

Legalisation or Global Law Formation?
On the Evolution of Law in World Society

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Many scholars in the fields of law and politics alike still would accept as “law” only norms which are legitimised and ultimately sanctioned by the sovereign authority of the state, the latter in that case being defined by its monopoly on the legitimate use of force. In the field of *international studies*, a substantial strand of research has recently focussed on processes of global “legalisation”, thereby seeking to denote an increasingly law-like quality of international norms and regimes in an interdependent world. Yet, if the very concept of law remains closely to the guarantor function of the sovereign state, there can - by definition and save the emergence of a “global state” - be no more than relative degrees of “legalisation” in world politics - yet not the formation of any “global law”. “Legalisation”, then, would merely signify a qualitative change in the way in which international *politics* is conducted, but would not warrant to see a global “legal” order to be emerging in any strict sense of the term. The issue presents itself similarly, though in different terms, within the field of *legal studies*. Issues discussed here are, for example, whether international law can be seen as law at all, or whether the so-called “lex mercatoria”, as a set of principles, rules, and (arbitratory) mechanisms mostly developing outside the purview of state-based legislative activity can be seen as forming “law”.

The present contribution does not seek to address the issues as to whether it is possible to speak of the formation of a global law “beyond the state” from either the standpoints of legal or political/international relations theory. Rather, it starts from the assumption that since legal and political theories always form necessary theories of reflection within the legal and political systems, in this function they do need to come up with some operative definition of what “law” *is*. However, any definition of what a law is, although being a definition necessary for the functioning of the legal system, always needs to exclude from its definition and ensuing analytical purview a number of legal operations in different historical and cultural contexts as much as it might exclude legal operations within the contemporary world system beyond the system of sovereign nation states. If one does take the idea seriously, however, that today’s world does form *one* social system – a “world society” -, which is however not integrated, but highly differentiated internally and constituted by the fact that all communication is addressable by all other communication,¹ then any essentialist definition of

¹ See Niklas Luhmann, “Die Weltgesellschaft”. *Archiv für Rechts- und Sozialphilosophie* 57 (1972) 1-34; *Die Gesellschaft der Gesellschaft* (2 Bde.). Frankfurt/M.: Suhrkamp 1997, 145-171; Observing world politics: Luhmann’s systems theory of society and international relations”. *Millennium: Journal of International Studies* 28 (1999), 239-265; Rudolf Stichweh, *Die Weltgesellschaft. Soziologische Analysen*. Frankfurt/M.: Suhrkamp 2001.

what constitutes a “law” remains insufficient for the purpose of assessing the quality and scope of law in world society.

Against this background, the present contribution adopts a second-order perspective on law in world society. It does not approach the issue of whether there is a process of global law formation going on, partially driven by processes of “legalisation” in international politics, by utilising the more narrow analytical lenses of either legal or political theory. It rather proposes to look at the issue through the lens of a theory of society. It seeks to observe the quality, scope and development of law in world society not by building on a substantial definition of what law “is”, but by first of all reflecting on the legal system’s function in world society in order to discern the specific difference between legal and, for example, political communication. What is proposed, in other words, is not to assess the evolution of a “law beyond the state” by utilising legal theory (“Rechtstheorie”), but by utilising a *theory of law in society* (“Theorie des Rechts”).

In the following, the present contribution will at first seek to provide a theoretical outline of what such a seemingly marginal change of perspectives from a “legal theory” to a “theory of law in society” entails. Using some concepts taken from Niklas Luhmann’s modern systems theory of (world) society, it will argue that to ground an understanding of law in society on an observation of communicative operations of a legal system allows to conceptualise territorial boundaries of sovereign states only as *internal* differentiations within *one* legal system, which is however a polycentric system (1). It will then observe how the transnational economic law of the *lex mercatoria* epitomises the changing and newly emerging internal differentiations within the legal system (2). And it will argue that while the developments *within* a global legal system are to be seen as forms of “global law formation”, a substantial number of legalising processes nonetheless can be observed which are driven by the operations of the political system and which can, but do not necessarily have to, lead to law formation (3.). A short final remark will provide some notes as to the analytic consequences of the view presented here (4.)

1. Law in world society

From the point of view of a theory of society, the interesting question is not one about a „nature“ or „substance“ of law, but about the *boundaries* of law (vs. everything else in

society).² Modern systems theory here seeks to identify these boundaries by pointing to the double-sided form of legal communication: legal communication is based and only possible on the basis of the distinction between “legal” and “illegal”. While legal/illegal forms the legal system’s basal code for its own operations, the distinction between “law” and “non-law” differentiates law against its societal environment. Such an understanding does preclude to envision a continuum of the „legality“ of norms; if operations within the legal system are differentiated against communication within the rest of society since they – and only they – are based on the basic distinction between legal and illegal, then any notion of a continuum of legality becomes meaningless. If something is law it is based on the legal/illegal distinction; that which is not law is not based on that distinction. In this fundamental sense, there can be gradual forms of law. However, one has to carefully distinguish between such a theoretical notion and the question of whether a specific norm is only addressed by the legal system, or whether it is also connected to, for example, communication within the political system. Yet such a question can only be asked in the first place if a systems-theoretically inspired conceptualisation of a strict operative autonomy of communicatively constituted function systems of society is taken seriously; yet it spares the task of endlessly redefining what law “is” in order to accommodate the different degrees and intensities by which the same thing is addressed by and through different function systems of society with their own operational logic at the same time.

In such an understanding, the „unity“ of law is not produced by the unity of a corpus of legal rules or by an extra-legal foundation of the law. Rather, “law itself produces all differentiations and denotations it employs...the unity of law is nothing else than the fact of this self-reproduction, of ‘autopoiesis’”.³ Put more elaborately by Luhmann:

In order to assert that there is a legal operation there must thus at least be one communication... Obviously, however, not any kind of communication is sufficient, otherwise the legal system would be congruent with society. Also, not any use of legal terms or of words with a legal connotation is sufficient – such as ‘the bill, please’ in a restaurant. In such uses law is but an aspect of contacts in daily life or in other function systems. Within the legal system itself there is only code-oriented communication, only a communication which asserts a reference to the values “legal” and “illegal”.⁴

The validity of law is thus not devised from an extra-legal foundation of validity, but merely symbolises the autopoietic closure of the legal system.⁵ The *validity* of law is the form through which the legal system observes itself, validity is not a (meta-)norm in itself. But it is

² Niklas Luhmann, *Das Recht der Gesellschaft*. Frankfurt/M.: Suhrkamp, 2nd ed., 15f.

³ *Ibid.*, 30.

⁴ *Ibid.*, 67.

exactly because of this that the legal system needs to rely on an external foundation of validity, since the validity of law itself cannot be coded within the legal system: „All law is valid law. Non-valid law is not law. Thus the rule which allows to see validity cannot be one of the valid rules.“⁶

Although law continues to rely on politics for the purposes of *enforcement*, such a dependency must not lead to the conclusion that there can be no law without a reliance on a sovereign state. The *legal system* contributes to the stabilisation of normative expectations in society not by enforcing, but by deciding on legality. In that sense the law does not solve conflicts, but it decides in situations which it is able to construct in legal terms.⁷ This idea can only be understood if one distinguishes an operative from a causal closure of society's function systems. Thus, in particular, the political and legal systems are not causally independent from each other, they are independent only in an operative sense: „It goes without saying that the separation of systems does not exclude intensive causal relations between them; however, one can only ascertain such causal relations if one is able to distinguish one system from the other.“⁸

In order to effect a close coupling between an operatively autonomous legal and an operatively autonomous political system, the modern state employs the form of a constitution. The constitution can be addressed by communication within the legal and political systems, yet cannot be seen as being fully included in any of these systems. It rather provides an opportunity for both to refer to a superior distinction in order to resolve paradoxes within the respective system. Thus, in a strict sense, referring a decision within the legal system to a constitutional court is not to ascertain its legality or illegality, but its constitutionality. However, what follows from the observation that the boundaries of law are not given externally, i.e. through the political system, territorial boundaries, a constitution and the like?

