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# *Sustaining Paradox Boundaries: Perspectives on Internal Affairs in Domestic and International Law*

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A. Claire Cutler, *Private Power and Global Authority: Transnational Merchant Law in the Global Political Economy*. Cambridge: Cambridge University Press 2003. Pp. XIV + 316. ISBN: 0521 82 660, BP. 47.50 (\$ 65.00); Hardback. ISBN: 0521 53397 X, BP. 17.95 (\$ 24.00).

## **Abstract**

*The book under review addresses the complex interaction of hard and soft law, legal-political intervention and social practice and self-regulation, public and private law, and rules of social praxis and behaviour in transnational law. While the increased contractualization of public governance and the growing involvement of private actors in public administration has, for some time now, been the subject of legal analysis in domestic contract law and administrative law scholarship, these findings have attracted little attention from commercial and international law scholars and practitioners. Cutler's book argues for the need to embrace a more comprehensive view of the complexity of developments in national, international and transnational law, acknowledging the emergence of new norm-generating actors and the challenge posed by them and their norms to the otherwise neatly defined realms of national and international legal orders. Exploring the arguments made against and in favour of *lex mercatoria*, Cutler can be read as arguing for the paradoxical re-entry of the dividing lines between state and civil society, public and private, even if and because the two opposing poles cannot be married in a single unifying concept but only together constitute the poles of our orientation.*

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## 1 Defining Transnational Law

The nature of the law merchant (*lex mercatoria*), which is at the centre of Claire Cutler's latest book *Private Power and Global Authority*, has been subject to a debate over the last century that has been referred to by some of its intimate observers as no less than a religious war.<sup>1</sup> This comes as no surprise: the allusion to the existence of a set of norms, combining rules and principles, that a worldwide merchant constituency is allegedly generating through the conduct of cross-border economic transactions is certainly a considerable challenge to our legal thinking.<sup>2</sup> Increasing the intensity of this challenge even more is the fact that the *lex mercatoria* not only seems to escape the instrumental grasp of the lawyer trained in domestic contract and commercial law and, even, in conflict of laws; it also seems to fall through the fingers of an international trade or a public international lawyer like dry sand in a child's hand. Its particular position 'in between' private (international) and public (international) law makes the *lex mercatoria* an altogether intriguing, irritating and generally unsettling problem for legal analysis.

Those who remain sceptical about the *lex mercatoria*'s claim to membership in the legal community make attempts to 'domesticate' it by declaring '*lex mercatoria*' a 'misnomer' for what could allegedly be better and sufficiently grasped through the available instruments of national commercial and conflict of laws rules ('private international law'). These sceptics or 'traditionalists' criticize the absence of satisfactory evidence sustaining the claim made by the 'transnationalists'<sup>3</sup> that there is a supposedly autonomous law created and constantly updated by commercial actors. They are equally sceptical of the claim that this law allows for a smooth handling of complex multipolar contractual constellations such as those emerging in the construction of large infrastructure projects often involving dozens if not hundreds of contractors and subcontractors brought together in worldwide consortia.<sup>4</sup>

At first sight, it seems today that this debate continues more or less on well-known paths, even though these are paths along which the mainstream of international law

<sup>1</sup> See Teubner, "'Global Bukowina': Legal Pluralism in the World Society", in G. Teubner (ed.), *Global Law without a State* (1997) 3; see also U. Stein, *Lex Mercatoria. Realität und Theorie* (1995), at 6, describing the debate as a 'postmodern ideological dispute par excellence'. The articles collected in K. P. Berger (ed.), *The Practice of Transnational Law* (2001) do paint a very colourful picture of this endless debate: see, in particular, the historical overview by the Editor, *ibid.*, 1, and the contribution by Gaillard, *ibid.*, 53. See, for an excellent introduction to the concept of *lex mercatoria*, Lowenfeld, '*Lex Mercatoria: An Arbitrator's View*', in T. Carbonneau (ed.), *Lex Mercatoria and Arbitration* (rev. ed., 1998) 71.

<sup>2</sup> A. C. Cutler, *Private Power and Global Authority* (2003), at 249: 'The implications of treating corporations and individuals as objects and not as subjects are deeply troubling empirically and normatively.'

<sup>3</sup> See this classification by Berger, 'The New Law Merchant and the Global Market Place. A 21st Century View of Transnational Commercial Law', in Berger, *supra* note 1, at 1.

<sup>4</sup> See, hereto, e.g. Gessner, Appelbaum and Felstiner, 'Introduction: The Legal Culture of Global Business Transactions', in V. Gessner, R. P. Appelbaum and W. L. F. Felstiner (eds), *Rules and Networks: The Legal Culture of Global Business Transactions* (2001) 1; E. Schanze, *Investitionsverträge im internationalen Wirtschaftsrecht* (1986); concerning the 'aftermath' of a failed consortium, see Flood and Skordaki, 'Normative Bricolage: Informal Rule-making by Accountants and Lawyers in Mega-insolvencies', in Teubner *supra* note 1, at 109.

does not venture.<sup>5</sup> While the true status of *lex mercatoria* in transnational legal practice remains uncertain, its life in the academy is also in peril.<sup>6</sup> Few law faculties show a greater willingness to embrace the field as a curricular element next to the traditional classes such as conflict of laws, international commercial law and public international law, which traditionally replicate the respective 'private' and 'public' law approaches to the study of border-crossing economic interaction. *Lex mercatoria* remains, at best, somewhere in the shadow of that other alien creature, namely *transnational law*. Transnational law, after its classical definition by Jessup, concerns the norms emerging from and for the transactions between individuals and collectivities interacting beyond and across national borders.<sup>7</sup>

