Legal pluralism or uniform concept of law?

Globalisation as a problem of legal theory*

Klaus Günther

The transnational expansion of the market economy, the emergence of a transnational capital market, the invention of world wide operating technologies of information and communication and transnational migration are the most salient features of the process usually called 'globalisation'. Whether these processes really deserve to be called 'global' or whether the characterisation is true only for the wealthy part of the world, is an open question. Nevertheless, their dynamic force has already begun to change the traditional patterns of social order, in particular the common model of a sovereign national state that is based on a more or less pluralistic as well as homogenous culture.

These processes and the corresponding conflicts have also begun to change the law. Most academic as well as political debates about the law are still directed at the concept of a national legal order with a centralised and public legislation, with a legally bound executive power that is responsible to the sovereign people, and with a relatively autonomous judiciary that is committed to a coherent adjudication of a legitimate legal system. This world of *infranational* legal norms is already superimposed by international and even supranational norms. One of the most telling examples is the European Union law that deeply transforms the national law of the member states. More and more legislating actors appear besides the national legislators which operate in different transnational legal fields and on different levels. These include international organisations like the world Trade Organisation (WTO), the World Bank (WB), and the International Monetary Fund (IMF) which have at least *de facto* legislating power or, as in the case of the EU, supranational organisations which are also *de iure* legislators. While these organisations are still more or less intensely submitted to the will of their member states and their national governments, this is not true for the many non state actors operating on the different transnational legal fields. Non-governmental organisations (NGOs) like

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Amnesty International, Greenpeace or Human Rights Watch are also involved in transnational legislating procedures or they even create new norms by their own practice which gain transnational binding force in the long run. In many areas like the World Wide Web, technology, sports, and some economic branches, private actors create their own law – without any involvement of a public legislator. Transnational corporations are more and more inclined to solve their contractual conflicts according to the *lex mercatoria* which is established by private arbitration courts.

Finally, there is no issue of national legislation which is not under international observation or influence – be it other nation states, international organisations, multilateral conference systems, NGOs or the mass media. A simple norm in national environmental law or labour law could turn out to be protectionist and, consequently, illegal discrimination of other competitors on the global market according to the norms of the GATT/WTO treaty. Governments as well as powerful private actors are subjected to a global human rights discourse led by other national governments, international organisations like the UN, national and international courts, international and local NGOs and global mass media, which all together identify – of course selectively – human rights violations, scandalise them publicly and continue to interpret them with regard to new cases and extend the scope of their application.

All these facts are important for the concept of law in at least two ways. Firstly, when there are many different public and private legislators or different kinds of private and public actors participating in different legislations in different areas and on different local, infra-, inter- or supranational levels, then a *uniform concept of law* can no longer be maintained. Instead, legal theory has to deal with many different normative systems. The positivist concept of *one* legal system that is logically ordered and hierarchically differentiated turns into a *plurality* of legal regimes. The fact of *legal pluralism* seems to turn the idea of a unified legal system into a mere fiction. But at least one difficult question arises: how is it possible to adjudicate legal cases according to the minimum requirement of justice, i.e. to treat like cases alike and to treat people with equal concern and respect if there is no coherent legal system? Secondly, during the long historical way to a democratic constitutional government with a differentiated system of primary and secondary rules, the principle was widely acknowledged that there is no province of law which could be completely detached from the legislative power of the sovereign people as the primary source of legitimacy. The identity of authors and addressees of the law, although institutionalised as a complex cycle and with different stages of

representation and delegation, should be inclusive with regard to all citizens and all cases. This principle loses its convincing force with regard to the fact of legal pluralism. Political legislation by general and coherently ordered legal norms and a legal adjudication based on the coherent interpretation of legal norms and precedents which all belong to one legal system seems to be more and more replaced by fragmented areas of self-regulation, practised by norm giving actors who have empowered themselves and who enact norms with different degrees of generality and scope. Again, difficult questions have to be raised: How is legitimate law possible then? How can fragmented procedures of self-regulation take into account *third party* interests and rights? How can equal rights to access and participation be granted? Can procedures of self-regulation be transparent enough to guarantee imputability of decision makers and responsibility for decisions and their consequences?

