LEX MERCATORIA AND GOVERNANCE:
THE POLYCONTEXTURALTILITY BETWEEN
LAW AND STATE*

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ABSTRACT

The hypercomplexity of a functionally differentiated society places its systems in more frequent irritations with its environment, mainly within an emergent process of globalization. The Lex mercatoria ends up connecting relations with all the social systems and, very closely, with the economic system, while governance partially assumes the relation of power given up by the State, and, at the same time, it seeks to establish new guidelines for current governments. The paradox reappears and will only be faced through polycontexturality.

Keywords: Society; Paradoxes; State; Governance; Law; Lex mercatoria.

1. INTRODUCTION

The theory of relativity transformed the concept of absolute time into a concept that takes into consideration the observer who is measuring it.¹ In this way, time is a question for the society. That generates hypercomplexity. Time needs more referentially redundant operations in order to acquire meaning in the different social systems. Thus, globalization plays an important role in the reassemblage of time and in the reproduction of highly dynamic information, rendering the traditional forms of constructing the world unable to apply without reservations.

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That causes the requirement that communications be self-referential, and systems autopoietically more indeterminate. Autopoiesis constructs a possibility of self-reference that explains the law, reintroducing the paradox of its logical foundations. Law is self-observation, self-description and, finally, autopoiesis. The re-entry of the legal code allows the system to structure itself in an independent form, allowing a processing of the complexity aimed at its reduction, but with the compensation of being more isolate and indeterminate. Only the law can say what the law is. Thus the paradox is born.

In this context, the emergence of a *lex mercatoria* and governance is verified. The *lex mercatoria* is constructed without foundation and without the pyramidal structure that has a constitution on the top and jurists quarelling in a desperate search for a basic norm, which they never find. Governance, at the same time that it represents the fulfilling of a lack, appears as a new political model aspiring to account for the necessities of the hypercomplexity. The lack of effectiveness of the law is reflected in the impossibility of the State to follow all the new social spheres with presence, thereby making the civil society participate through political spheres, pressuring and retracing an administration model that contemplates new structural couplings with other systems of the society.

Therefore, for this reduction of the increasing complexity of the society as a whole to happen, the introduction of new concepts, such as polycontexturality, is necessary. Polycontexturality is the introduction of the plurality from the contexture, that is, possibilities that transcend binarity, for example, between private/public and State/nation, preparing the emergence of “unexpected” forms that complement a determined social function. The traditional hierarchical distinction between legislation (politics) and application (law) would give place place to a hierarchical multiplicity of jurisprudences structurally connected to other social subsystems.

2. **POLYCONTEXTURALITY AND HYPERCOMPLEXITY**

2.1 **Time Imbalance, Globalization and Hypercomplexity**

To a functionally differentiated society, time becomes a very important symbolic synthesis of meanings, since the hypercomplexity is strongly tied with the concept of globalization. This, by its turn, is mainly characterized by its high dynamism of information and technology, glimpsing at the necessity of epistemological answers adequate to its own temporality and its proper sophistication. “The changes that affect the operation of determination of time take a specific direction when the societies incorporate an ever increasing number of individuals and when they are oriented to an increasing functional differentiation”.2 For this orientation,

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references of meaning are used, which are proper to each social system and only exist within their own time.

Albert Einstein’s theory of relativity uses the principle of proportional time and space of Isaac Newton. It reveals that where there is too high a concentration of matter, the space will bend over itself whenever a body passes by with an incredibly high speed, such as the speed of light. But for the space to bend over itself it is necessary that the time bends as well. Therefore, he perceives that the time can be dilated in counterpoint with the contracted space. Time will go slower for a body whenever it is faster than another one – the faster it goes, less time passes by.

This conception of time allows us to perceive the different levels of time that are developed in each social system. That is, the social system of economy carries out its own operations in an incredible speed: the main stock exchanges acquire nearly physical-psychic reactions in relation to, for example, corruption scandals in the politics or false budgets of international investments. Meanwhile, the social system of religion, with a very thinner cognitive opening, that is, much more pointed toward its proper operation (repetition) already established (by the Bible, for example), takes much more time to produce any difference.