In such a situation, it is more or less a question of semantic tactics if one wants to stick to the overall notion of a „positivity“ of law and to a theoretical „positivism“. If so, the imagination of an authoritative placement of law, the imagination of a source of validity behind that (transcending the law) would need to be given up, however. Neither the state, nor reason, nor history legitimise the law. Of course there can be theories which propose this and they still do exist. Yet if those are described as self-descriptions one requires from them to adopt a mode of second-order observation. They need to learn to reflect upon themselves as self-descriptions of a system describing itself. Otherwise they become anachronistic.... *What*

⁵ Ibid., 98.

⁶ Ibid., 102.

⁷ Ibid., 159.

⁸ Ibid. 421.

*remains, then, is the recognition of an unavoidable diversity of perspectives of observation – even within one and the same system.*⁹

In the end this means nothing more and nothing less that although a transnational law beyond the state can be said to exist if observed from the perspective of a theory of society, the observation of a phenomenon such as the *lex mercatoria* from within the legal system will necessarily always entail different kinds of observation. What is decisive here, however, is that one can observe that something is observed as law within the legal system at all – yet not through all perspectives through which this system observes – and that at least one decision is taken within the system on the grounds of such an observation. Thus, due to the facticity of many perspectives of observation even within one system, *within the legal system* there can be no definitive or exclusive answer to the question as to whether the *lex mercatoria* constitutes law or not. Yet, *within world society*, law is observed as law if at least one perspective of observation in the legal system observes it as such and if this leads to at least one decision being taken on the basis of a distinction between legal and illegal. If one takes the sociological thesis of an operative closure of society's function systems serious, then such a conceptualisation of what makes law law seems to be more plausible – yet admittedly more complex – than the idea that it is the sovereign state which makes law to be law (it also provides a safeguard against having to conclude that the law of other cultures and epochs would in fact not qualify as law, a perennial problem of many legal theories).

To refocus a theory of law from an „essence“ to the „operation“ of law seems to be more appropriate to understanding its function in a complex society. Put differently, it seems to be misleading to see the way in which the law is usually related either to the individual, the state, or a regulative function as an analytic simplification. Quite to the contrary, such a seemingly simple conceptualisation of law is highly inadequate if the law is required to construct the myriad of different interactions, institutions and organisations of society in its own terms. It is exactly in this sense in which Gottlieb's notion of “relationism” asserts that the real obstacle for a unitary legal theory lies in society's complexity: „The idea that a single all encompassing concept of law accounts for all juridical phenomena in modern societies in a wide range of complex settings cannot be sustained.“¹⁰ „The idea that law is necessarily derived from the State through its legislative and judicial organs and that it depends upon the State for its efficacy is warranted neither by a historical perspective nor by the experience of

⁹ Ibid. 538 [Emphasis my own].

¹⁰ Gidon Gottlieb, „Relationism: legal theory for a relational society“. *University of Chicago Law Review* 50

relational societies. The separation between law and the State is a feature of relational societies“.¹¹ This observation leads Gottlieb to a definition of law and its sources which seems to be compatible with the systems-theoretical concept of a legal system as an autopoietic, communication-based, functionally differentiated system of society:

The source of juridical norms in a relational order is to be found in agreements, arrangements, and other patterns of interaction between the parties. The pronouncements of the courts of the State and the laws of the other branches of government may purport to govern a relational order formally subject to the State, but they are not the sources of law *in* such relationships; they are external to them.¹²

To argue along these lines means to reverse the justificatory demand against those arguments which would deny that trans- or international law in fact is law. If one focuses on relations rather than on the ascription of rights and duties to individual actors, then international law with its strong emphasis on co-ordination rather than enforcement would indeed be more paradigmatic for the law of a complex society than for national law. In that sense, non-national law would form less of a “problem” for legal theory than provide an example for the evolution of law within a complex society!¹³ The argument that “in the end” the law relies on an enforcement as guaranteed by the state alone then needs to be reconsidered taking into account that a significant number of durable legal relations in fact does not rely on the threat of an intervention by the state, but is stabilised by the build-up of mutual trust (symbolic capital) and arbitration procedures excluding the state.¹⁴

If law is thus understood as an area of functionally differentiated yet operatively autonomous communication in (world) society, then a „law beyond the state“ must not be limited to an area of transnational economic law. Equally, developments *within* national legal systems may be placed in the same context: „The development of commercial relations has seen the rise of new forms of property and novel credit instruments that do not trace their decent from legislative or judicial sources but from innovations of the financial community.“¹⁵

If such a law, according to Gottlieb’s opinion, forms part of a „living law“ in Ehrlich’s sense, then, particularly, traditional doctrines on the sources of law cannot be upheld any longer. Rather, the boundaries of law itself become bifurcated, „boundaries“ understood in a diachronic sense. This means that it is exactly not possible to unequivocally state when

(1983), 568.

¹¹ Ibid., 567.

¹² Ibid., 567.

¹³ Ibid., 569.

¹⁴ See *ibid.*, 570.

¹⁵ *Ibid.* 598.

something switches from the side of non-law to the side of law by applying the distinction between *lege latae* and *lege ferenda*. This distinction does not form a differentiation internal to the legal system, but one within the political systems against the background of its *claim* to be the single legislative source: „The sharp distinction between accepted rules and new claims...is a facet of State and bureaucratic ordering, not of all juridical systems“. ¹⁶ Within the present perspective, however, for something to operate as law within society it is only - and exclusively - necessary that something is used and addressed as law within the legal system. Gottlieb points to international law as proof for such a quality of law as being its own source: in international law, there can be no clarity *ab initio* as to whether the conduct of states will in the end be coded as illegal conduct or as precedence, thus creating new law. ¹⁷ The only thing important in this respect is that it is not „the state“ which creates law, but that it is the legal system which allocates the code of illegal/legal to a specific decision generated within the political system.

Following Luhmann, a „unity“ of the law in world society would thus be merely an operative one. „Unity“ is merely generated through the operation of law on the basis of the distinction between legal and illegal and through the construction of a boundary between the legal system and its systems environment. The unsatisfactory result of attempts to locate law in society by using the means of legal theory is further reinforced if legal theory is not only required to identify the sources for the validity of legal norms in national legal orders or for certain „legal cultures“, but to do so for a „global law“. If one thus combines the insights, that, on the one hand, law „functions“ on the basis not of a sovereign guarantee of validity but on the basis of the legal system’s operative closure, and that, on the other hand, no tendency towards a substantial global harmonisation of national legal systems can be discerned, then no single legal theory seems to be possible which could accommodate the diversity of law within world society. Instead of a single legal theory, what seems to be required in this context is rather a „theory of legal pluralism and [...] a doctrine of the sources of law conceptualised as pluralistically in accordance“. ¹⁸ Yet, such a legal pluralism does not (merely) combine understandings of the different roles which law assumes in various cultures, but rather needs to take into account the pluralism of different, overlapping legal orders within the same

¹⁶ Ibid., 560f.