In the following I would like to address these two challenges in different steps. I shall briefly sketch the relevant normative phenomena on the various transnational legal fields and identify the most prominent actors (section 1). In a second step I shall demonstrate how theories of legal pluralism deal with these phenomena (section 2) and which consequences have to be drawn from these interpretations and justifications of legal pluralism for the concept of law. In the next step, I shall demonstrate that theories of legal pluralism interpret the emergence of transnational legal orders from an external point of view only (section 3). From an internal point of view it turns out that a universal code of legality is being established by transnational networks of public and private actors (section 4) which need to be interpreted and applied in legitimate procedures of lawmaking and legal adjudication (section 5).

1. Transnational legal fields and their actors

As already indicated above, the emergence of transnational norms can be observed primarily in four different fields: (a) in a globally expanding market economy and the global financial market, (b) with regard to the consequences of this expansion for the environment, migration and the economic and social systems of poorer countries, (c) with regard to human rights (d) and in the field of an emerging transnational law of public security coping with dysfunctional consequences of globalisation. Different kinds of actors are working in this field: national governments, internationally operating law firms, various legal experts, NGOs,

other private interest groups and international organisations. Of course, some of these actors are much more important than others. Nevertheless, each of them is operating in transnational expert networks together with economists, scientists and political activists. As legal experts, they play an important role in the process of an emerging transnational law. It is a law made by legal experts (or a German term borrowed from Friedrich Carl von Savigny: *Juristenrecht*).[1]

(a) The global expansion of the economic system has often been described by many authors. It is perhaps the only social system which really crosses national borders. No nation state is able to protect itself against its ambivalent, positive as well as negative consequences. The international commodity exchange increases rapidly, financial markets and service markets have already crossed national borders with the help of the invention of new communication technologies. Decentralised transnational corporations become powerful actors whose fortunes exceed those of many nation states. National legislations are subjected to a regulatory competition for attracting transnational corporations.

At the same time the World Bank and the IMF give loans to poor countries or countries facing economic crisis under the condition that they will enact a legal system which facilitates market economy. Many private legal experts are working for the governments of these countries, either on behalf of international organisations or other national governments interested in expanding their own legal systems into these countries, or simply as service providers in a transnational market for legal expertise. They draft constitutions or contract laws and educate judges and the administration staff.[2]

The legal regime of the WTO and the GATT is directed towards an international system of free trade which shall prevent national legislations from indirect discriminations of foreign competitors. The WTO is an international organisation which is according to its self-understanding nothing else but an executive body of the will of its member states. In fact it has already developed its own organisational interests, and with the Dispute Settlement Body and the Appellate Body it has already established a kind of quasi-jurisdiction over its member states (von Bogdandy 2001). At the same time, tendencies towards increased economic self-regulation, more or less independent of national legislation, can be observed.

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[1] For a more detailed elaboration, see Günther & Randeria 2001.

[2] For example, the constitution of the Republic of Albania was drafted by a German law professor on the ninth floor of the Frankfurt law school building: Frankenberg 2001. See also Boguslawskij & Knieper 1998.

Internationally operating law firms are primarily working in this field. Many law firms have expanded transnationally themselves – mostly British and American law firms – and by acting this way they have become powerful organisations (See Günther & Randeria 2001, 55–59). They exert their powerful influence on the regulatory competition between national legislations with forum shopping for their clients, looking for the most convenient national legal systems (with regard to tax law, labour law, law of corporations, environmental law, tort law etc.). More important for law firms in the role of private legislating actors is private arbitration. Under the competitive influence of American law firms, private arbitration has become professionalised and has thereby changed from an exclusive club of dignitaries into an *arbitration market* (Dezalay & Garth 1998). Here they participate in the creation of an international *lex mercatoria* detached from national legislations. National governments are only needed as bailiffs for the execution of court decisions. In some areas, law firms directly negotiate with each other about transnationally binding rules for their clients, for example netting clauses for insolvency cases that happen during trade with derivatives on the global capital market. The driving force of regulatory competition puts national legislators under pressure to transform these informally binding norms into national law (Günther & Randeria 2001, 55–59).

Transnational corporations equipped with the legal expertise of powerful internationally operating law firms gain a status similar to the status of citizenship. Like citizens of a sovereign people they can demand their government not only to take responsibility for its political decisions, but also to be sensitive to their interests in legislation. Saskia Sassen has called this kind of privileged status *economic citizenship* (Sassen 1996). In many countries of the south, transnational corporations are capable of forcing national governments to become dependent of them. Examples of this are the oil companies operating in Africa or textile companies set in Central America.