Yet, doubts remain as to the appropriateness of our theoretical fashioning of transnational law, as long as we continue to painfully squeeze it somewhere in between *private* and *public* international law. It remains unsatisfactory to continue to operate on a vaguely conceptualized and much less empirically explored territory. As a consequence, transnational law, understood and undertaken to study the legal claims and stakes that emerge among economic and other private actors involved in global economic enterprises and human activity, attains itself a highly ambivalent status of both an endangered but ultimately harmless species. For the proponents of such an undertaking, the goal is to justify it as a fully-fledged scholarly field and to constantly deliver news of its 'existence' in a practical manner.

The opponents have a much simpler task. They can, to begin with, apply a distinction between 'national' and 'international' and reattach many of the legal norms agreed upon by the economic actors to the national legal orders of 'private international law' or, conflict of laws, thus bringing the transaction and the legal dispute resulting from the transaction 'home'. In a second and still more decisive step, another distinction will be introduced by which the *law* of private international law will be distinguished from the *non-law* of transnational law. Transnational law, in this perspective, is seen as fluid and boundaryless, and the building of a defence will tragically only result in reascertaining the traditionalists' doubts as to the viability and distinctiveness of transnational law. Since the reason for this is deeply embedded in the nature of transnational law itself, claims to transnational law's 'legality' can only lose as long as the transnationalist aims to compete with the vision of law put forward by the traditionalist. The risk is that transnational law will be lost in the process as a key to understanding a vast array of norm-generating human activity

<sup>5</sup> See one of the classical statements: Schmitthoff, 'Das neue Recht des Welthandels', 28 *RebelsZ* (1964) 47; see the comprehensive discussion of the national and international literature in Stein, *supra* note 1; an extensive discussion and outline of a theory of the *lex mercatoria* is given by K. P. Berger, *Formalisierte oder 'schleichende' Kodifizierung des transnationalen Wirtschaftsrechts: zu den methodischen und praktischen Grundlagen der lex mercatoria* (1996); the collection of theoretical and empirical assessments in Teubner, *supra* note 1, has attained almost the standing of a classical contribution to the field.

<sup>6</sup> A notable exception here is York University's Osgoode Hall's ICT (International, Comparative, and Transnational Law) curriculum allowing LL.B. students to follow a specialized string of courses in their second and third years.

<sup>7</sup> P. C. Jessup, *Transnational Law* (1956) 1.

beyond the nation-state if its proponents continue to try to make it an equal to its allegedly rival legal orders.

In short, transnational law must instead be defined as emerging from a process of multi-level interaction among individual and collective actors, whether this interaction involves multinational corporations engaging in intra- or inter-firm norm generation,<sup>8</sup> non-governmental organizations or international organizations drawing up 'human rights codes' addressed to multinational firms<sup>9</sup> or the norm-generating practice of deliberation and negotiation within government networks.<sup>10</sup> Transnational law does evolve from the activity unfolding among individual and collective actors that leads to appropriations of respective rules from national legal orders, to the explicit or implicit incorporation of general legal principles into a multi-polar agreement or merely to a tacit consensus of future obligations that are to be respected by all parties involved. It becomes obvious that the legal status of norms and codes of conduct that we see unfolding in a historically unprecedented manner today poses many problems. One of them is how to incorporate norms that are often enforceable less by official means than by soft inductions of reputation, consent or actual practice into the traditional legal architecture that we have grown accustomed to within the nation-state.

The findings and the interpretation of an author such as Sally Falk Moore regarding the inherently divided nature of legal and social fields as 'semi-autonomous fields'<sup>11</sup> offer a rich potential to better grasp the complex interactions of hard and soft law, of legal/political intervention and social practice and self-regulation, of public law rules and private law rules, ultimately, of private rules of social praxis and behaviour. This strand of analysis, i.e. the larger field of law and society studies, however, has gained little access into mainstream legal thinking. Indeed the same fate has awaited the enlightening *varieties of capitalism* literature that has for many years now potentially delivered very enlightening perspectives on the double-bind of historical institutional development and political decision-making in different socio-economic frameworks and contexts.<sup>12</sup>

<sup>8</sup> For a very clear exposition of this practice see Snyder, 'Global Economic Networks and Global Legal Pluralism', *EUI Working Paper Law No. 99/6* (1999).

<sup>9</sup> See Hillemanns, 'UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights', 4 *German LJ* (2003) 1065, available at: [http://www.germanlawjournal.com/pdf/Vol04No10/PDF\\_Vol04\\_No\\_10\\_1065-1080\\_European\\_Hillemanns.pdf](http://www.germanlawjournal.com/pdf/Vol04No10/PDF_Vol04_No_10_1065-1080_European_Hillemanns.pdf).

<sup>10</sup> See, notably, Slaughter, 'Agencies on the Loose? Holding Government Networks Accountable?', in G. A. Bermann, M. Herdegen and P. L. Lindseth (eds), *Transatlantic Regulatory Co-operation* (2000) 521.

<sup>11</sup> Moore, 'Law and Social Change: The Semi-autonomous Field as an Appropriate Subject of Study', 7 *Law and Society Review* (1973) 719.