¹⁷ Ibid. 608.

¹⁸ Ibid., 257 [translation my own].

geographical space as well as the polycentrism of the genesis of legal norms and legal interpretations.¹⁹

Of course, traditional doctrines of the sources of law cannot be upheld under such a perspective: on the one hand, as Luhmann notes, the notion of a „source“ entails the problematic assumption of a foundation of (contingent) law on a non-contingent basis. On the other hand, if legal norms are not necessarily state-based legal norms, an entirely new spectrum of sources seems to unfold. Thus, for example, the „sources“ of international law are, in a way paraphrasing Ehrlich, to be found in the „proto-law of specialised, formally organised and functional networks, which create a global, yet strictly sectoral identity.“²⁰ „Global law evolves from society’s peripheries, from areas of contact between different social systems, and not from the centre of national or international institutions“.²¹

Accepting Teubner’s idea of a plurality of legal orders and sources of law, and applying it to the *lex mercatoria*, it becomes clear that it is only partially justified to speak of an „autonomous“ transnational or global legal evolution. „Autonomy“ merely exists in relation to the political system. Yet of course the evolution of the *lex mercatoria* takes place in a strong structural coupling with another social system, namely the economic system: „Thus the *Lex mercatoria* would constitute that part of global economic law which operates on the periphery of the legal system in direct ‚structural coupling‘ with global companies and economic transactions. It constitutes a ‚para-legal‘ legal order, created at the ‚fringes‘ of law, at the intersection to economic and social processes.“²² However, this must not lead to argue that the economic system provides the basis of the validity of this law: the *legal* character of the *lex mercatoria* is only produced within the legal system itself: „What we observe here is a *self-reproducing legal discourse of global scope which closes its boundaries by employing the code of legal/illegal and reproduces itself through processing a symbol of global (not: national) validity.*“²³ Although in such a legal discourse too a sanction serves as a symbolic support of a norm, there is no inherent reason why such a symbolic support could not be provided by other means.²⁴

¹⁹ On „cultural“ legal pluralism, see Surya Prakash Sinha, „Legal polycentricity“. In: Hanne Petersen/Henrik Zahle (eds.), *Legal Polycentricity: Consequences of Pluralism in Law*. Aldershot: Dartmouth 1985, 31-69; zum Polyzentrismus: Inger-Johanne Sand, „From the distinction between public law - to legal categories of social and institutional differentiation in a pluralistic legal context“. In: Petersen/Zahle, *Legal Polycentricity*, 85-101; see also the other contributions in this volume.

²⁰ Gunther Teubner, „Globale Bukowina. Zur Emergenz eines transnationalen Rechtspluralismus“. *Rechtshistorisches Journal* 15 (1996), 262 [translation my own].

²¹ *Ibid.*, 261 [translation my own].

²² *Ibid.* 269.

²³ *Ibid.*, 269 [translation my own].

One conclusion is *not* to be drawn from a theory of society-based view on the law and its pluralistic and polycentric form: that the „traditional“ forms of law in world society, i.e. a territorially differentiated law based on the nation-states' monopolies of the legitimate use of force, were to become obsolete. A conceptualisation of law from the standpoint of a theory of society points to nothing less, but also nothing more, than to the contingency of observations of legal theories *within* the legal system. What it allows is to describe the evolution of the legal system of world society. Seen from such a perspective, there can be no doubt that there is a law „beyond“ the state. The minimal formal requirement for the existence of law in this sense is that legal communication takes place, i.e. communication based on a distinction legal/illegal, and that at least one decision is taken on the basis of that distinction. The latter requirement directly follows from the function of the legal system to provide society with decisions.²⁵

Even if from the perspective of a theory of law a theoretical possibility might have been shown that transnational, non-state-based law can exist, it is still an entirely different, empirical, question as to which degree and whether it actually does exist. Negative answers could be conceived of in this respect. Thus, for example, the empirical conclusion might be reached that the *lex mercatoria* forms a special case, or one in which individual norms in order to be valid in the end rely on sanctions by the state as well.²⁶ In a historical perspective, it could possibly be shown that a law beyond the state is diminishing and that relative to national law more transnational law could be observed to have existed in Ehrlich's times than after the global spread of the nation-state associated with decolonisation and after the waves of legalisation associated with the evolution of the welfare state in the 1970s in particular.

To approach this empirical question, it seems helpful to analytically distinguish between different areas of law in world society. Against the conceptualisation of a pluralistic and polycentric global legal system, this *analytic* distinction must however not be read to be of an exclusive nature. Thus, for analytic purposes the law of world society can be seen to consist of:

1. The law of national legal systems, the „ideal“ of a law grounded in a state sovereign competence competence and guaranteed by state-enforced sanctions.
2. International law, i.e. a law *de jure* independent from national legal systems yet constitutively tied to them through the sole international legal subjectivity of states and the

²⁴ See *ibid.*, 270.

²⁵ Such a definition also prevents the analytical shortcircuit to see all communication about the law as legal communication.

²⁶ See David Kennedy, „Receiving the international“. *Connecticut Journal of International Law* 10 (1994), 1-26.

process of national ratification of treaties.

3. International „soft law“, i.e. legal regulations in international relations which are not, or cannot be reduced to, treaties.
4. Transnational law - with the most visible example of the „lex mercatoria“ - as a law which is not drawn up by states and which operates independently from their competencies to legislate and sanction.

Most discussions on a „transnational law“ do focus on the last of these areas. Yet, of course - and reflecting the analytical nature of the distinction- the boundaries between the fourth and third areas seem to be at least as porous as between the second and third. Particularly the latter distinction is quite important in order to assess the quality of a legal system of world society. In contrast to the fourth area, where the „sources“ of law are to be found outside of the state, the evolution of soft law is to a high degree driven by operations of world society's political system. The important question in this respect is whether the „institutionalisation“ of international politics, i.e. the emergence of a system of rules and norms through *international regimes*, signifies an evolution of law *driven* by states which however cannot be fully accounted for as the evolution of an international law *controlled* by states. The question therefore is whether the evolution of this third area, the *legalisation of international politics*, in the end can be seen to be co-terminous with the evolution of international law or whether it has to be seen as an autonomous process of legal evolution in the context of the polycentricity of law mentioned above

The evolution of a transnational law beyond the state points to a functional differentiation between world society's political and legal systems. Yet, if in addition to that interactions within the political system of world society give rise to a law which binds states yet cannot be reduced to an international law grounded in the sovereignty of states, then this could be read so as to suggest that a functional differentiation assumes not only an increasing importance between the systems of politics and law, but that it also becomes more important vs.-a-vs. territorial differentiation within the political system itself..

2. The contours of an emerging global legal system

Within world society's legal system the lex mercatoria constitutes a subsystem which is to a large degree independent, continually evolves and experiences a reflexive institutionalisation;

it is nonetheless differentiated against state-based law and coupled to the global economic system (i.e. not to the global political system). Yet even an increasing institutionalisation must not mislead one to assume some kind of emerging „homogeneity“ of the lex mercatoria in the sense that it would represent a set of norms and rules which are part of the lex alone (and thus of no other legal subsystem). Rather this institutionalisation is based on a number of internal differentiations as well as on points of contact to other parts of the legal system - national legal orders as much as the international legal order. It is only this simultaneity between a coupling with and a differentiation from other parts of the legal system which permits the lex mercatoria to better identify its own systemic boundaries and thus to strengthen its identity.