(b) The global expansion of the economic system is supported by scientific inventions and new developments in information and communication technology. They cause new regulatory problems that cannot be solved by national legislation alone. The consequences of modern biotechnology is one of many examples. Questions such as whether genetic engineering of food should be prohibited, and if not, whether food packages should be marked accordingly cannot be answered only by national legislation, because food products can be bought and sold all over the world. The problems become even more severe when it comes to genetic re-

search on human beings. Besides various attempts to international legal regulations, one can also observe tendencies towards self-regulation among scientists.

Modern information and communication technology is transnational in itself. All attempts to regulate the World Wide Web by centralised legislation, either on national level or by international law, have failed. National governments are more or less helpless when they try to prohibit by law Nazi propaganda (prohibited in Germany, not prohibited in the US) or child pornography. According to some actors of the World Wide Web, the state and the law made by centralised political bodies should be kept out of it. Again, self-regulation is considered as more democratic, more appropriate and more efficient. The distribution of domain names by ICANN has become something like a paradigm case for transnational self-regulation of a social system defined by its technological features. The rules of distribution and of the conflict resolution procedures are not considered as law in the traditional sense of state-law, but nevertheless this is some kind of a valid normative system with binding force.

Other problems caused by the expanding economic system have a transnational dimension too. This is true for environmental damages which do not stop at national boundaries as well as for migration movements from poorer to wealthier countries or political radicalism and terrorism which spread form one country to another. As one can see in each case book of international law, international treaties and conference systems are intended to deal with these consequences, but national governments representing a national sovereign are much too weak to succeed in establishing and executing efficient legal regulations. Often NGOs have much more power to gain world wide public attention for a particular issue, for example the necessity of environmental protection or for the monitoring of the commitment of national governments to international treaties.[3]

(c) This observation is even more true for the human rights development. Human rights have gained a dynamic force after the end of the Cold War. The state has always been considered as both the guardian and the opponent of human rights. Meanwhile no state can withdraw from committing itself at least rhetorically to human rights – and each state is observed by other states, by NGOs and the mass media. But many international human rights treaties which require national governments to respect the human rights of their citizens do not give the right to individuals to litigate against the government in case it violates their human rights. Only recently the individual has become a subject of international public law as a

[3] See for the example of protection of environment David Held et al. 1999, 376–413.

bearer of human rights. Again NGOs (like Amnesty International or Human Rights Watch) and private mass media are the most important actors for directing world wide public attention to human rights violations which cannot be prosecuted and adjudicated. Mutual observations of national governments with regard to their respect for human rights often follow previous public attention. This is also true for another important change in the scope of human rights. Historically, the negative concept of human rights directed against governmental actions has been much more important than their horizontal or third party effect. Meanwhile human rights violations by private actors in the broadest sense are generally considered as more serious. Human rights are therefore claimed by minorities against majorities, by individuals against powerful private organisations, by one disadvantaged group against other privileged groups or, finally, against para-state organisations or civil war parties.

(d) As already indicated above, political action is more and more submitted to human rights – up to the point where national sovereignty and human rights collide as in the case of humanitarian interventions. In cases of severe human rights violations a transnational criminal law emerges – directed against government officials, and military and para-military persons. The Rome Statute and the erection of the International Criminal Court was the project of legal experts (mainly law professors) and NGOs for many years, until national governments joined in the movement provoked by the severe human rights violations that had occurred during civil wars in the recent years.

Nevertheless, the emergence of a transnational criminal law is much more driven by other forces. Social dysfunctions as a consequence of economic globalisation like unemployment or the financial overcharge of the welfare systems make many people feel insecure about their individual future (Baumann 2000, chapter 1). This feeling manifests itself partially in an increasing fear of crime which can be observed mostly in the countries who benefit from economic globalisation. This fear focuses in particular on foreigners and on criminals who operate transnationally, like mafia networks or terrorist groups. In reaction to this, many national governments participate in a 'war on crime' by co-ordinating their national measures, for example by enacting similar statutes in criminal law (prohibiting money laundering, drug dealing, etc.). Although the national legislator is still making the law, it does so because of international pressure. Correspondingly, within each of these countries, populist movements are asking for security against the risks of crime. Step by step criminal law is transformed into a law of public security which mixes traditional criminal law with administrative law (Garland

2001, 145). Already before and all the more after the terrorist attacks in New York on September 11, 2001, prosecutors, secret services and military agencies co-operate in the war on crime, destroying the constitutional boundaries between criminal prosecution and public security step by step. As a consequence, public security is widely considered as prior to the right to individual liberty.