The law is a mechanism to control the time, having its existence linked to time. Time builds society. Society, in turn, builds the time. Nevertheless, the law is predominantly operated by an analytical rationality, being understood as a social fact; that is, regulating all future decisions with the past. At each decision taking, the law, understood in these terms, overestimates the time horizon of the past. This overestimation of the past is the immediate act in all decision taking, preponderantly in the legislations, jurisprudences, doctrine, or better yet, decisions that had already been taken previously in a way or another, that is, sources of the past.

In post-modernity, society begins to have an instantaneous notion of time, a fast notion of time, a notion of time revealed by the media, computers and the Internet, while the jurists remain on the written text, the Code, the Constitution. That is, there is a huge gap between the notion of time, the notion of society in the legal thought and what society is today. Thus, there is a terrible temporal parallelism, for the jurists program norms to last for years, while these sometimes do not last for days.

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When regulating future decisions with the past, no difference is produced, and, therefore, past and future will be a continuous line of repetitions. As a result, the taking of decisions that do not produce differences does not produce time, thus leaving a time imbalance between the law and the society. This imbalance characterizes, for consequence, an institutional crisis that leaves no way of directing decisions for central questions of the society: future environmental damages, cloning, transgenics, Internet, and then to generate “new rights”.

Hence, the law has not been observing its time imbalance, not corresponding effectively to the social demands, that is, to problems related to time, and is consequently incapable to surpass the current challenges posed by society. It is, therefore, fated to a gradual reduction of effectiveness and power, placing its survival at risk.6 Thus, in globalization, decisions must be taken in an urgent way, faster than before, rendering difficult the idea of questioning, which has to bind the past, and, at the same time, disconnect the past, to bind the future and at the same time disconnect the future, still trying to make law play this role.7

The hypercomplexity of the society appears exactly on this dynamics between society and globalization, with its temporal consequences, in the attempt of an observation of a social system. For this reason, time imbalance is so important for the explanation of hypercomplexity, for, in the observation of the observer, the system is not given a symmetrical form, making it difficult for the rationalities and functionalities to converge operatively.

We can see that this problem emerges exactly between the pair operation-observation, where the observation of the society proceeds in a hypercomplex way. It is only possible to observe the law in relation to politics or economy; another plane, necessarily not the economic nor the political or the legal one, needs to be a sociological plane. This movement outwards duplicates the complexity. The hypercomplexity of the society is a consequence of the attempt to converge horizons that have been lost, such as politics and the law, by means of the society, for in this way it is possible to grasp why these systems meet such huge difficulties when following their autopoietic trajectory.

Operation is the other side of observation. “Since every observation can only be made in the form of factual operation (here: of communication), it is in this level where the operative closing of the social system with the possibility of evolutionarily divergent structural formation occurs.”8 Being the observation hypercomplex, which would

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be the communicative operation? How can the systems communicate with double complexity? The answer to these questions must necessarily pass through the paradoxes for us to arrive at polycontexturality. We will only understand the difficulty of finding the difference, if we question where the law and the State are, or better yet, how we can understand them in a hypercomplexity that does not confer traditionally accepted reciprocal validity.

2.2 Self-foundational paradoxes

Literature, as well as other branches of art, has this nobility of being able to say what is not said and of being, therefore, often inaccessible to those who do not set themselves as second order observers. The paradox does not exist by itself; it is the form that makes possible the distinction of the society. And since its first distinction between system and environment, there remains a paradox: only the system determines its own system and differentiation from the environment. The negation of the paradoxes is perhaps reflected by the fact that we have this tradition of searching for the fundamentals, mainly the jurists. However, the paradox does not give this possibility, or it is all that we will be able to reach in terms of fundamentals.