Although from the viewpoint of a legal theory a unitary theoretical conceptualisation of the lex might not be said to exist,²⁷ it can also be observed that an increasing attention paid to the lex within the legal sciences in turn does lead to the problematisation of basic assumptions of legal theory. It is in this way that the evolution of the lex mercatoria has started to leave a significant imprint on the (legal theoretical) self-description of the legal system; observing the legal system from an external (theory of society-) perspective, this can be seen as an indicator for the system's changing structure and form, particularly insofar as this involves a looser coupling to the political system and the latter's still primary territorial differentiation. The lex thus provides new irritations and variations which the legal system can utilise for its further evolution. These irritations and variations themselves can be discerned in a number of attempts to classify the lex within the legal system:

In relation to international law the transnational economic law of the lex breaks through the boundaries of a „dualistic science of international law“ in that it particularly transcends the dualistic separation of law into national law on the one and international law on the other hand.²⁸ Also, from the standpoint of legal dogmatic it hardly seems possible to - following Savigny - trace back the lex to a genesis in national sources of law.²⁹ The lex in this respect does evoke a problematic for the legal system's self-description which requires it to identify some source. This problematic can most pointedly be observed in relation to the theoretical question of in how far general principles of law in the sense of Art. 38c Statute ICJ constitute sources of law. Here, the lex provides a challenge since it not only seeks to theoretically identify the general principles as sources of law, but it takes these principles to form immediately applicable law. This challenge is hardly to be underestimated: if the „general

²⁷ Ursula Stein, *Lex Mercatoria. Realität und Theorie*. Frankfurt/M.: Klostermann 1995, 200.

²⁸ Karl Zemanek, „Über das dualistische Denken in der Völkerrechtswissenschaft.“ In: Von der Heyde et al. (eds.), *Völkerrecht und rechtliches Weltbild. Festschrift für Alfred Verdross*. Wien: Springer 1960, 321-337.

principles of law“ according to the notion of „sources of law“ precede the law (as its „source“), then they can hardly law in themselves. The problematic can be illustrated in relation to „pacta sunt servanda“. The discussions here focus on the issue of whether this principle forms a constitutive characteristic of contractuality itself;³⁰ or whether it has to be seen as a legal norm for itself from which an obligation following from the treaty can be deduced.³¹ Although there is a quite heated debate on this issue, it is however not quite clear why „pacta sunt servanda“ should not be *both* constitutive for the existence of a contract as well as constitutive for the validity of the norm enshrined in the contract. In the end, the difference boils down to a basic question for a legal theory whose co-ordinate system regarding the status of the „sources of law“ does not seem to contain a proper place for describing the *lex mercatoria* within the legal system and thus generates the need for original descriptions new to the system. These descriptions range from Verdross‘ thesis of a „contract outside of a legal order“ („rechtsordnungsloser Vertrag“),³² over the notion of a „positive legal order floating freely in space“,³³ to the idea of an emerging „private public international law“ („Privatvölkerrecht“).³⁴ After reviewing a number of attempts to locate the *lex* within the coordinate system of legal theory, Ursula Stein aptly concludes that the evolution of the *lex* does require significant modifications of any legal theory unable to accommodate legal practice - rather than to disqualify the *lex* as „non-law“. ³⁵ Attempts to come up with such modifications contribute to a transcending or a modification of a number of differentiations the legal system employs in its self-description in addition to the one between national and international law: thus, a legal norm does not have to be either national *or* non-national - as according to a dualistic understanding -, but can be both. The genesis of a norm within a national or an a-national legal order does not necessitate that the norm could not also spread to another legal order (and be still existent in or severed from its originating order). Thus, the material law of the *lex* can find its way into the reform of national arbitration law. On the

²⁹ See Friedrich Carl von Savigny, *System des heutigen Römischen Rechts*, Bd. 8. Aachen: Scientia 1981, 2nd reprint of the edition of 1849).

³⁰ See Jarrod Wiener, *Globalization and the Harmonization of Law*. London: Pinter 1999; Jutta Stoll, *Vereinbarungen zwischen Staat und ausländischem Investor. Rechtsnatur und Bestandsschutz*. Berlin: Springer 1982, 38-40.

³¹ Hans-Werner Rengeling, *Privatvölkerrechtliche Verträge. Zum Rechtscharakter eines Vertrages zwischen einem Staat und einer ausländischen Privatperson (oder einem nichtstaatlichen Verband)*. Berlin: Duncker und Humblot 1971, 248.

³² Alfred Verdross, „Die Sicherung von ausländischen Privatrechten aus Abkommen zur wirtschaftlichen Entwicklung mit Schiedsklauseln“. *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 18 (1957/58), 635-651; see also: Thomas Reimann, *Zur Lehre vom rechtsordnungslosen Vertrag*. Bonn: L. Röhrscheid 1970.

³³ Stein, *Lex mercatoria*, 87.

³⁴ Rengeling, *Privatvölkerrechtliche Verträge*.

³⁵ See Stein, *Lex Mercatoria*, 179-183.

other hand, certain norms of the lex can originate in national or international legal orders, yet „lose their original character with their introduction into the structure of norms ordering transnational economic relations“.³⁶

It is particularly because of the dynamic with which the lex mercatoria and its evolution modifies internal boundaries of the legal system that it constitutes one of the most lively areas of a „living law“ of world society. Yet, it is of crucial importance in this respect that this dynamic is primarily driven by a coupling between the legal and the *economic* system and does not result from a strong coupling between the legal and political systems.³⁷ Yet of course it remains to be seen whether a „depoliticised“ lex mercatoria³⁸ will, as Teubner suspects, in the end lead to a „repoliticization“.³⁹

The present attempt to observe the transnational law of the lex mercatoria from the point of view of a theory of society can be summarised in two points:

1. The evolution of the lex mercatoria bears the characteristic of an increasing strengthening of a legal system (as a subsystem of world society's legal system), driven particularly also by its own reflexive elements in practice and theory. This subsystem is linked to national or international legal orders, yet not constitutively based on them. The quality of this evolution has reached a degree where it seems superfluous to ask whether the validity of the lex in the field of international trade requires an explicit agreement on its applicability in each individual case, or whether the lex mercatoria can be applied ipso jure.⁴⁰ Although one can thus agree with Mustill that the lex mercatoria does not constitute a legal order which can be chosen in the sense of the choice given by the UNCITRAL model law, for example,⁴¹ this is not the case since the lex does not constitute an equal order next to national legal orders, but since the clause on the choice of applicable law is in itself already part of the lex mercatoria.

Although in its evolution the lex mercatoria can draw on a multiplicity of „legal sources“ outside itself,⁴² it seems of utmost importance that it is *the operation of the lex mercatoria itself*, particularly the practice of arbitration, which constitutes the most important source from which the subsystem „lex mercatoria“ draws its norms.

³⁶ Stein, *Lex mercatoria*, 191 [translation my own].

³⁷ „It is a growth, not a creation“ (Lord Justice Mustill, „The new *lex mercatoria*: the first twenty-five years“). In: Maarten Bos/Ian Brownlie (Hg.), *Liber Amicorum for The Rt. Hon. Lord Wilberforce*. Oxford: Clarendon Press 1987, 153); similarly Felix Dasser, „Lex mercatoria: Werkzeug der Praktiker oder Spielzeug der Lehre?“ *Schweizerische Zeitschrift für internationales und europäisches Recht* 1 (1991), 305.

³⁸ Schmitthoff, „Nature and evolution“, 21.

³⁹ See Teubner, „Globale Bukowina“.