These changes seem to demonstrate that the nation states, their governments and national legislators still play a very important role in the process of globalisation. This is obviously true for the state as a security agency. But this is only one, although very important, part of governmental functions. And the nation state does not decide about its monopoly of violence on its own, but under international pressure and under the pressure of populist demands. The nation state could in principle be substituted as a security agency. To put it bluntly, national governments act as if they were private security services. The state grants public security for the majority who benefit from economic globalisation against the minority of losers – or, on a global scale, a small minority in the wealthy part of the world against the majority in the poorer part. Although national governments still take part in the process of globalisation, they have already changed.

2. Theories of legal pluralism

The description of the various phenomena of globalisation in different legal fields given above demonstrates how the law becomes more and more detached from nation state legislation. Although some governmental functions are still necessary, like the monopoly of violence, they come down to instruments for the solution of problems caused by economic globalisation. The most influential actors in an emerging transnational law are non-state actors who lack public and political authorisation and legitimacy. And it turns out that different kinds of transnational law emerge in different social areas.

Legal anthropology scholars are not surprised by this description. The fact of legal pluralism has always been considered as a salient feature of 'primitive' societies with more than only one central agency of legislation making homogeneous and universally binding law. But many legal anthropologists believe that this is also true for 'modern' societies. Here the fact of legal pluralism is only covered by *legal ideology*.

Two theoretical innovations in legal anthropology turn out to be very helpful for the description and explanation of legal transnationalisation. In the beginning of

the 20th century, Eugen Ehrlich discovered in Bukowina, a province in the East of the Habsburg Empire, that besides the central legislator in Vienna and a centralised judiciary, there existed an independent customary law that was much more important than the law of the state (Ehrlich 1913). It had emerged through continuous practice, had been accepted collectively and worked parallel to the state law or even supported it. Ehrlich's discovery was harshly criticised by Hans Kelsen who argued that the fact of a practice can never become a reason for legal validity and that customs become law only if they can be traced back to a *'Grundnorm'*. For a long time, Ehrlich's discovery was overshadowed by Kelsen's critique. It was Leopold Pospisil who re-discovered Ehrlich and used his theory for the description of legal phenomena in archaic societies (Pospisil 1972). He also suggested making use of this theory in describing legal phenomena in modern societies. Modern societies do not only have positive law, but there exist many other social actors with an authority to make valid norms – like moral or religious norms (Pospisil 1972, chapter IV). The positivist model of a unified hierarchy of law, based on a *Grundnorm* or a *rule of recognition* was considered as a false description, and the ongoing debate about the distinction between legal norms and other kinds of social norms was considered to be useless. According to an anthropological description, state law turned out to be very heterogeneous, incoherent, something like a *bricolage* of different social norms with unintended side effects when compared to the original intentions of the central legislator.

A second innovation was made primarily by legal anthropologist Sally Falk Moore. She discovered that not only there exist various social actors who create valid norms and a plurality of collective normative systems in a society, but that legal norms (in the narrow sense) interact with other normative systems in a society. Law is not only internally pluralistic, but it is also externally dependent on other kinds of normative systems. It is a 'semi-autonomous field' besides other fields like religious norms and local customs etc. (Moore 1973.) If one takes one's attention away from legal autonomy and takes a closer look at the embeddedness of law in other social fields and their normative systems one realises a multitude of dynamic interactions between these fields and their actors. As a consequence, the distinction between customs and state law looses its convincing force.

Law is then considered as one social field among others where actors who negotiate about the validity of norms at the same time are actors in other social fields with other normative systems. During these negotiation processes the interests and intentions of the actors, as they are shaped by the various normative systems and as they shape these systems in turn, are continuously changing. What

is important in law is not its statics as a coherent system of primary norms and its dynamics controlled by secondary rules, but the continuous process of negotiating on legal validity on various levels and in different social areas, different ways to make use of law, ways to circumvent it or to assimilate it to other normative systems: *Law as Process* (Moore 1978).