There are paradoxes everywhere, wherever we look for foundations. The Founding problem of law, then is not to find and identify the ultimate ground or reason which justifies its existence. The problem is how to surpress or to attenuate the paradox which an observer with logical inclinations or with a sufficient degree of dissatisfaction could see and articulate at any time.9

It is important that a legal theory that aims at facing the new challenges of the society do not have fear of paradoxes. As it seems, they are not frightful, they are not logical errors and they will be present whenever a legal evolution is willing to understand the logical foundations, or better yet, whenever the metaphysical justification of the law is really faced in the legal evolution. “The acceptable thing about systems theory is, then, the fundamental challenge from real paradoxes that inevitably recurs in structural change and calls for the construction of new social identities”.10

The social subsystems interact somehow: by interference, structural couplings or symbolically generalized means. However, all these mechanisms are possible only through an even more concise operative closing. The decision becomes possible

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with the introduction of a cogitative “device”. This device is translated into the movement that brings the decision about because it “unfolds-explains” the case in another way; it liberates it from the intensity and narrowness of its original intuition; it introduces a virtual component that makes the decision possible by means of the expansion of the original disposition of the case.11

Not only do worlds of meaning necessarily bring out paradoxes, but paradoxes bring out new worlds of meaning. Not only do conflicts of laws produce inconsistencies, but these produce new conflicts. Paradoxes are not logical errors that have to be extirpated if one is to advance.12

As we know, the transition to modernity created the concepts of law and state. The development of the national states and, later, of the democratic republics, made the distinction between legislation and justice administration possible, leaving the natural law behind. “These societies could see their order as natural order, and could therefore characterize alternatives as disorder”.13 Therefore, legal evolution is tightly linked to the creative use of paradoxes and ways to create principles to resolve eventual injustices self-generated by the third question.14

The King’s Two Bodies – the grandiose christological fiction of the immortal Sovereign “above” the mortal human being as the supreme source of law (Kantorowicz 1957) – have protected the law against the deconstruction of its foundation and its identity. The contradictory multiplicity of law’s identities and the founding paradox of law are both to be found hidden behind the facade of law’s hierarchy at the top of which the King’s Two Bodies are governing law’s empire. The constitutional law construction of the political democratic sovereign as the top layer of law’s hierarchy has allowed the law to externalize its threatening paradox and to hand it over to politics where it is “resolved” by democracy.15

In fact, the law, when deciding social conflicts, alienates them by making them rest on the fictions it produced itself; thus, the application of the binary code of the law (distinction legal/illegal) on itself paralyzes the observer, producing an endless oscillation. The key for understanding this alienation is in the phenomenon

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14 LUHMANN, Niklas. op. cit. p. 160.
of re-entry, transmitting the symbol of the legal validity of a norm to another one. The re-entry happens when the formula of the code of law re-enters itself. The law, from the theory of the autopoietic social systems, is a system that presents itself as an infinite game of normative and cognitive differences, as a transformation in continuous variation of norms and principles in its set, as an iteration of recursive legal acts, whose changes depend on changeable environments. Moreover, it is configured within a structure of binary oppositions that has its first differentiation from the reality in the binary codification of legal and non-legal.

Thus, this code defines the first choice of the legal system, which will, at the same time, be defining everything that is not legal; in this case, the environment is the society “less” the law. This code is very important, for it allows the law to develop all its autonomy, which is necessary for a continuous complex evolution in accordance with the society.

The path we are following goes towards some type of radical transformation of the law. That is, the current paradoxical forms are changed in such a way as to deconstruct themselves. The deconstruction of the law found its exile in the paradox. It is through the discovery of the paradox, that deconstructivism haunts the Law, again in search of its foundation. “The deconstruction is a universal method through which each distinction, each concept or each system dissolves itself in paradoxes and multiple identities and fluently associates itself with the question of its conditions of failure and success”.18

One of the questions which deconstructivism is worried about is exactly the foundations of the law. It thus perceives that if the law is to become the system of the law and to be differentiated from other kinds of discourse, it must be enforced, that is, it must have a command of force in its discourse. This premise of force stems from the approach that Pascal conceives in relation to justice: “It is right (justice) that what is right be followed, it is necessary that what is stronger be followed”.20 Therefore justice without force is impotent, and force without justice is tyranny.21

Hence, the concept of justice has its genesis in a strong understanding of force. This force is imposed by somebody, by a sovereign; but still it does not clarify the

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19 We will represent “deconstructivism” through the thoughts of Jacques Derrida.
reason why people obey this authority, that is, why validity is ascribed to some kind of norms and not to others. Derrida’s deconstructivism will give an answer with the `mystic foundation of authority’.

