1263–92.

Foucault, Michel (1975) *Surveiller et punir: la naissance de la prison*. Paris: Gallimard.

Fouchard, Philippe (1965) *L'arbitrage commercial international*. Paris: Dalloz.

Giddens, Anthony (1990) *The Consequences of Modernity*. Stanford, CA: Stanford University Press.

Goldmann, Berthold (1964) 'Frontières du droit et "lex mercatoria"', *Archives de Philosophie du Droit* 9: 177–92.

—— (1979) 'La lex mercatoria dans les contrats et l'arbitrage international: réalite et perspectives', *Journal du Droit International* (Clunet) 106: 475–505.

—— (1986) 'The Applicable Law: General Principles of Law – the Lex Mercatoria', in J.D.M. Lew (ed.) *Contemporary Problems in International Arbitration*. London: The Eastern Press.

Hart, Herbert L.A. (1961) *The Concept of Law*. Oxford: Clarendon.

Highet, Keith (1989) 'The Enigma of the Lex Mercatoria', *Tulane Law Review* 63: 613–68.

Hofstadter, Douglas R. (1979) *Gödel, Escher, Bach: An Eternal Golden Braid*. New York: Basic Books.

—— (1985) 'Nomic: A Self-Modifying Game Based on Reflexivity in Law', in D.R. Hofstadter (ed.) *Metamagical Themas: Questing for the Essence of Mind and Pattern*. New York: Bantam.

Jackson, Bernard J. (1988) *Law, Fact and Normative Coherence*. Liverpool: Deborah Charles.

Kahn, Philippe (1982) 'Droit international économique, droit du développement, lex mercatoria: concept unique ou pluralisme des ordres juridiques?', in B. Goldmann (ed.) *Le droit des relations économiques internationales*. Paris: Librairies Techniques.

Kahn, Philippe (1992) 'La lex mercatoria: point de vue français après quarante ans de controverses', *McGill Law Journal* 37: 413–27.

Kassis, Antoine (1984) *Théorie générale des usages du commerce*. Paris: Librairie generale de droit et de jurisprudence.

Kerchove, Michel van de and Ost, François (1992) *Le droit ou les paradoxes du jeu*. Paris: Presses Universitaires de France.

Krippendorff, Klaus (1984) 'Paradox and Information', in B. Dervin and M. Voigt (eds) *Progress in Communication Sciences* 5. Norwood: Ablex.

Luhmann, Niklas (1993) *Das Recht der Gesellschaft*. Frankfurt: Suhrkamp.

Lyotard, Jean-François (1983) *Le différend*. Paris: Les Editions de Minuit.

Macaulay, Stewart (1966) *Law and the Balance of Power: The Automobile Manufacturers and Their Dealers*. New York: Russell Sage.

Mann, Frederick A. (1968) 'Internationale Schiedsgerichte und nationale Rechtsordnung', *Zeitschrift für das Gesamte Handelsrecht* 130: 97–129.

—— (1984) 'England Rejects "Delocalized" Contracts and Arbitration', *International and Comparative Law Quarterly* 33: 93–198.

Muchlinsti, Peter (1997) 'Global Butowina Examined: Viewing the Multinational Enterprise as a Transnational Law-Making Community', in G. Teubner (ed.) *Global Law Without a State*. Aldershot: Dartmouth Gower.

Mustill, Michael J. (1987) 'The New Lex Mercatoria: The First Twenty-five Years', *Liber Amicorum Lord Wilberforce*. Oxford: Oxford University Press.

Osman, Filali (1992) *Les principes généraux de la lex mercatoria*. Paris: Librarie générale de droit et de jurisprudence.

Ost, François (1994) 'A Game Without Rules? The Ecological Self-Organization of Firms', in G. Teubner, L. Farmer and D. Murphy (eds) *Environmental Law and Ecological Responsibility: The Concept and Practice of Ecological Self-Organization*. Chichester: Wiley.

Robe, Jean-Philippe (1997) 'Multinational Enterprises: The Constitution of a Pluralistic Legal Order', in G. Teubner (ed.) *Global Law Without a State*. Aldershot: Dartmouth Gower.

Sandrock, Otto (1989) 'Die Fortbildung des materiellen Rechts durch die Internationale

Schiedsgerichtsbarkeit,' in K.H. Bockstiegel (ed.) *Rechtsfortbildung durch Internationale Schiedsgerichtsbarkeit*. Köln: Heymann.
Schmitthoff, Clive M. (1990) *Schmitthoff's Export Trade: The Law and Practice of International Trade*, 9th edn. London: Steve.
Simon, Gérald (1990) *Puissance sportive et ordre juridique étatique*. Paris: Librairie générale de droit et de jurisprudence.
Spencer-Brown, George (1972) *Laws of Form*. New York: Julian Press.
Spickhoff, Andreas (1992) 'Internationales Handelsrecht vor Schiedsgerichten und staatlichen Gerichten', *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 56: 116–41.
Stein, Ursula (1995) *Lex mercatoria: Realität und Theorie*. Frankfurt: Klostermann.
Suber, Peter (1990) *The Paradox of Self-Amendment: A Study of Logic, Law, Omnipotence and Change*. New York: Peter Lang.
Summerer, Thomas (1990) *Internationales Sportrecht vor dem staatlichen Richter in der Bundesrepublik Deutschland, Schweiz, USA und England*. München: V.V.F.
Teubner, Gunther (1992) 'The Two Faces of Janus: Rethinking Legal Pluralism', *Cardozo Law Review* 13: 1443–62.
—— (1997a) 'Global Bukowina: Legal Pluralism in the World Society', in G. Teubner (ed.) *Global Law Without a State*. Aldershot: Dartmouth Gower.
—— (1997b) 'The King's Many Bodies: The Self-Deconstruction of Law's Hierarchy', *Law and Society Review* 31: 763–87.
—— (1998) 'After Privatisation? The Many Autonomies of Private Law', *Current Legal Problems* 51: 393–424.
—— (2000) 'Contracting Worlds: Invoking Discourse Rights in Private Governance Regimes', *Social and Legal Studies* 9: 399–417.
—— (2001a) 'Un droit spontané dans la société mondiale?' in Charles-Albert Morand (ed.) *Le droit saisi par la mondialisation*. Bruxelles: Bruylant.
—— (2001b) 'Economics of Gift – Positivity of Justice: The Mutual Paranoia of Jacques Derrida and Niklas Luhmann', *Theory, Culture & Society* 18: 29–47.
—— (forthcoming) 'Alienating Justice: On the Social Surplus Value of the Twelfth Camel', in David Nelken and Jiri Pribam (eds) *Consequences of Legal Autopoiesis*. Aldershot: Dartmouth.
Welsch, Wolfgang (1995) *Vernunft: Die zeitgenössische Vernunftkritik und das Konzept der transversalen Vernunft*. Frankfurt: Suhrkamp.

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