Legal anthropologists have been prepared for the irritating observation that the importance of nation state legislation enacting homogeneous and coherent law for all citizens on a certain territory is diminishing. They had already characterised the positivist model as the 'legal ideology' of professional lawyers (Moore 1978, 2). Keebet von Benda-Beckmann has tried to analyse the transnational dimension of legal pluralism with the tools of legal anthropology (von Benda-Beckmann 2000). This dimension includes the increasing importance of public international law (like human rights) for individuals in their relation to their national legal systems and their nation states, the dynamics of factual law-making in international organisations, the interactions between international organisations and national governments and various interest groups, the role of NGOs, the practice of alternative dispute settlements, *lex mercatoria* and international commercial arbitration, and the complex and conflicting relation between religious normative systems and the pluralistic national and international normative systems.

Boaventura de Sousa Santos is one of the first scholars who has drafted a theory on the emerging transnational law and who has done this using the tools of legal anthropology. According to Santos, legal pluralism is already *communis opinio*: '[r]ather than being ordered by a single legal order, modern societies are ordered by a plurality of legal orders, interrelated and socially distributed in different ways' (de Sousa Santos 1995, 114). 'The Law' is not considered as something pre-given to the conflicts between social actors. Law is always in the making, and what is most decisive for the making of law is the answer to the question: who gets the power of legal definition in various conflicts with other social actors? Santos calls these struggles and competitions '*the politics of definition of law*' (de Sousa Santos 1995, 115).

With regard to the multitude of law-making actors in the transnational fields Santos suggests drawing a map in order to localise the different places and movements of these actors – actors who make local orders global, who influence local orders with transnational orders or provoke their resistance, and actors who make genuine transnational law:

> While some, admittedly the most significant, instances of the transnationalisation of law can be directly traced back to the networking of globalised localisms and localised globalisms which go together with the transformation of capital

> accumulation and Western cultural imperialism on a global scale, other instances, although connected with these transformations – if for no other reason, to resist against them – stem from autonomous political and cultural considerations, such as those lying behind the agendas of cosmopolitans and common heritage of mankind. (de Sousa Santos 1995, 269.)

This means that the law is actually present primarily in the exchange processes between these different areas, that law is already operating in a transnational field. Legal communication is already taking place between these areas. Whoever raises a legal claim refers to the norms of *interlegality:*

> We live in a time of porous legality or legal porosity, multiple networks of legal orders forcing us to constant transitions and tresspassings. Our legal life is constituted by an intersection of different legal orders, that is, by *interlegality*. Interlegality is the phenomenological counterpart of legal pluralism, and a key concept in a post-modern conception of law. (de Sousa Santos 1995, 473.)

3. The complementarity of legal pluralism and uniform concept of law

From a legal pluralist point of view the insistence on the model of legal unity with a logical hierarchy of norms, a clear distinction between legal norms and other kinds of social norms, and with a clear distinction between primary and secondary rules with its consequence of a clear assignment of the legislative power is nothing else but a self-deception of professional lawyers. But although theories of legal pluralism might give a more appropriate description of (and even a justification for) the fragmentation of legal changes in the transnational field, they face strong objections which can be based on the principles operating in the background of the legal ideology. These questions have already been raised in the introduction above: How is just adjudication of legal conflicts possible? And, can law making be legitimate under the regime of legal pluralism? When the distinction between law and other social norms disappears, when every social actor who is creating social norms and who has the power to execute them is treated as a legislator, when the validity of positive law goes side by side with other types of legitimate validity (for example, factual acceptance by a majority), and, finally, when negotiating processes between various social actors make valid law – then it makes no more sense to speak

of 'the law', and one has to give up the principles of equal adjudication and of the democratic legitimacy of legislation. If law is the ephemeric and contingent result of multi-level negotiations between many different actors it does not make any sense to attribute any truth value to propositions of law (Twining 2001, 41 and 63 *et seq*).