They are not obeyed because they are right but because they have authority. The word <belief> supports all the weight of the proposal and justifies the reference to the <mystic> character of authority. The authority of the laws rests only on the belief that is given to it. They are believed; this is their only foundation.22

Derrida brings a new concept of justice that makes a radical distinction from the neopositivist law, which still persists. Law and justice are thus not confused. While the law is deconstructable, the deconstruction is justice.23 This deconstructability of the law is what makes deconstruction of justice possible. However, it seems that the inclusion of the mystic foundation of justice takes us from the paradox of the law to an occultation again, now sacred once more:

Deconstructive justice does not represent any immanent principle of society. It addresses directly the transcendence of law. By stressing the unbridgeable divide between law and justice and its simultaneous non-separable intertwinement, it reformulates a relation of law to the sacred that has been lost with secularization.24

However, deconstructivism, in contrast to the theory of the autopoietic social systems, renders this violence as a paralyzing paradox. “Real paradoxes are highly ambivalent. They contain destructive, paralysing potentials, but at the same time productive, creative possibilities”.25 The strength of the paradox is to make the continuity of the legal system impossible, leaving deconstruction as the only alternative. “Justice itself, if such a thing exists, within or beyond the law, is not deconstructable. As it occurs with deconstruction itself, if such a thing also exists. Deconstruction is justice”.26

For the deconstruction in the nature of the double deconstruction, it means, more than anything, the paradox of decision: there is no determinable deconstruction of the law, but only différance, continuous transformation and adjournment of the meaning of the law, and later, the foundation of the law on the arbitrary

22 DERRIDA, op. cit. 1994.
Deconstructivism is obviously satisfied to deconstruct legal doctrine by provoking and horrifying the scholarly community with antinomies and paradoxes. Legal autopoiesis poses the somewhat sobering question: After the deconstruction? Thus being, Derrida proposes something like transcendent alterity as the only way out. But is it possible to believe that this deconstructivist proposal may be able to face a hypercomplex society?

This cannot be the answer because globalization is even stronger than the force (of the Law) itself. And that leaves the own logic of the system modified. Normally, the system operates in two logical planes. The practice of deparadoxization becomes simple and perfect through politics, that is, the modification of the old as a contingency is absorbed by a functional system of the politics. The paradox of the constitution of the law is only kept away in the intersystemic union between law and politics – which stands in a land of nobody.

However, within a hypercomplexity, the logical way out through politics is difficult to be operated because the political system has plenty of disadvantages in comparison to the economic system and to other social systems, such as science or even religion. Astonishingly, even the Law will create auto-organizations responsible for the legal decisions within globalization, breaking hierarchical systems and even autopoietic systems. There only remains a polycontexturality of systems that exchange codes and structures so that their operations are successfully concluded. Law and politics need to review their organizations, programs and, at last, to be reviewed within this perspective in which the self-foundational paradoxes start to emerge again. This is the signal that new distinctions need to be made to occult it and in order for us to operate politics and law again.

### 2.3 Polycontextural Law

Gunther Teubner has one of the first works about polycontextural law, a concept also coted by Niklas Luhmann. That concept was initially developed from the polycontextural logic, by Gotthard Günther, stemming from studies on clas-

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Comparative and contemporary logic; as a result, it was possible to evolve into an extremely complex stage of the three laws of the classical logic. Adding a fourth law, originally from Leibniz, it mainly changed the conditions over which two classical laws were conducted: *tertium non datur* (TND) – the law of the excluded middle (LEM) –, and the law of noncontradiction. Thus, he was able to perceive that there is something that is not within 0 nor within 1, i.e., that exceeds, that goes beyond, but that remains in between.32

For any designation (acceptance, affirmation) or non-designation (rejection, negation) of the LEM in (4′) a point of designation – a logical place – has to exist from which the designation or non-designation of the total situation as given by the LEM occurs. Such a logical place (or ground) has to be indicated by a number – a third value. This value (place value) cannot be located between true and the false one, i.e., beyond 1 and the 0 (law of the excluded middle) but beyond the 1 and of the 0, i.e. beyond the false one.33

In the case at hand, if we define a logical domain – a contexture – for only the characteristic called “red” or “not-red”, then, in accordance with the rules of analytical definition, the *genus proximun* of the considered attribute is “color”, which would represent the apex in the pyramid of data for the diairesis (Platonic division). The contextual difference has the environment as its reference, the contexture relates to the complexity of the system. Referring to the complexity of the system entails the amount of possibilities that compel to proceed selectively. The maintenance of the multiplicity of possibilities entails that the meaning is always tied to the plural by the reduction of possibilities, never being able to be binarily formulated, but only ternarily.