⁴⁰ Mustill, „New lex mercatoria“, 160.

⁴¹ Ibid.

⁴² See the list in *ibid.*, 173, referring to Ole Lando, „The *lex mercatoria* in international commercial arbitration“. *International and Comparative Law Quarterly* 34 (1985), 747-768.

2. Although this operation of the lex also serves to reproduce the boundaries between the lex and other parts of the legal system, it also illustrates that it is not possible to clearly draw these boundaries on the basis of a quality of norms that would be specific for the lex mercatoria. To formulate it in systems-theoretical terms: all operations of the legal system are based on the distinction legal/illegal, yet are processed on the basis of programs differing between different legal orders. It is only in this sense that one can resolve the seeming paradox that national and international legal orders on the one hand and transnational, non-state law seem to exclude each other on the basis of their inherent claims as to the foundations of their validity (sovereignty), yet do also complement each other on the other hand. As Rengeling remarks analogously in his attempt to classify the lex mercatoria as „private public international law“, to classify as an independent legal order it is not necessary for each legal order to draw on a source exclusive to itself; rather, it is more important that a number of existing norms which can be addressed from different parts of the legal system crystallise together to a sufficient degree.⁴³ And the lex mercatoria can with little doubt be seen as an example for such a crystallising process.

Against the background of these observations it would seem nonsensical to draw clear boundaries between the legal system's various subsystems. Thus, legal norms of the lex mercatoria can as well be also part of customary international law.⁴⁴ Yet even if such an „overlap“ of norms utilised by different subsystems could be discerned this does not necessarily imply that the lex would merge into these other subsystems. Such a merger *might* take place if a unification of legal orders takes place. Yet the diagnosis of an increasing unification of law seems to apply more to regional or interregional rather than to global contexts⁴⁵ and does not seem to reach even close to the demands placed by developing countries in this respect within the context of the debates on a New World Economic Order in the 1970s.⁴⁶

Coming back to the theoretical starting point of these observations, it seems hardly to be productive to try and answer the question of what is and what is not law by drawing on a „basis“ of law if that is meant to mean a basis of its validity external to the law itself - and

⁴³ Rengeling, *Privatvölkerrechtliche Verträge*, 193.

⁴⁴ *Ibid.*, 16.

⁴⁵ See Wiener, *Globalization and Harmonization*; but see Klaus Peter Berger, *Formalisierte oder 'schleichende' Kodifizierung des transnationalen Wirtschaftsrechts: zu den methodischen und praktischen Grundlagen der lex mercatoria*. Berlin: de Gruyter 1996.

⁴⁶ See Norbert Horn, "Uniformity and diversity in the law of international commercial contracts". In: Norbert Horn/Clive Schmitthoff (eds.), *The Commercial Law of International Commercial Transactions*. Deventer: Kluwer 1982, 17f.

particularly not if that validity is seen to solely rely on the sovereign state's monopoly to sanction. Or, as Dasser aptly summarises: „We need to be conscious about the fact that..., the notion that only state law is law forms a *petitio principii*, which becomes unstable already in relation to international law. The American Legal Realists of the Inter-War periods have recognised clearly, that there are no *right or wrong definitions of the law, but only useful and useless*“.⁴⁷

3. Legalisation, or: redefining the relation between politics and law on a global level

The *lex mercatoria* strongly indicates that there is a certain „autonomous“ dynamic of legal evolution within world society. This “autonomy“ here is to be understood vs.-a-vs. the genesis and sanctioning of legal norm within the political system and may be read as signifying the functional differentiation between these societal systems; this also means the territorial boundaries of the nation-state form an ever less adequate system of reference for describing the evolution of law. Yet, as the *lex mercatoria* in particular shows, this also does *not* mean that couplings between different function systems become superfluous or obsolete. Equally, referring to the relation between the legal and political systems, functional differentiation between operatively autonomous systems does not make the couplings between these systems superfluous. National as well as inter- and transnational legal orders will remain coupled to the political system through various constitutional forms.

Yet if the observation of a functional differentiation between operatively autonomous social systems is taken serious, then all evolution of law does, strictly speaking, take place within the legal system, and not within the political system – despite structural couplings between different systems. In this respect, a legal evolution in a way „triggered“ by operations of the political system (or, strictly speaking, by the autonomously operating legal system observing its environment) would not even need to rely on sovereign acts of legislation or treaties in international law. Rather, law could in fact be seen to emerge even from operations by the political system which are not even intended to lead to the formation of law. In other words, we here would observe functional differentiation in a way that the autonomous evolution of law takes place in a coupling with the political system, yet beyond the structurally coupled areas of “international society” (coupling political system and international law) or nation-state constitutions (coupling political systems and national legal orders). It is in this sense that in the following it will be argued that a „*legalisation*“ of international relations can be seen as

⁴⁷ Dasser, „*Lex mercatoria*“, 307 [translation and emphasis my own].

both an evolutionary process related to international law in a more narrow sense, *as well as* a process of the genesis of legal norms and rules as an unintended result of operations of the political system.

Yet, as with “law”, the notion of “legalisation” requires some clarification. Analytically at least, it seems rather fruitless to assign the term to the mere proliferation of positive legal rules since such an understanding leaves aside the concept’s inherent relational dimension. A process of “legalisation” can only mean the evolution of law *in relation to something else*, yet not the evolution of the legal system itself (which is what an increasing body of positive law would entail; yet to describe this as legalisation would basically mean to talk about a legalisation of the legal system – an obvious contradiction in terms). Legalisation always takes place as the evolution of the legal system in a coupling to another social system, such as the political and economic systems. In a way this is reflected already within most of the relevant literature in that legalisation is primarily meant to refer to an increasing body of regulatory or interventionist law. In this sense, indeed, legalisation appears as the expression of a regulatory activity of the political system by the means of utilising a structural coupling with the legal system. Of course, as Teubner remarks, “legalisation cannot be meaningfully analysed as an historically universal phenomenon. It is rather important to analyse the specific type of legalisation which can only be understood against its specific historical background”.⁴⁸

Applied to current conditions, this means that the historical-systematic context of legalising processes can not be seen as congruent with nation-state territories in relation to which most processes of legalisation have been analysed up to now. I propose to unfold an assessment of legalisation within such a context by looking at the evolution of “international regimes”. In this context, Klaus Dieter Wolf and Michael Zürn identify “international legalisation as the ‘spearhead’ of institutionalised cooperation”.⁴⁹ “International legalisation here is understood, on the one hand, as a deliberate strategy of cooperation between states, and, on the other hand, more abstract as an expression of the self-organisation of states and other international actors”.⁵⁰ And quite obviously in international relations the processes of legalisation as a result of institutionalised interstate cooperation do not – in contrast to nation-state contexts – entail a significant proliferation of regulative and distributive rules (as in the evolution of the

⁴⁸ Gunther Teubner, “Verrechtlichung - Begriffe, Merkmale, Grenzen, Auswege”. In: Friedrich Kübler (ed.), *Verrechtlichung von Wirtschaft, Arbeit und Solidarität*. Baden-Baden: Nomos 1984, 302f [translation my own].