However, these consequences are to be drawn only if one considers a uniform concept of law and legal pluralism as competitors for the title of the most appropriate understanding of transnational law. Yet, if it were unavoidable for professional lawyers (advocates, legislators, NGOs, arbitrators etc.) to take an *internal* point of view to the legal field, they could not avoid treating legal materials at least under the hypothesis of self-containment, unity and coherence; otherwise they could not even communicate with one another. If this were true it would be more appropriate to draw a picture of *complementarity* with legal pluralism as a description from an external point of view and general unified legal theory as a description from an internal point of view. The challenge presented by legal pluralism to legal theory would consist of nothing else than lifting the threshold for legal theory to reconstruct its concept of a uniform law. Legal theory would have to give up the paradigm case of a national legal system with one legitimate legislator and one coherent system of norms and precedents.

4. The universal code of legality

From an internal point of view actors in the various and multi-levelled networks of interlegality still communicate with one another by referring to a, at least hypothetically, uniform concept of law. Such a uniform concept can be spelled out in terms of a legal meta-language which contains basic legal concepts and rules, like the concept of rights and of fair procedures, and the concepts of sanction and competence. In addition, the legal meta-language is deeply penetrated by historical legal experiences, like the various human rights revolutions or the struggle for democratic procedures of legitimate legislation. Many people have these basic concepts in mind when they refer to law, or when they raise a legal claim on any level from local to transnational law. Additionally, the legal meta-language is more than a theoretical hypothesis. It already works in the daily routine of legal communication in the spheres of interlegality (Boyle & Meyer 2005). Therefore I suggest calling the meta-language a universal code of legality. This code of legality has a certain factual validity, independent of nation state legislators, national judicial systems and national governments. The code of legality is also disengaged from

political democratic legislation and still far away from a coherent interpretation of its elements.

Is this more than a fiction or at best the kind of law talk of Western lawyers which immediately disappears in the face of the fact of legal pluralism? As already indicated, the code of legality is more than a semantic system. Some concepts, like the concept of rights or the concept of fair procedure are linked with other normative principles which have their own normative force. One could easily add further basic elements to the list: rules and principles that belong to the basic traditions of all legal systems. In the various spheres of interlegality there are no normative systems which are not already penetrated by the legal meta-language. Of course, this argument is not conceptual, but empirical and, perhaps, culturalistic. The universal code of law contains the different legal traditions of the Western world, the Roman and common law systems. But this seems to be more a challenge for legal pluralism than for a uniform concept of law. It turns out that legal pluralism works with the far more serious fiction that there are normative social systems which are completely detached from the modern code of legality.

If this is true, one could draw some theoretical consequences out of these facts. If the code of legality is already working in practice, its users can do a lot of different things with it, but they cannot do everything they want. The meanings of many concepts already determine some possible pathways to the future. The detachment of the code of legality from national legislations and national courts does not transform it to a tool which could be used arbitrarily. With the concept of rights we already have the idea of equal persons as individual bearers of rights, the right to some type of a fair procedure for the realisation of rights, and the right to a minimum of social welfare benefits as a necessary requirement for the fair value of individual rights. Drawing on Jürgen Habermas one could call this a preliminary *system of rights* which is already contained in the very notion of modern law that emerges as a complementary normative system to a post-conventional level of morality, and as a functional requirement for co-operation problems in complex modern societies (Habermas 1992, chapter 3).

What is still lacking is the constitutional re-construction of the system of rights in democratic procedures. Democratic legitimacy belongs to the basic requirements of the universal code of legality (and, according to Habermas, it is required by the discourse principle as a constitutive feature of communicative action in general), but with regard to transnational law, there is no place for procedures of democratic legitimation to operate.

Here I would like to go back to the historical experiences of the nation state. Historically, the nation state was one of the first places for the realisation of universal human rights, and, at the same time, for the democratic practice of self-determination of the people. The historical experiences of the nation state contain the American and French Revolutions as well as the experience of its abuse by fascist regimes. But even these traumatic experiences of injustice have had far reaching consequences for the idea of democratic self-determination. They have given the insight that there are no human rights without democratic self-determination which is also true the other way round; there is no democratic self-determination without human rights. If one takes the normative value of the historical experiences of the nation state seriously, one could say that the universal code of legality can be disengaged from the nation state, but it cannot be disengaged from human rights and democratic self-determination. Consequently, the universal code of legality already contains the demand for its interpretation within fair procedures which are institutionalised by law and which guarantee the minimum requirements of democratic self-determination: the right to change the role between author and addressee of legal norms, transparency of procedures of opinion and will formation, imputability of decisions and responsibility for consequences, equal access to procedures and equal rights of participation for third parties.