<sup>12</sup> See, notably, Hall and Soskice, 'An Introduction to Varieties of Capitalism', in P. A. Hall and D. W. Soskice (eds), *Varieties of Capitalism. The Institutional Foundations of Comparative Advantage* (2001) 1; Soskice, 'Divergent Production Regimes: Coordinated and Uncoordinated Market Economies in the 1980's and 1990's', in H. K. Kitschelt et al. (eds), *Continuity and Change in Contemporary Capitalism* (1999) 101; Hollingsworth, 'New Perspectives on the Spatial Dimensions of Economic Coordination: Tensions between Globalization and Social Systems of Production', 5 *Review of International Political Economy* (1998) 482.

## 2 Transnational Law and National Legal Transformations

The closure of the ‘traditionalist’ legal thinking to the emerging orders of *soft law* in almost all fields of law (for instance, environmental, labour, corporate) is all the more irritating as this phenomenon is not restricted to the international or transnational, but significantly characterizes longer-term trends in public administration at the national level. Comparative studies of developments in regulatory law and policy in Western states over the past three decades have shown a widespread movement away from a top-down approach in public governance to an increasingly hybrid interaction of public and private actors. This trend has been apparent in such diverse fields as the enforcement of environmental standards, the delivery of health care and social welfare services on a vastly contractualized basis or in the financing and executing of public buildings and services.<sup>13</sup> While the increased contractualization of public governance and the essential involvement of private actors in public administration has, for some time now, been made the subject of intensive legal analysis by private contract law and administrative law scholars,<sup>14</sup> these developments have attracted little attention from among predominantly commercial and even international law scholars and practitioners. At the same time, these developments in the immense field of public administration reflect nothing less than a fundamental transformation of the central pillars of the established welfare state and rule of law concepts which affect the separation of powers, the policy-making role of judges, or the roles of parliament. Increasingly, the latter is seen as merely setting the framework for policies to be concretized within the realm of administrative discretion with large degrees of private involvement.

As a consequence, the failure to see any connection between these processes and one’s own legal field results in a far more significant and deplorable shortcoming. The ongoing transformation of public governance at the national level does call into question the fundamental distinction between public law and private law just as much as the phenomena of transnational law described above in relation to the emergence of widespread norm-generating activity beyond the nation-state challenges international law’s legal and conceptual boundaries.

## 3 Law’s Gatekeeping

This is precisely the background against which we can assess contributions to legal scholarship under the heading of ‘transnational law’, ‘international trade law’, ‘*lex mercatoria*’, ‘global civil society’ or ‘world economic constitution’. The book by

<sup>13</sup> See the accounts on the US, the UK, France and Germany in 81 *Public Administration* (2003), contributions by Stillman II, Bevir, Rhodes, Weller and Elgie.

<sup>14</sup> See already Freeman, ‘Collaborative Governance in the Administrative State’, *UCLA L. Rev.* (1997) 1; Freeman, ‘The Private Role in Public Governance’, 75 *New York University Law Review* (2000) 543; Zumbansen, ‘*Quod Omnes Tangit*: Globalization, Welfare Regimes and Entitlements’, in E. Benvenisti and G. Nolte (eds), *The Welfare State, Globalization, and International Law* (2003) 135.

A. Claire Cutler reviewed here constitutes a very valuable step towards embracing a more comprehensive view of the complexity of developments in national, international and transnational law. It is also a worthy attempt to visit and revisit the traditional approaches with which we have all been trained and professionalized. As one owes, willingly or unwillingly, consciously or unconsciously, a significant historical debt to any term or concept with which one engages in legal analysis, there is little valuable or truly transformative insight to be gained from a merely phenomenological account of current developments in the named legal fields. It is only by taking into account the lengthy process of a legal field's development in all of its ideological and other normative constraints that current legal analysis can contribute to a worthwhile and existentially needed critique of the ability of our legal system to address and handle a given social reality.<sup>15</sup>

*Private Power and Global Authority* deserves to be highlighted in many respects. Cutler's book, published in the series 'Cambridge Studies in International Relations', is first and foremost a much-needed study in *internal* relations. It is, in fact, more precisely a crucial report on *internal affairs*, in that it offers a substantive critique of the ways in which the law is administered by the gatekeepers of individual disciplinary departments. Because her aim is such an inquisitive and ungrounding one, Cutler must proceed in her description and analysis of new developments in *lex mercatoria* in — for both author and reader — a challenging and complex fashion. Cutler has not chosen 'transnational merchant law' for an arbitrary reason or, because in one way or another it seemed trendy at the time. This most recent book does reflect, as does her previous work,<sup>16</sup> an approach to the study of law, international law and international relations that aims, above all, at the establishment of a critical inquiry into the normative and conceptual foundations of these various disciplines and their protagonists. This undertaking is in its fundamental, encompassing scope in close dialogue with Marxist legal theory and, among others, the political critique approach to legal analysis generally identified under the heading of 'critical legal studies', that was developed in the United States most notably by Duncan Kennedy.<sup>17</sup> According to this stream, the realm of elements in law meriting close inspection and inquiry is overwhelmingly rich. When legal analysis turns to a critical assessment of its own

<sup>15</sup> For a very clear formulation of this approach see Arthurs, 'Private Ordering and Workers' Rights in the Global Economy: Corporate Codes of Conduct as a Regime of Labour Market Regulation', in J. Conaghan, R. M. Fischl and K. Klare (eds), *Labour Law in an Era of Globalization. Transformative Practices and Possibilities* (2002) 471.