Whenever it was assumed that Reality harbored a rational as well as an irrational component the contexture of Nothingness served as the ontological location for everything that did not seem to be rationally conceivable. It also served as the ontological locus into which the observer of the world could be placed because it became very soon evident in the history of logic and of epistemology that the classic pattern of thinking with its concomitant mono-contextural ontology offered no place for the observer or the world or the thinking subject because it would have been absurd to assume that the subject of cognizing belonged in the contexture of that which as cognized.34


This perspective makes the privileged position of only one observer disappear and faces the reality without myths or mystical revelations, but as paradox. The international law has never appeared to be adept of hierarchies, neither has the international private law. Hypercomplexity is a characteristic of the society that brings to these relations even more strength in order to establish new relations of guarantees through contracts, of technical relations, of laws of international trade – *lex mercatoria* – sports law – *lex sportiva internationalis* – technical standardization, and international laws of work. The polycontextural law cannot take advantage over the political myth of the legislative will and invent a fiction in its place, allowing them to make their paradoxes pass through the social discourses structurally linked to theirs.35

What the polycontexturality breaks is the unit of context of the discourses. There is not a single contexture anymore, modernly bequeathed to the sovereign, to the State, but polycontextures. It is not simply a question of referring to a lack of center, or of build a polycentrality; polycontexturality is more radical. “Polycontexturality is a plurality of mutually exclusive perspectives that are constituted by operations between environment/system and that do not share with one another”.36 Therefore, the law ceases to be text and starts to be communication. It is not a single discourse and starts to go through different codes of validation within the context of globalization. It is the paradox reintroducing itself in other spheres. As a consequence, world-wide law emerges from the social peripheries, from zones of contact with other social systems, and not in the center of institutions of state-nations or national institutions. This new law is not nourished with stocks of tradition, but with the continuous self-production of global nets, often formally organized and defined in a relatively narrow way, of cultural, scientific or technical nature.37

The policontextural law is formed by the introduction of a historical rupture of the hypercomplex society and its spatio-temporal reorganization by the globalization. Polycontexturality shows itself as the operative side of the own hypercomplex observation. This operative side is realized through the organizations that compose the structures of the society. Therefore, it is impossible to define an object of the polycontexturality without taking the society, along with its systems and its historicity, into account.

Hence, its self-description will stem from the theory of the autopoietic social systems and, more than that, from the hypercycles and the new indetermination


that autopoiesis provokes. The self-referential part works through the policon-
textural law that will determine and is determined by its initial characteristics
already developed and to be developed: rupture with the binary scheme and the
introduction of the multi; rupture with classical logic and the modern model of
State.

3. GOVERNANCE AND LEX MERCATORIA

3.1 State and Law in the form of globalized society

The modern society has as its main centers of decision taking the State and
the law. What happens in the hypercomplexity is a joint transformation of the
actors, for there are more organizations taking, which have functions already
delineated by the differentiated society. But those are not gone for good. That is,
at least some social systems, such as law and politics, suffer from an autopoietic
crisis. This crisis is an impossibility of making the main premises of the modern
law and State work. This change centers on the observation of the hypercomplex-
ity and of the globalization.

Globalization, as process of social acceleration, compels the society to inter-
relate communicatively. “What is acceptable in the theory of the systems is, thus,
the fundamental challenge of the real paradoxes that inevitably occur periodi-
cally in the structural changes and ask for the construction of new social identi-
ties”. Then, there is communication, that is, the social subsystems interact
somehow: by interference, structural couplings or symbolically generalized means.
However, all these mechanisms are possible only through a still more concise
operative closing. The law, in spite the State losing sovereignty, has never been so
demanded, the State, although the law loses the monopoly of justice, has to be
present and hold the modern premises.