5. The indeterminacy of the code of legality and its democratic transformation

It would be wrong to say that the code of legality as a universal framework of transnational legal communication already contains a homogenous and coherent transnational legal system. If the hypothesis of a universal code of legality is true, then the code is characterised by its radical indeterminacy. With regard to emerging transnational regimes of private ordering, Gunther Teubner speaks of its 'relative indeterminacy and vagueness' including the secondary procedures of enactment as valid norms (Teubner 2000, 441). This is true for the code of legality in general. Its radical indeterminacy and vagueness is one of the internal consequences of the fact of legal pluralism. This is the reason why different and even opposing interest groups, organisations and social systems can refer with different intentions and interpretations to the same code of legality at the same time. But only because they refer to the same code, can one identify their conflicts as *legal* conflicts.

Because of its indeterminacy the code of legality does not serve as a substitution for natural law. The actual meaning of the concepts and principles with regard to concrete problems has to be negotiated among the participants. For example, the meaning of the concepts of individual rights and complementary duties including the principle of liability have to be interpreted, arranged and organised in order to establish a transnational environmental law. The same is true for principles such as the equal protection of human rights. Transnational legal communication between different cultures always refers to human rights, but their concrete meaning will be established only within the horizon of the concrete case at hand with regard to the different traditions and cultures that are involved. The code of legality does not only contain indeterminate universals, but also *contested* universals.

If the interpretation of the historical experience of the nation state suggested above is true, then the code of legality plays *a double role* in the various procedures of negotiations about contested universals. On the one hand, the code of legality is the *subject*, the controversial issue of these negotiations, but on the other hand, it is also the *medium* of negotiating. According to the historical experience of democratic self-determination, the medium of negotiation has to be a democratic procedure. The more we struggle about contested universals of the code of legality, the more we get entangled into the requirements of fair procedures which meet democratic requirements as the legitimate medium for the interpretation and institutionalisation of the code of legality. There is no way out of the code of legality.

Whether and to what extent the demand for a democratic practice of negotiating about the universal code of legality has a chance of being realised remains an open question. Without nation state legislation it remains unclear which institutions serve the democratic implementation best. For the time being the code of legality is administered by different legal experts in different roles and fields, as already mentioned above. Therefore, the characterisation of contemporary transnational law as the law of legal experts (*Juristenrecht*) seems to be more appropriate.[4] If one follows the path of democratic legitimacy, the procedures of negotiation will have to be institutionalised in such a way that power inequalities are neutralised, that rights to equal participation are granted, that third party interests are adequately represented, and that the procedures are transparent. In contemporary debates about globalisation one can observe a gap between a tendency

[4] For an optimistic look on the role of public international law scholars who adhere to universalist values of scientific method ('global invisible college of international lawyers') see Peters 2007, 767seq.

to extend the model of the nation state to a global scale, and a tendency to a fragmentation of legitimation procedures for different social systems – each social system shall have its own ('private') legal regime. The code of legality is still waiting for adequate democratic procedures.

The most radical consequence is drawn by post-modern legal theorists. According to them, the fact of legal pluralism only demonstrates that the law is paradoxical. Legal pluralism works like a deconstructor of the law's hierarchy. According to Gunther Teubner, it becomes obvious that 'law is circular and only grounded on itself, on the arbitrary beginning with a violent distinction [i.e., between lawfulness and unlawfulness], on the *fondation mystique de l'autorité*' (Teubner 2000, 240). This deconstructivist approach with a quotation of Derrida/Montaigne seems less dramatic if the arguments made above are true. If there is a universal code of legality, and if this code is used by various social actors on all levels of transnational law in order to establish legal procedures for the democratic opinion and will formation about primary legal rules, then the circle is less vicious than pretended. An indicator of this is the astonishing general willingness to participate in legal communication on various levels, the eagerness to be included in transnational legal communication instead of its mere negation and rejection. The code of legality might be indeterminate and vague, its concepts might be contested, but the code as such is widely accepted. Instead of the mystical foundation of law, what is at stake is the permanent re-activation of the very idea of one transnational legal community. In the last step we have to trust the historical experience of the democratic constitutional nation-state to ground our hopes that people will re-activate the idea of a constitutionalised democratic self-legislation against the networks of legal experts who only administer the universal code of legality.

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