<sup>16</sup> See, notably, Cutler, 'Global Capitalism and Liberal Myths: Dispute Settlement in Private International Trade Relations', 24 *Millennium: Journal of International Studies* (1995) 377; Cutler, 'Artifice, Ideology and Paradox: The Public/Private Distinction in International Law', 4 *Review of International Political Economy* (1997) 261; see also the edited volume by A. C. Cutler, V. Haufler and T. Porter (eds), *Private Authority and International Affairs* (1999).

<sup>17</sup> See, e.g., Kennedy, 'Form and Substance in Private Law Adjudication', 89 *Harv. L. Rev.* (1976) 1685; *Idem*, 'The Stages of the Decline of the Public/Private Distinction', 130 *U. of Pa. L. Rev.* (1982) 1349; *Idem*, 'Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power', 41 *Maryland L. Rev.* (1982) 563; *Idem*, *Critique of Adjudication. Fin de Siècle* (1997).

conceptual foundations, to its method,<sup>18</sup> then there is hardly any distinction, any boundary that can remain outside of this analysis. Cutler's main target is the public/private distinction, for which she is able to offer an entirely new reading and relativization by bringing to light some of its underlying normative assumptions.

The public/private distinction is picked up with reference to its determining power for national and international legal discourses. Cutler highlights its central role in separating fields of legal application and, as such, separating fields and spheres of social activity. Ultimately, it can be shown that the preservation and impassioned defence of the distinction allows for a continuing practice of accommodating social phenomena to the legal conceptual framework, and not the other way around. Karl Klare significantly expresses this line of reasoning for Cutler's approach:

The peculiarity of legal discourse is that it tends to constrain the political imagination and to induce belief that our evolving social arrangements and institutions are just and rational, or at least inevitable, and therefore legitimate. The *modus operandi* of law as legitimating ideology is to make the historically contingent appear necessary. The function of legal discourse in our culture is to deny us access to new modes of conceiving of democratic self-governance, or our capacity for and experience of freedom.<sup>19</sup>

This reads almost like a blueprint, the *idée directrice*, for Cutler's whole undertaking. The quote carries in itself the core instrument which can be used to call into question the disciplinary boundaries and reality descriptions and the ways in which they allegedly naturally and neutrally feed into law. That Cutler's approach is informed by the attack by 'critical legal studies' on the presupposed, deeply ideological neutralization of law, by understanding and portraying it as 'formal', is clearly expressed in her formulation of the 'four myths' that form the foundation for the public/private distinction.<sup>20</sup>

These myths include the idea, first, that 'the private ordering of economic relations is consistent with natural or normal economic processes'. The second myth 'posits the neutral and apolitical nature of the private sphere'. Relying for an exposition of this idea on a very convincing selection of writings by Nigel Purvis, Morton Horwitz, and David Kennedy, Cutler stresses the gap between the alleged formality and, thus, completeness of legal norms governing the law of contract and commerce, and the question, lying outside of the law, of whether and when a transaction can be considered 'fair'. This separation between the norm and its social interpretation eventually turns the law into a 'mechanism of exclusion', that is significantly characterized by the act of 'projecting a stable relationship between spheres it creates

<sup>18</sup> For a very clear assessment see Kennedy, 'From the Will Theory to the Principle of Private Autonomy: Lon Fuller's "Consideration and Form"', 100 *Columbia Law Review* (2000) 94; Wiethölter, 'Privatrechts-theorie als Gesellschaftstheorie?', in F. Baur *et al.* (eds), *Funktionswandel der Privatrechtsinstitutionen, Festschrift für Ludwig Raiser zum 70. Geburtstag* (1974) 645; and, most recently, Wiethölter, 'Recht-Fertigungen eines Gesellschafts-Rechts', in C. Joerges and G. Teubner (eds), *Rechtsverfassungsrecht. Recht-Fertigung zwischen Privatrechtsdogmatik und Gesellschaftstheorie* (2003) 11.

<sup>19</sup> Cutler, *supra* note 2, at 53; quote taken from Klare, 'The Public/Private Distinction in Labor Law', 130 *U. Pa. L. Rev.* (1982) 358.

<sup>20</sup> See, for the following, Cutler, *supra* note 2, at 54–56.

to divide'.<sup>21</sup> This myth empowers the law, in effect, to remove social and political activities from 'public and political scrutiny' by identifying them as 'private' and, thus, apolitical.<sup>22</sup>

The third myth, then, is the portrait of the 'consensual and non-coercive nature of private exchange relations'.<sup>23</sup> This myth alone would merit an entire book or, better, an entire recreation and re-initiation of contemporary legal debate. The roots of this critique as developed within the European turn-of-the-century legal critique of 'private power', the attack on the formalism of contract, antitrust, and unfair competition law and the US legal realist movement's attacks on the image of a non-coercive market sphere supposedly characterized by equal private interaction,<sup>24</sup> are still lying bare, but there is little hope that today's law students will hear of these names, let alone of the texts and topics, even once during their legal education.

Finally, Cutler presents a fourth myth which, even more than the others, opens up a whole new dimension for her analysis. 'The fourth liberal myth posits the inherent efficiency of the private regulation of commercial relations.'<sup>25</sup> While there has certainly been much discussion of the widely made claim within traditional private law scholarship as to the fundamental efficiency of law that is made and administered in close proximity to the actors, this perspective does not yet envisage another line of developments that has become crucial only more recently. The extraordinary transformation of legal, political, cultural and socio-economic systems that has followed the liberalization, for example, of former colonies and, after 1989, Eastern European former socialist states, has also entailed a fundamental change in the role of law. Consultancies, trade and development, rebuilding and joint venture agreements in states in transformation ('transformation states') abound and 'transition markets' have become the prime target not only for a fully-fledged economic influx but also for the import of a ready-to-use legal order and institutions.