Within this historical moment, following the modern standard of social
groups divided after their state-nation, we will observe many transformations in
all its social systems, in their own ways and not necessarily simultaneously,
mainly as concerns elements of its sovereignty, such as the relativity of its bound-
aries with economic blocks, cultural movements of immigration, cultural techno-
logical shocks:

The interaction and the division, the globalization and the territorializa-
tion, are process mutually complementary. More necessarily, they are two
faces of the same process: the world-wide redistribution of sovereignty,

power and freedom to act unchained (but with some determined form) by the radical jump in the technology of speed.39

Still, it is important to observe that the own notion of sovereignty must be demystified from an idea that has been symbolically constructed since 1648, with the Peace of Westphalia, when the State withheld sovereignty over its territory, with exclusive authority within its geographic borders.40 “The notion of a golden age of sovereignty in which States contained ‘their’ societies within territorial boundaries is a myth. It is hardly surprising that, on the basis of this dichotomy, so many heterodox theorists tend to associate sovereignty and ‘globality’ with two different phases of historical development”41

The sovereign body of the State has perhaps never existed, but in some way it justified the actions of states, mainly in matters of war and colonization movements. Or, more precisely, the sovereignty of the State-nation and its proportional relationship to the territory and to the formation of the people had different developments, in different parts of the world, which will inevitably change with the globalization.

Therefore, the sovereign State-nation of modernity starts to collapse, or at the least its concept is transformed. The development of regimes and international organizations provoked important changes in the structure of the elaboration of decisions in global politics. New forms of multilateral and multinational politics have emerged, and, with them, there came distinct styles of adoption of collective decisions that involve governments, intergovernmental organizations, and a great variety of transnational lobbies and international non-governmental organizations.42

Effectively, the decision process of the State is globalized. A cooperation with other institutions is necessary. Nobody is isolated anymore. International organizations such as UN, Inter-American Court of Human Rights, WTC, G20, UN Commission of Human Rights and International Amnesty institutionalize deeper connections among themselves: proposals and quarrels are resolved in world-wide meetings in such a way as to make economic and political decision taking possible. It happens because a new concept of relation among parts of the world is established; is not simply international: there is a global emergence of different inter-relations, intertwined in distinct ways, as much as happens in the Internet.

Globalization does not consider the International in a strict sense, as in the case of the Internet – facilitation of networks of information and data, as in the case of libraries and conferences, and also as a tool for the commerce, including commercialization of illegal products, that is, traffic. Thus problems of the electronic commerce emerge, generating difficulties for the application of international rules of commerce, mainly as regards investigation, control of sites, and networks of organization of illicit practices.43

Thus, speaking of globalization is more than simply speaking of internationalization. What happens with the nation in this process of interchanges may be called ‘transnationalization’, but these differentiations are tenuous in fact. What is important to understand is that the majority of the commercial transactions are not submitted to the national laws, not even the international laws, which the states promulgate and which they are themselves in charge of respecting; that is, the commercial transactions are little worried about these laws.44

As for the law, even after the end of the geopolitical bipolarity and the Cold War, there has not been a regimen of international law derived from the establishment of a global law under a unique authority, having the power of coercion or of a solid consensus of the state-nations.45 That can be verified due to a great complexity that involves not only the society, but also the political system itself, which hardly manages to converge in some few points on international security and human rights.

The recurrent doubts about law’s hierarchy so easily silenced in the nation-states’ past can be silenced no more. They explode in the face of the “statelessness” of lex mercatoria and other practices that produce global laws without the state (Teubner 1997b). It is globalization of law that is killing the sovereign-father and making the legal paradox visible.46

Hence, the phenomenon of globalization must be viewed in its practical and theoretical disruption, considering mainly the elements that break with certain modern ideals. It is not anymore possible to have one’s eyes closed to this transformation, for the noise reminds us that we are living in another model of society. In this model, it is necessary to observe the law from within the globalized society.

“At the beginning of the modern age it was the collapse of natural law and today it is the effect of globalization which amounts to a real threat to the operations of the legal system”.47

Therefore, we verify that both the State and the law suffer great transformations when diving into the globalization age. The hypercomplexity of the established relations shows us that other polycontextural forms appear, emerging from the apparent clutter, opening space for the appearance of governance in the political system and of lex mercatoria in the legal system.