⁴⁹ Klaus Dieter Wolf/Michael Zürn, “Macht Recht einen Unterschied? Implikationen und Bedingungen internationaler Verrechtlichung im Gegensatz zu weniger bindenden Formen internationaler Verregelung.” In: Klaus Dieter Wolf (ed.), *Internationale Verrechtlichung*. Pfaffenweiler: Centaurus Verlagsgesellschaft 1993, 11 [translation my own].

welfare state). At first, however, it needs to be highlighted in this context, that it is an important step in the argument of the research on international regimes to have identified the process of an institutionalisation of international cooperation between self-interested, sovereign states as a possible source of legalisation.⁵¹ Yet, the notion of legalisation in the context of regime research differs from the one presented here in that regime theory seems to argue that legalisation is seen to be represented in a *gradual* development of „law-like“ characteristics of international norms. Against the background of present theoretical perspective, however, to identify any gradual degree to which a norm is a legal norm or not does lead to an imprecise formulation.⁵² As a reminder: in the present theoretical context it is only possible to talk about a *legal* rule or norm if it is coded according to the distinction legal/illegal and if based on it at least one decision is reached. Thus, it is possible to talk about *international legalisation* precisely when legal rules thus understood emerge from an regulatory activity in the political system. To illustrate this subtle, yet theoretically important difference in another way: any “degree” of international legalisation can only be observed *in relation to* the operations of the political system and the observation as to whether such an operation leads to the emergence of a within the legal system. Put bluntly: Within the legal system, a legal rule is a legal rule and there are no legal rules outside of the legal system; it makes no sense to speak of a gradual „law-like“ character of a legal rule. The analytical implications of such a seemingly complex theoretical view will hopefully become clearer if such a perspective is used in order to describe the *evolution of international law and international regimes as an interconnected process of international legalisation*.

If there is one outstanding process which characterises the evolution of international law after World War II, it is to be found not in the addition of more subjects of international law, but in the proliferation of the sources of international law and a proliferation of the objects of international law.⁵³

⁵⁰ Ibid. 14 [translation my own].

⁵¹ See Kenneth W. Abbott et al., “The concept of legalisation”. *International Organization* 54/3 (Summer 2000; Special Issue on “International legalisation”), 401-419; see also the extensive interdisciplinary debate on what makes a rule a legal rule; particularly: Robert J. Beck/Anthony Clark Arend/Robert D. Van der Lugt (eds.), *International Rules. Approaches from International Law and International Relations*. Oxford: Oxford University Press 1996; Friedrich Kratochwil, *Rules, Norms and Decisions. On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs*. Cambridge: Cambridge University Press 1989.

⁵² On the graduality of the legal character of international rules, see Dieter Wolf/Michael Zürn, “Europarecht und internationale Regime: Zu den Merkmalen von Recht jenseits des Nationalstaates”. In: Jürgen Neyer et al., “Recht jenseits des Staates” (ZERP-Diskussionspapier 1/1999). Bremen: ZERP, 1-32.

⁵³ A similar argument is to be found in Stephan Hobe, “Die Zukunft des Völkerrechts im Zeitalter der Globalisierung”. *Archiv des Völkerrechts* 37 (3-4/1999), 253-282.

Usually, Art. 38 Statute ICJ is taken as an enumeration of the sources of international law. Taking a closer look, however, Art. 38 itself does not explicitly refer to „sources“ of law, but only to legal principles to be applied by the Court. It is thus by no means mandatory to see Art. 38 as a comprehensive enumeration of the sources of international law.⁵⁴ Yet it can hardly be overemphasised that within the spectrum described by Art. 38 - understood as an important part of the international legal system's self-description - it is accepted that international law can emerge *beyond* the legislation of or between nation-states. This of course particularly refers to the sources of custom, the general principles of law and legal opinion. But it is also beyond these sources that one can observe the formation of law without it being sanctioned by states, such as in the operations of international organisations. One might refer to the internal organisational law of these organisations themselves, for example,⁵⁵ or to the arbitrary practice of the WTO. In this sense, Palmetier/Mavroidis observe: “The WTO is a product of an international agreement, and that agreement and the agreements annexed to it constitute the basic source of WTO law. The reports of panels and the Appellate Body, however, add a growingly important gloss to those texts. Most WTO disputes will be resolved primarily, if not solely, with reference to the texts and to prior reports, and in this sense the WTO legal system may be thought of as largely self-contained”.⁵⁶

Although it is barely possible to specify a changing relation between the various forms of international/transnational law and the sources of law they draw upon in a quantitative sense, it seems that the various forms of “soft law” have gained in importance vs.-a.-vs. the law enshrined in treaties. Yet it is not always clear what it is which makes “soft law” “soft”. The “softness“ can relate to the (non-)existence of sanctioning mechanisms for a legal rule, to the source of law on which a rule draws, or it may only be inferred retrospectively via rule compliance.⁵⁷ Together with the evolution of treaty law this tendency towards soft law-formation forms the basis for an expansion of subject areas and actors addressed by international law. After the full territorial coverage of the globe by international law has been largely finalised with the United Nations Convention on the Law of the Sea, this particularly refers to an increasing coverage of areas defined sectorally and personally, such as in the areas of international environmental law, through more soft obligations and goal declarations

⁵⁴ Also: Brownlie, *Principles of Public International Law*. Oxford. Clarendon Press 1990, 3; as an overview over the discussion on sources of law in international law: David Kennedy, *International Legal Structures*. Baden-Baden: Nomos 1987.

⁵⁵ So already Zemanek, “Über das dualistische Denken”.

⁵⁶ David Palmetier/Petros C. Mavroidis, “The WTO legal system: sources of law”. *American Journal of International Law* 92 (1998), 413.

⁵⁷ See Kenneth W. Abbott and Duncan Snidal, “Toward a theory of international legalisation”. *International Organization* 54 (2000; Special Issue on “International legalisation”, pages xxx-xxx.

following, for example, the so-called „world conferences“, and an increasingly specific codification of human rights (as rights of children, women, national minorities etc.), or in the installation of new international courts and tribunals.⁵⁸ Here, the “soft” character of norms is based, on the one hand, on different degrees of obligation, on the other hand on an increasing involvement of non-governmental actors in the processes of norm-generation.⁵⁹ However, in all cases “soft law” refers to operations within the legal system, *soft law is not non-law*. Soft law is not about different degrees of law, but about different forms of law in a complex “transnational legal process”⁶⁰. Taking a closer look, it is particularly the much-discussed „non-binding“ character of instruments of “soft law”⁶¹ which does not refer to the character of a norm as „law“, but refers to the norm’s effects in other social systems and in particular the political system.

It might be tempting to compare this legal evolution in analogy to the various phases of this development as identified in nation-state contexts. One could then interpret it as the evolution of international law from some kind of „primitive” law into a differentiated and complex legal system.⁶² The co-evolution of inter- and transnational law could then be classified as some kind of „legalistic constitutionalisation“ („rechtsstaatliche Konstitutionalisierung“); the latter would of course not yet have taken the decisive step to fully establish the “rule of law” on a world societal scope, yet would have begun to firmly move in that direction. Contributing to a differentiation and consolidation of the world societal legal system would be developments such as the at least punctual penetration of the principle of non-intervention in the case of severe atrocities.⁶³ Of course, in contrast to that legalisation would be minimal in relation to a “democratic constitutionalisation“ beyond national legal systems - mostly limited to the legalisation in relation to human rights as a precondition of any further legalisation.⁶⁴ A similar observation would need to be made regarding issues of „social legalisation“, i.e. the

⁵⁸ See <http://www.un.org/law/icc/index.html>.

⁵⁹ See Stephan Hobe, “Global challenges to statehood: the increasing importance of non-governmental organizations”. *Indiana Journal of Global Legal Studies* 5 (1997), 191-209; see also: Harold Hongju Koh, “Why do nations obey international law?”. *The Yale Law Journal* 106 (1997), 2599-2659; Abram Chayes/Antonia Handler Chayes, *The New Sovereignty. Compliance With International Regulatory Agreements*. Cambridge, Mass: Harvard University Press 1995.