Although the end of authoritarian rule has given way to an often very optimistic view on the chances of democratic developments,<sup>26</sup> recent years have seen a problematic overlapping of the often radical and uprooting structural reforms currently suggested for transforming states and their yet unstable markets on the one hand, and the highly proceduralized and sophisticated forms used for reforming mature welfare states by more or less carefully drafted privatization and deregulation policies, on the other. The much-needed structural support by transformation states, however, often shifts the balance between these poles exclusively in the direction of

<sup>21</sup> Kennedy, 'A New Stream of International Law Scholarship', 7 *Wisconsin Int'l LJ* (1988) 1, at 8.

<sup>22</sup> Cutler, *supra* note 2, at 55.

<sup>23</sup> *Ibid.*, at 56.

<sup>24</sup> See, e.g. Böhm, 'Das Problem der privaten Macht', in F. Böhm (ed.), *Reden und Schriften* (1960) 25; Pound, 'The New Feudalism', 16 *American Bar Association Journal* (1932) 553 [also published as 'The New Feudal System', 35 *Commercial Law Journal* (1930) 397]; Hale, 'Coercion and Distribution in a Supposedly Noncoercive State', 38 *Political Science Quarterly* (1923) 470.

<sup>25</sup> Cutler, *supra* note 2, at 56.

<sup>26</sup> See, F. Fukuyama, *The End of History and the Last Man* (1992); for a critique of this view, see, recently Miller, 'Self-Determination in International Law and the Demise of Democracy', 41 *Columbia Journal of Transnational Law* (2003) 601.



radical privatization, both with regard to institutions and to processes. What results is a privatization discourse and practice that can only bear the slightest resemblance to prior development trajectories in the receiving country. At the same time, privatization politics in transformation states take place against such a particular institutional, political and socio-economic background that the entirely differently situated and embedded privatization discourses in mature post-industrial welfare states can serve even less as role models.

Cutler's fourth myth of the allegedly natural efficiency of private ordering does, then, play out in the transnational legal sphere. We are transposed at the city limits of Eastern European capitals like Chisinau where the visitor is greeted with KPMG and other business consultancy signs. In such places, the erosion of the boundary between the public and the private has progressed in such a decisive manner that only a careful reconsideration of the different conceptions that have been heralded as underlying the separation promises an adequate starting-point of analysis. As a consequence, however, comparative law has taken a very practical turn,<sup>27</sup> and the triumphantly presented privatization of almost all fields of economic production in transformation states and their markets has yet to reveal its deeply depoliticizing nature.<sup>28</sup> This provides us with a deeply unsettling insight into the normative aspirations of members from one of the strongest forerunners of a global (civil) society:

Indeed, it is the transnational corporate elite that is pushing vociferously for the establishment of a global business regulatory order. But it is an order of a particular sort — one consistent with a renewed emphasis on neoliberal values concerning the superiority of the private ordering of global corporate relations.<sup>29</sup>

This observation is even more unsettling as the leading role of private firms in building markets and institutions, in fact, constitutes a strong challenge to the emerging civil society and transnational law literature. That literature, in fact, is under constant threat of being seduced by the opening up of new and untainted spaces of human interaction, uncorrupted by the well-known power structures inherent in the nation-state and its history.<sup>30</sup> The hope for a global civil society, however, can only become a promise if the fate of related hopes developed in the nation-state are recalled and reconsidered.

<sup>27</sup> See the brilliant analysis by Pistor, 'Of Legal Transplants, Legal Irritants, and Economic Development', in P. K. Cornelius and B. Kogut (eds), *Corporate Governance and Capital Flows in a Global Economy* (2003) 347; see also Schauer, 'Legal Development and the Problem of Systemic Transition', 13 *Journal of Contemporary Legal Issues* (JCLI) (2003) 261, cited here as *John F. Kennedy School of Government/Harvard University Fac. Res. Working Paper Series RWPO3-025*, available at <http://www.ssrn.com> (<http://ssrn.com/abstract=427223>).

<sup>28</sup> For a comprehensive analysis of this privatization import via supposedly value-free, 'technical' codes of conduct and business principles see, K. Rittich, *Recharacterizing Restructuring, Law, Distribution and Gender in Market Reform* (2002).

<sup>29</sup> Cutler, *supra* note 2, at 254.

<sup>30</sup> Cf. Zumbansen, 'Piercing the Legal Veil: Commercial Arbitration and Transnational Law', 8 *European Law Journal* (2002) 400.

## 4 Draw a Distinction!

Cutler constantly draws distinctions. In fact, and for good reasons, she does so even where her aim is to demolish them, to deconstruct and demystify well-established boundaries. As she builds on the sharp observations by Susan Strange concerning the state's eroding sovereignty 'upwards, sideways and downwards',<sup>31</sup> she highlights the inner connections between different levels of governance that characterize today's political culture, where the dividing lines between state and civil society, public and private, can only be drawn by an act of paradox, i.e. the re-introduction of the boundary and the acknowledgement that the two opposing poles cannot be married in a single unifying concept.