3.2 Governance – Society and State

The paradox created in the hypercomplexity, as we have previously explained, places the question of a new political model, or a distinct form of state in order to advance over its paralyzation. “Then, for the question that occupies us, it is decisive that the globalization of politics, in comparison to other subsystems, is relatively halted and will probably continue to be so for the next times”.48

The most promising hypothesis, in a polycontextural perspective, is the construction of the concept of governance, that is, not a government or a state – something of which it cannot even be defined as a model of –, but something that looks more like a structure, with programming characteristics of the political system. This politics structures itself in a polycontextural way, since it emerges not only from the political system, but from other systems where it still exerts a political function, or can/must follow a democratic structure.

Governance is an attempt of having a system of multiple levels and forms of regulation in which micro and macro regions, as well as different modalities of associations, organizations and networks of citizens that emerge as new political units, can contribute for the reconstitution of global politics in more democratic and less socially exclusive terms.49 The development of the economic capacity by means of investments and efficient public politics is necessary in order for the profits of the globalization to be distributed among everybody – these being strategic points for the governance.50

Effectively, the notion of governance stemmed from an analysis of the governability crisis, in the local and the international planes, inscribe itself in the problematic of the loss of credibility of the state and the reduction of efficiency and the effectiveness of public action. In a world of increasing complexity, of increasing differentiation and subsystems, the State is impotent to predict the consequences of its actions and, hence, to dictate norms and to apply them, being incapable of answering to the demands of society.\textsuperscript{51}

The regimen of governance is not a result of privatization strategies of neoliberal parties and governments alone, but of a secular displacement of the balance between the political system and the economic system, given “that its norms represent a genuine law, that cannot be occulted anymore, carrying out legislative, administrative, and regulatory tasks, as well working to solve conflicts of the classic law in new ways and contexts”.\textsuperscript{52}

In fact, governance goes beyond the concept of ‘government’ because it includes control mechanisms that are outside the bounds of jurisdiction and the government’s regulatory sphere; it goes beyond democracy because it entails efficiency notions and development concomitantly.\textsuperscript{53} The State loses part of its international validity, yielding space for private initiative and non-governmental organizations, thereby leaving to the substitution of the concept of governance for the one of government. “To speak of governance is admitting that we have the control on the one hand, and the controlled ones on the other hand, without the necessity that the relation between them be one of authority or hierarchy”.\textsuperscript{54}

Global governance encompasses every single domain of human activity (industry, commerce, environment, moral, law, communication and information etc.) and can be developed as to conquer the planet, thanks to communication and information technologies. This concept should not be confused with good governance of the World Bank, International Monetary Found or United Nations Development Program,\textsuperscript{55} even though the World Bank was the first one to use this


term, characterizing as ‘good governance’ those governments that managed to keep a certain level of human rights and other environmental characteristics such as sustainable development and reform of the State (privatizations), arriving in what would come be called Washington Consensus.

Hence, governance has more consistent possibilities of operative selection in a hypercomplex world, since it does not require that the political system form a structural coupling with another system at stake. Governance is a structural program constructed in parallel to the autopoieses of other systems, hence it can be described as a “democratic model” of the administration of society sectors, including the political one, with involvement of the civil society in the functional task of having the institutions fulfill the roles which they were given, that is, making social organizations more efficient and democratic.

3.3 Lex mercatoria

As concerns the law, more precisely within the international business/enterprise law, the economic and the law systems end up establishing very important relations of structural coupling. Thus, economy and technological development acquire important advances for the political project of an increasing exchange of goods and consumption be materialized. However, this connection has frequently been so effective that the states themselves have not had enough agility to impose norms or limits to regulate this commerce. In spite of the State playing an important role, it is not present in all the moments where international transactions occur. Moreover, as the history tells us, this process of building law without active involvement of the states is older than the own states and seems to have its origins in the Medieval Age, being called lex mercatoria.

Lex mercatoria began in medieval Europe, when this term was employed by traders in order to regulate their own relations, forming, through statutes and corporations, their own code, which would be consulted to grant decisions in competent mercantile jurisdictions whenever the parts belonged to the class of traders.