⁶⁰ Harold Hongju Koh, “Transnational legal process”. *Nebraska Law Review* 75 (1996), 181-207.

⁶¹ See Dinah H. Shelton (ed.), *Commitment and Compliance. The Role of Non-Binding Norms in the International Legal System*. Oxford: Oxford University Press 2000.

⁶² The idea of international law as “primitive law” goes back to Kelsen and Hart; see, for example: Hans Kelsen, *Reine Rechtslehre. Einleitung in die rechtswissenschaftliche Problematik*. Leipzig: Deuticke 1934; also Michael Barkun, *Law Without Sanctions. Order in Primitive Society and the World Community*. New Haven, Conn.: Yale University Press 1968.

⁶³ See the contributions in: Gene M. Lyons/Michael Mastanduno (eds.), *Beyond Westphalia. State Sovereignty and International Intervention*. Baltimore, Md.: Johns Hopkins University Press 1995.

institutionalisation of welfare state-like forms through inter- and transnational law. Although the establishment of, for example, social standards mainly through “soft law” may form an important precondition for moving in that direction, the establishment of extensive redistributive norms characteristic for the welfare state on a global scale still seems a most distant prospect.

Yet the limits of any comparison between historical forms of legalisation in national context to present forms of global legalisation quickly become apparent. Indeed, through the evolution of inter- and transnational law, the legal system has clearly embarked upon a course which does not justify to see only a „primitive“ form of law at work beyond national contexts. But of course, central evolutionary achievements of national processes of legalisation are only partially, if at all, developed in a global context, particularly those which have led to the emergence of the democratic, constitutional „Rechtsstaat“ and the social and democratic welfare state. Yet it also becomes immediately clear that an analogy which would only read this as a „lacking behind“ of a global legal system in a sequence of legalisation built on the national model cannot do justice to the specific characteristics of a number of specific legalising tendencies in an international or global context. Here, one only needs to think of the evolution of European Union law, but also the evolution of law in the WTO context. Both processes can be described as forms of constitutionalisation and the establishment of a “rule of law” beyond the nation-state, in the EU’s case even containing elements typical for the welfare state.⁶⁵ The legal system’s evolution thus seems to be characterised by subsystemic specificities pertaining to varying degrees of legalisation. This does imply that the evolution of world society’s legal system cannot be modelled in analogy to the evolution of national legal systems under the condition of the latter’s primary territorial differentiation and that drawing any such analogy can be of heuristic value at most.

The EU and the WTO provide examples of “self-contained regimes”, i.e. legal systems which do provide secondary norms which immediately react to subsystemic breaches of the norm and thus prevent a falling back to the primary norms of international law. Yet, particularly with reference to the evolution of transnational economic law, it seems by no means to be warranted to refer to international organisations such as the EU or WTO alone when looking for points at which subsystemic intensifications within the legal system of world society do occur. Rather, one could in that respect point to a number of legalising processes leading to

⁶⁴ But see Thomas M. Franck, “The emerging right to democratic governance”. *American Journal of International Law* 86 (1992), 46-91.

⁶⁵ See in relation to these examples: Jürgen Neyer, “Legitimes Recht oberhalb des demokratischen Rechtsstaates. Supranationalität als Herausforderung für die Politikwissenschaft”. *Politische Vierteljahresschrift* 40 (1999), 390-414.

sector- or functionally specific evolutions of law (trade law in general, environmental law, law of the sea etc.).

Subsystemic intensifications within the legal system of world society constitute a legalisation in relation to the political system only insofar as the evolution of the legal system reflects regulatory demands by the political system *and* further develops legal norms by drawing on sources which cannot be fully located within the political system. One can, in other words, only speak of any kind of genuine legalisation if legal norms do not merely enshrine regulatory customs within the political system. “International legalisation” thus takes place through partially selfreferential (sub-)systemic intensifications within the legal system of world society; intensifications which through structural couplings with the political system generate effects within that system, pre-structure decision contexts, and generate new demands from the political to the legal system: legalisation thus understood takes place in a feedback loop between different social systems.

It only seems natural to turn to international regimes if international legalisation is understood as the legal system taking up and evolving in response to demands communicated within the political system, supplementing those by selfreferential legal evolution and thereby feeding a feedback loop by conditioning the horizon of normative expectations of the political system. As a result of political cooperation most international regimes do in the end contain a number of legal relations or are enshrined in them; in some cases, a regime might be said to be the same as a particular treaty of international law.

Yet if there is but one result to be distilled from the body of research into international regimes, it is that most regimes in international relations cannot be reduced to a single treaty or a sum of treaties.⁶⁶ They are „more“ than that: for the international political system they form a structural element of institutionalised cooperation resp. “complex interdependence”; for the legal system they form a source of law. Despite numerous differences regarding the understanding of international regimes,⁶⁷ it seems undisputed that international regimes do form institutions broadly understood and thus differ from formal organisations.⁶⁸ The characteristic of regimes as institutions implies that although regimes consists of norms and rules, they form more than the sum of these parts. As an institution, a “regime” is always more than particular rules and norms which could be attributed to specific function systems

⁶⁶ “The process of international treaty signing has created its own self-reinforcing dynamic”. Peter M. Haas/Jan Sundgren, “Evolving international environmental law: changing practices of national sovereignty”. In: Nazli Choucri (ed.), *Global Accord: Environmental Challenges and International Responses*. Cambridge 1993, Mass.: MIT Press, 416.

⁶⁷ Andres Hasenclever et al., *Theories of International Regimes*. Cambridge: Cambridge University Press 1997, 13.

such as law or politics: an institution can however be seen as representing the structural couplings between function systems (without, like organisations, forming operatively autonomous function systems of their own).

To apply such a perspective to the „legal character“ of regimes implies that it is not possible to ascribe a „more“ or a „less“ of a legal character to regimes understood as representations of structural couplings between function systems, contrary to what Abbott and colleagues seem to suggest by relying on the criteria of degrees of obligation, precision and functional delegation of rules for assessing their degree of legality.⁶⁹ Rather, the question would need to be phrased differently from the very beginning: Not how much of a legal, political, or other character is inherent in a regime, but in which form the regime plays a role in the political, legal, economic etc. systems. A „legal character“ is thus not a characteristic intrinsic to an institution⁷⁰ and „legalisation“ does not *per se* describe a form of institutionalisation;⁷¹ the process of legalisation exclusively refers to an increasing refocusing of an institution towards a mode of normative expectation through an increasing addressing of the institution in the legal system. It is in this sense that the common distinction between „power-based“ and „legally based“ regimes does not distinguish between regimes according to their intrinsic nature, but according to the relative degrees to which these institutions are addressed by the political and legal systems. Primarily power-based regimes thus form the most unspectacular cases if looking for indicators of international legalisation. With „power“, regime evolution proceeds on the basis of *the* medium specific for communication within the political system.⁷² One might legitimately speculate that any structural coupling with the legal system expressed in such a regime will be of such a (close) kind, that regulative demands by the political system will lead to the evolution of a rule within the legal system without any supplementing operation of the legal system. „Pure“ cases of such power-based regimes might be suspected to be found in international regimes in the military realm (arms control) in which political operations are translated into international treaty law on a one-to-one basis. Supplementing effects within the legal system emerging from such a treaty would mostly lead to only marginal additional legalisation. The processing of demands by the political system within the legal system in this context will create little new, qualitatively transformed legal demands placed upon the political system. In contrast to that, „legally based“ regimes form the other end of the spectrum. Here, the coupling between the legal and the political system is dynamic

⁶⁸ Ebd., 10.