This plays out in a particularly valuable way when applied to the continuing dispute over the legal nature of the *lex mercatoria*. One perspective that could be taken on *lex mercatoria*, would be to understand it as an identifiable, possibly autonomous legal order. This view would shed light on a myriad of customs, principles and norms generated on different levels of human interaction, thereby fully exposing the observer to a complex image of societal self-regulation under the constant threat of state intervention. From another perspective, *lex mercatoria* could merely be read as a transient label for a multi-polar, complex structure of cross-border contracts for which, however, the traditionally available law of the nation-state remains applicable, regardless of how difficult this might prove in some cases. In both cases, the observer's perspective will be fully determined by his or her approach to legal regulation as such. This is to be understood in the most basic and fundamental sense: one's perspective on the law determines its application. Whether law is understood as an instrument of *social ordering* or of *political regulation* makes all the difference, as this distinction demands a decision as to whom is recognized as the author, the 'subject' of law.

At the same time, perhaps we are not so free to choose our starting-point. Rather, it seems that much of what we take out of the law has been put into it by us on the basis of our general conception of the law as part of a wider approach and attitude to the society we live in.<sup>32</sup> This observation merits expression if only to adequately lay out the ground upon which contributions such as the one under review feed into the consciousness of the legal communities in various parts of the world. While it remains an important task for the self-description of legal theory to address and to assess the advent of new terminology resulting from within the nervous reactions of the legal system to experiences of its inadequacy when confronted with phenomena that overwhelm the system's integrity, this assessment can only happen in one way. We constantly need to draw distinctions between the still fragile and unstable terminology emerging to address social phenomena and the world this terminology is actually designed to describe. We can never, however, have both. The coexisting

<sup>31</sup> See Strange, 'The Defective State', in 124 *Daedalus* (1995), at 55–56, cited in Cutler, *supra* note 2, at 51.

<sup>32</sup> See, the classical exposition of this idea in B. N. Cardozo, *The Nature of the Judicial Process* (1921, rev. ed., 1976).

claims on both sides are our destiny and it is this coexistence that can neither be transcended nor sacrificed, if only for the price of giving in to yet another ideology.

## 5 Law's Communication with Society

The four myths that Cutler introduces in the first part of her book are unfolded and then discussed in the rest of the volume, and the insights resulting therefrom are bound to unsettle the reader, forcing him or her to reconsider dearly held presuppositions as to what constitutes the legal order. Cutler's strong emphasis on the notion of sovereignty and many scholars' incapacity or unwillingness to imagine a conceptualization of sovereignty apart from the state as its allegedly exclusive *locus*, together with her exploration of the potential of attaching and locating sovereignty in the realm of private actors, underlines and stresses her guiding argument: that a formalist upholding of the public-private divide serves to make the observer blind to any form of norm-generation and true autonomy of private actors and, thus, blind to the claims made by emerging social actors that are continually seen as mere objects, not as *subjects* of law.<sup>33</sup>

She develops this argument in the context of current discourses in international law and international relations, Marxist legal theory, and the Weberian idea of a move to rationality as modernity's determinative stronghold on law, supposedly preparing the ground both for the '*bürgerliche Gesellschaft*' and the bureaucratic state.<sup>34</sup> This first phase of Weberian juridification is remarkable when seen in the light of our most recent, disillusioning experience with the welfare state's all-encompassing aim of giving clear guidance to an already highly complex and differentiated market society.<sup>35</sup> While some participants in today's public law discourse are already moving away from the mainstream by suggesting a differentiated picture of the *post-privatization* state, one with a drastically changed role, but whose existence as such is not called into question, Cutler's proposal to rethink the state, public authority and sovereignty is trying to reach even beyond this contemporary vision of the 'supervision state', a state that is immersed in society's doings through monitoring and, at times, even initiating and empowering processes of societal self-regulation.<sup>36</sup> Cutler's approach aims at understanding 'international law as practice and *praxis*'<sup>37</sup> ('we might conceive of international law as a form of *praxis* involving a dialectical relationship between theory and practice, thought and action, and law and

<sup>33</sup> Cutler, *supra* note 2, at 247–249.

<sup>34</sup> *Ibid.*, at 146.

<sup>35</sup> See, N. Luhmann, *Politische Theorie im Wohlfahrtsstaat* (1981); Teubner, 'Juridification — Concepts, Aspects, Limits, Solutions', in G. Teubner (ed.), *Juridification of Social Spheres* (1987) 3.

<sup>36</sup> See, e.g. H. Willke, *Supervision des Staates* (1997); Vesting, 'Zwischen Gewährleistungsstaat und Minimalstaat: Zu den veränderten Bedingungen der Bewältigung öffentlicher Aufgaben in der "Informations- oder Wissensgesellschaft"', in W. Hoffmann-Riem and E. Schmidt-Assmann (eds), *Verwaltungsrecht in der Informationsgesellschaft* (2000) 101; Ladeur, 'The Theory of Autopoiesis as an Approach to a Better Understanding of Postmodern Law', *EUI Working Paper Law No. 99/3* (1999).

<sup>37</sup> See Cutler, *supra* note 2, at 100–103, 257–262.

politics'<sup>38</sup>). Mobilizing the way that the discourse on the *lex mercatoria* has evolved through time, Cutler uses the different stages of development to point to the embeddedness of legal analysis in a wider framework of political and socio-economic self-understanding. Building on Gramsci and Karl Klare, she aims at a non-deterministic perception of the law:

International lawmaking is thus to be understood in dynamic terms as a process giving rise to material, institutional, and ideological conditions embodying both oppressive and potentially emancipatory social relations. . . . Law exists not as a fixed body of neutral and objectively determinable rules, but as a construct of, and thus deeply embedded in, international society.<sup>39</sup>

In Cutler's view, the *lex mercatoria* is very aptly situated in the context of a changing international scenery, with a drastic reconfiguration of international actors and processes on the one hand and a struggling conception of international law trying to adapt its conception and terminology to this challenge. 'Processes of juridification, pluralization, and privatization are transforming structures of authority, "which implicitly challenges the old Westphalian assumption that a state is a state is a state".'<sup>40</sup> Even more pointedly, Cutler writes: 'In both law and politics, conventional approaches tend to peripheralize the role of law in the global political order, thus obscuring a critical understanding of the contribution that transnational merchant law makes to the constitution of political practices.'<sup>41</sup>

With an obvious relevance for our previous remarks on the transformation of the public and the private spheres on the level of national law, she goes on to remark:

The actors, structures, and processes identified and theorized as determinative by the dominant approaches to the study of international law and organization have ceased to be of singular importance. Westphalian-inspired notions of state-centricity, positivist international law, and 'public' definitions of authority are incapable of capturing the significance of nonstate actors, informal normative structures, and private, economic power in the global political economy.<sup>42</sup>

On the domestic level of legal analysis, the state may still be the *point d'origine* and the *point de fuite*, but it is increasingly challenged in its claim to be the central legal subject on the international plane.

The history of the *lex mercatoria* from its medieval origins to the present serves as an instrument to lay bare the transformation of 'public authority' in today's debates of international law and international relations. The medieval *lex mercatoria*, the rise and fate of which is finely traced by Cutler, eventually fell victim to the statization of law and the rules governing commercial activities. While in the common law world the commercial rules that were both collected and partially set down in commercial statutes eventually informed an overwhelming economic dissemination within the British Commonwealth, the incorporation of merchant rules into codifications in France and Germany and their worldwide 'export' had their share in eroding the basis

<sup>38</sup> *Ibid.*, at 103.

<sup>39</sup> *Ibid.*, at 103–104.

<sup>40</sup> *Ibid.*, at 241, citing Cox, 'Structural Issues of Global Governance: Implications for Europe', in A. Gramsci, *Historical Materialism and International Relations* (Stephen Gill ed. 1993), at 259, 263.

<sup>41</sup> *Ibid.*, at 241–242.

<sup>42</sup> *Ibid.*, at 242.

of customary commercial law for some time. Even if commercial custom persisted, the codification of private and commercial law worked to effectively place the individual and his well-defined rights at the centre of the legal system. With the debate over the 'legal person' (*la personne morale* or, *die juristische Person*) fully unfolding in the course of the nineteenth century,<sup>43</sup> commercial actors were increasingly seen not as subjects of law, but as its objects.

The debate continued to divide the field into those who recognized the legal standing of private associations as ensuing from their social role and function and those who understood legal personality as merely the result of the state granting such a status to those entities. Today's theory of the law merchant is characterized by a complex parallelism of fatigued scholarly interest in answering the classical questions as to the ultimate legal nature of the law merchant on the one hand, and by an attitude of indifference among members of the mainstream regarding a final resolution of the old dispute on the other.

On both sides, however, perceptions have given way to what appears to be a more relativist and, possibly, tolerant view. Doubtless, this also follows from the multitude of norm-generating groups, collectivities, international organizations and transnational associations issuing 'best practice recommendations' and 'codes of conduct', which altogether reflect a proliferation of norm-producers on many different levels and regardless of their ultimate 'legal' nature.<sup>44</sup> In addition, the well-functioning co-existence of arbitral tribunals and ordinary courts, along with the regulatory competition of national legal systems in adapting their laws of civil procedure to accommodate the needs and interests of a transnational arbitration community (should some of their members actually decide to bring an award before a local ordinary court because the arbitral opponent declined to respect its terms), takes a lot of tension out of the debate.

Amidst this apparent relaxation, however, we can hear the soft tones of a very dangerous and intoxicating melody: in fact, the song is invoking the old lullaby of state-centredness and apolitical societal activity. The private is (again) not political, but natural and efficient. Cutler calls up Pierre Schlag's concept of the 'problem of the subject' and asks about the 'subjects' in current international law theory. What she finds in the sphere of international law, is indeed the continuation of what has long emerged as the dominant perception in national legal theory:

In international law, the problem of the subject appears in the designation of states as 'subjects' of the law, while individuals and corporations are regarded as 'objects' of the law. As such, whatever rights or duties individuals and corporations have are derivative of and enforceable only by states who as subjects conferred these rights and duties upon them.<sup>45</sup>

<sup>43</sup> For a discussion of the American debate see M. J. Horwitz, *The Transformation of American Law 1870–1960* (1992), at 65–107; see, for a recent account of the German development, P. Zumbansen, *Innovation und Pfadabhängigkeit* (forthcoming), at Ch. 3; see also the contributions in R. B. Grantham and C. E. F. Rickett (eds), *Corporate Personality in the 20th Century* (1998).

<sup>44</sup> See, e.g., the list of Corporate Governance Codes at [http://www.ecgi.org/codes/all\\_codes.htm](http://www.ecgi.org/codes/all_codes.htm).

<sup>45</sup> Cutler, *supra* note 2, at 247.