⁶⁹ Abbott et al., „Concept of legalisation“.

⁷⁰ Abbott et al., „Concept of legalisation“.

⁷¹ So xxxGoldstein et al., „Introduction“.

⁷² See Niklas Luhmann, *Die Politik der Gesellschaft*. Frankfurt/M.: Suhrkamp 2000, chapter 1.

in the sense that a legal evolution triggered by demands by the political system leads to an intensification of the regime within the boundaries of the legal system, leading to new legal demands placed on the political system. These new demands *can* result in new specific generalised structures of normative expectations within the political system (they do not *have to*, since in the end the political system remains an operatively closed system) which in turn can result in demands placed by the political system on the legal system being formulated differently. In this sense, the regime serves as the medium of the “feedback loop” of legalisation referred to above: the political and legal systems do „learn“ from each other.

The environmental sector might provide a good example for an area being characterised more by legally than power-based regimes. Here, in contrast to the area of arms control, for example, a highly significant (sub-)systemic intensification within the legal system can be observed which conditions the operations of the political system by providing a stabilised background for normative expectations. The legal system thus produces a relative security of expectations. The literature on international environmental regimes has documented this form of legalisation as a “selfreferential” legal evolution which results from demands by the political system in many places:⁷³ it can be observed most visibly when operations within the political system (reflecting interests) turn into „norm cascades“ within the legal system which recondition interests within the political system.⁷⁴ Yet: in contrast to some newer „constructivist“ perspectives in International Relations theory this process need not be described as a rather diffuse transformation of political actors’ „identities“, but can be observed as different intensities of addressing an issue within the legal and political systems, transmitted through institutions as a medium of structural coupling between the systems.

Summarising these deliberations, the process of “international legalisation” “beyond the state“ on a global (world societal) scale can be understood so as to mean that relatively more regime formation takes place on the legally-based end of the spectrum of regimes. And although drawn up against an entirely different background than the present observation, the case studies in the recent *International Organization Special Issue* on “International legalisation”

⁷³ See, for example, Bertram I. Spector et al. (eds.), *Negotiating International Regimes. Lessons Learned from the United Nations Conference on Environment and Development (UNCED)*. London: Graham and Trotman/Martinus Nijhoff 1994; Oran R. Young, *International Cooperation. Building Regimes for Natural Resources and the Environment*. Ithaca, NY: Cornell University Press 1989, sowie *International Governance. Protecting the Environment in a Stateless Society*. Ithaca, NY: Cornell University Press 1994; Andrew Hurrell/Benedict Kingsbury, *The International Politics of the Environment*. Oxford: Oxford University Press 1992; Peter Haas et al., *Institutions for the Earth. Sources for Effective International Environmental Protection*. Cambridge, Mass.: MIT Press 1993; Tony Brenton, *The Evolution of International Environmental Politics*. London. Earthscan Publishers 1994.

⁷⁴ Haas und Sundgren talk about a “slippery slope” of legalising processes once they have started; Haas/Sundgren, “Evolving international environmental law”, 416

seem indeed to point into this direction: “some international institutions are becoming increasingly legalised”.⁷⁵

Regarding the transnational economic law of the *lex mercatoria* as much as the evolution of international law, the operative autonomy of the legal system precludes a view which sees a sovereign, territorially differentiated statehood as a sole source and guarantor of law; this operative autonomy must not lead one to conclude that no causal relations would exist here, however. Yet causal relations need to be mediated through structural couplings between operatively autonomous systems; the demand for institutions which mediate these couplings (and thus, for example, provide the important function of synchronising asynchronous systems) increases as a result of functional differentiation.

In this way, a perspective on international legalisation utilising the tools generated from a theory of society-inspired point of view can describe ongoing processes of legal and regime evolutions, yet by describing them within the context of the quality and results of a functional differentiation between the legal and political systems of world society can do so without having to rely on a legal theoretical definition of what a law or legal rule in the end „is“.

4. Legalisation *and* global law formation

This contribution has presented what might at first seem to be a rather complex view on the question of whether there is an emerging “global law” and whether it is possible to speak of an increasing “legalisation” in world politics. This complexity is however due to a strategic decision, not to address the issue through the lens of any legal theory, but through the lens of a theory of society. To do so and to do so by referring to the inherently complex Luhmannian theory of society does however entail the major advantage that it becomes possible to address the quality and scope of global law formation and legalisation without having to engage in the seemingly endless turf wars on what the law actually “is”. By focussing on the function of law in society and by pointing out the quality of the legal system as an operatively closed, functionally differentiated communicative system in contemporary world society, the question of “global law formation *or* legalisation” then produces the answer of “global law formation *and* legalisation”, yet provides it with a decidedly new twist: there is indeed a global legal system which entails all communication which is processed on the basis of the legal/illegal

⁷⁵ Goldstein et al., “Introduction”.

code and law can be said to exist in this functional sense if at least one decision is achieved within the legal system. The global legal system thus does evolve in the sense that within it new subsystems and legal forms do emerge, such as the *lex mercatoria*. Yet, as the global legal system entails all legal communication (not: communication about the law!), it entails various forms of law, be they national, international, a-national, or otherwise. This system is inherently pluralistic. To adopt such a view also means that it is rather fruitless to ask whether a global law is emerging “above” the level of the sovereign nation-state - since *ab initio* national legal systems are only seen as *internal* differentiations of the legal system, yet strongly coupled with national political systems. “Legalisation” in this view, then, does not refer to the evolution of the global legal system in itself. It refers to the evolution of other, functionally differentiated systems of world society through institutionalized processes of coupling with the legal system. Thus, there can be a “legalisation” of the economic or political systems if the operations of these legal systems lead to the formation of law which in turn influences the way in which (normative) expectations operate within these systems. But it is important to bear in mind that the insight into the operative autonomy of these systems, given that they process communication on different basal codes, does not allow to diagnose any deterministic relation between the operations of the legal and the political systems, for example. The way in which (normative) expectations change in the political system because of a legal regulation in the end depends on how the political system observes its environment, and not on any direct “influence” by the legal system.

To adopt such a theory of society-inspired point of view might at first seem to leave one in a state of uncertainty as to its more precise analytic implications. Yet this is exactly its (critical) purpose. It is not to intervene in the debates in international relations on “legalisation” or in the debates on the nature of law in legal theory. It applies a different mode of observation and can not be translated directly into these debates. Yet it can serve to foster these debates and research on legalisation and global law formation in two ways: first, it can serve the decidedly critical purpose of requiring from participants in the various debates to reflect upon and lay open their “non-reflective” points, i.e. their remaining underlying ontological and substantialist assumptions about what, for example, law “is”. This does not lead to a criticism of the legitimacy of making such assumptions; yet it might help to see what on the basis of these assumptions cannot be seen. By so doing it can, second, encourage a debate between disciplines as to the quality and scope processes of global law formation and legalisation. The upcoming 2002 Annual meeting of the American Society for International Law, for example,

has chosen the topic of “The internationalisation of law and the legalisation of international politics”. According to the view presented here, a debate between the legal and political sciences on this issue is most fruitful if the fundamental difference between these two issues is acknowledged in the first place; any attempt to “merge” the two agendas will inevitably run up against the different operational codes of the legal and political systems.