She continues:

The *de jure* insignificance of business corporations and associations in the face of their *de facto* significance reflects a disjunction between theory and practice. ... The law has ceased to constitute, mirror, and, in some cases to discipline state practice and bears only a remote relationship to the demands for recognition coming from emerging social forces.<sup>46</sup>

This insightful perspective productively transforms the *lex mercatoria* debate so that its critical reformulation feeds into a wider international debate over the future of the state, of constitutionalizing international organizations<sup>47</sup> and, notably, private law-making.<sup>48</sup> The interaction of tribunals and courts, of associations and international organizations, the ever-increasing norm production on all levels of civil society, within and beyond the nation-state,<sup>49</sup> has rightly informed and stimulated a constitutional debate,<sup>50</sup> a debate that has with good reasons already proceeded to depart from traditional attachments to states as allegedly exclusive constitutional actors.<sup>51</sup>

The tension between the underlying claims traditionally attached to private law and public law norms, between individualistic and collectivistic conceptions of society, between state-centred and society-based models of political governance, continues to occupy our mind and to shape our very capacity to think of alternative political designs. Cutler writes:

Private actors, such as transnational corporations and private business associations, are increasingly functioning authoritatively, but this is rendered invisible by an ideology that defines the private sphere in apolitical terms. Liberal mythology makes the political content of the private sphere disappear by defining it out of existence and, in so doing, isolates and insulates private commercial activity.<sup>52</sup>

Yet, what has become clear, painfully so, in the course of the past few years, is that there is no guarantee involved in falling back on traditional concepts of what the law is and where its reach begins and the limits to its legitimacy claims can be found. Claire Cutler's exposition of the varying and competing discourses that underlie any

<sup>46</sup> *Ibid.*, at 249.

<sup>47</sup> See, notably, Petersmann, 'Constitutionalism and WTO Law: From a State-centered Approach towards a Human Rights Approach in International Economic Law', in D. L. M. Kennedy and J. D. Southwick (eds), *The Political Economy of International Trade Law. Essays in Honor of Robert E. Hudec* (2002) 32.

<sup>48</sup> Teubner, 'Contracting Worlds: The Many Autonomies of Private Law', 9 *Social & Legal Studies* (2000) 399; Teubner, 'Globale Privatregimes: Neo-spontanes Recht und duale Sozialverfassungen in der Weltgesellschaft', in D. Simon and M. Weiss (eds), *Zur Autonomie des Individuums. Liber Amicorum Spiris Simitis* (2000) 437, see unpublished version in English at <http://www.jura.uni-frankfurt.de/teubner/>.

<sup>49</sup> See, hereto, Zürn, 'Sovereignty and Law in a Denationalised World', in V. Gessner, R. P. Appelbaum and W. L. F. Felstiner (eds), *Rules and Networks. The Legal Culture of Global Business Transactions* (2001) 39; Zürn, 'Globalization and Global Governance: From Societal to Political Denationalization', 11 *European Review* (2003) 341.

<sup>50</sup> See, in particular, the proposals by Walker, 'The Idea of Constitutional Pluralism', 65 *Modern Law Review* (2002) 317; Frankenberg, 'The Learning Sovereign', in R. A. Miller and P. Zumbansen (eds), *Annual of German & European Law*, Vol. 2 (forthcoming 2004).

<sup>51</sup> See, Walter, 'Constitutionalizing (Inter)national Governance — Possibilities and Limits to the Development of an International Constitutional Law', 44 *German Yearbook of International Law* (2001) 170; Teubner, 'Globale Zivilverfassungen: Alternativen zur staatszentrierten Verfassungstheorie', 63 *ZaöRV* (2003) 1. English version available at <http://www.jura.uni-frankfurt.de/teubner>.

<sup>52</sup> Cutler, *supra* note 2, at 242.

contemporary conversation about the law merchant has rightly identified the vast space that opens up beneath our feet when we allow ourselves to question the stability of our legal (and political and economic and social and cultural) self-understanding. Her major contribution must be seen in the decisive step forward, or backward, or inward: that is, not to give in to vague and illusionary hopes of transcending or merging the separation between these competing claims, ultimately the opposition of the public and the private. Instead, her careful tracing of the fragile and vulnerable transnational legal discourses through the cold winds of the liberal market ideology, the juridification of the liberal state, the state-centredness of Westphalian international law, and the privatization drunkenness of contemporary exporters of the Western legal system, has done everything but that. Instead of formulating yet another cheap promise of a better world where the *bourgeois* may finally be a *citoyen*, where the market citizen obliges because she is the ultimate origin of the laws and rights bestowed upon her, Cutler asks us to sustain the tension, to live with the dualism, but consciously so.

The paradox is the inner connectedness of the opposing poles, where one side only makes sense with regard to the other.<sup>53</sup> One cannot merge them to form a new entity, and yet one cannot separate them as they are reciprocally linked. The view of the law merchant is ultimately a cold and uncorruptible view of the fallacies and ideologies of many of today's legal discourses that bluntly continue to replicate what is at best the farce of freedoms never attained.

<sup>53</sup> Luhmann, "'Was ist der Fall?' und 'Was steckt dahinter?'" Die zwei Soziologien und die Gesellschaftstheorie', 22 *Zeitschrift für Soziologie* (1993) 245; Teubner, 'Der Umgang mit den Rechtsparadoxien: Derrida, Luhmann, Wiethölter', in Joerges and Teubner, *supra* note 18.