Lex mercatoria had been this not only because it regulated mercantile relations, but also, and mainly, because it was a law created by the merchants. Its sources had been the statutes of the mercantile corporations, the jurisprudence of the curie mercatorum, because in them merchants


had their sessions. Much in the same way, it is understood today as *lex mercatoria* a law created by the entrepreneur class, without mediation of the legislative power of the states.\(^{58}\)

This expression is currently used, mainly with the emergence of globalization, to delimit the set of norms not elaborated with the political mediation of the states, yet being destined to regulate commercial relations of the global market.\(^{59}\) Thus, the genesis of *lex mercatoria* resides right in the circumstance of standing in reaction to the *status quo* created by the national systems that demonstrate ineptitude to conduct the relations of international business, becoming thereby a great source of *lex mercatoria*.\(^{60}\)

*Lex mercatoria* is a set of principles and usual rules, spontaneously brought to light or elaborated in the picture of the international trade, with no reference to a particular system or national law. They are developed in international businesses applicable to each definite area of the international trade, and are regularly approved and observed.\(^{61}\)

*Lex mercatoria* is not based on the legal system. Or is there a basic global norm? Or is there a secondary global rule? The deconstructivist discourse of mystic foundation has difficulties in finding the violence, but, then, what remains to be done? *Lex mercatoria*, not being paralyzed by the paradox, is based on its self-foundation and is operated through the polycontexturality, that is, an originary law, emergent from the economic system; but this law, not economy.

Thus, *lex mercatoria* breaks two taboos: the first one is that its affirmation is only realized through private law disposals (contracts and fusions); and the second, by demanding validity among the state-nations and even beyond the “international” relations, forming themselves spontaneously in the transnational plane, without the authority of the State, without its capacity to impose sanctions, without its political control and without the legitimacy of a democratic process.\(^{62}\)

It is also possible to observe that the conflict between state and non-state law is frequently left behind, allowing the development of important aspects in the operation of *lex mercatoria*, where the force of decision of legal conflicts of available goods is attributed to arbitration. “The international arbitration and the famous

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\(^{59}\) CAROCCIA, Francesca. op. cit, p. 290.


'codes of behavior' elaborated by some international organizations represent steps in the direction of resolving the conflict between the international lex mercatoria and the domestic law of the individual states”.63

The current constitution of lex mercatoria, as we have been stating, has neither an originary nor a unique source. However, big creators of customs and principles of this network of decisions may be indicated. The most traditional agency of regulation of commerce is the International Chamber of Commerce of Paris (ICC), which was founded in 1919 and is self-designated as “the world’s only truly global business organization”.64 This organization is exclusively formed by great private corporations from any branch of activity and any country of the world. Amongst its main objectives it is the promotion of commerce, services and investment, eliminating obstacles and distortions of the international trade, the promotion of the construction and configuration of rules and standards, and the development of global politics of commerce.65

Other two international organisms that aspire to unify the private global laws are called UNCITRAL66 and UNIDROIT.67 While UNIDROIT has an heterogeneous intergovernmental and commercial formation, UNCITRAL is truly the State’s arm that still resists within this subject.

As we could verify, the whole development of lex mercatoria ran parallel to the State, with the endurance of its increasing role in the formation of regional blocks, which still seems more like a tendency than a reality, give that, with the exception of the European Union, the other global blocks are very slowly for any sort of agreement. Hence, other organizations that have great interest in this development have had more salience. The establishment of norms and standards of commerce has a direction of adaptation from the domestic law to the global law, not the opposite. The federal constitutions of the involved states have little or no influence in the establishment of these norms.

4. CONCLUSIONS

The constitution of the contemporary society is based on operative redundancies that are modified through differentiations. For that to happen, time is

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64 INTERNACIONAL CHAMBER OF COMMERCE. <http://www.iccwbo.org/>.

necessary; this in turn it constructs time. But only what is possible may be changed, thus, everything that is not, but that can be, will only be because it is allowed to be, and there is nothing beyond that – nothing mysterious or metaphysical – for this reason there is paradox. Paradox will always be the end and the beginning of every possibility of emergence of new meanings and this is so in result of its own previous, or even simultaneous, end, as its condition of possibility. Soon, the autonomy of the legal system finds its basis in the self-foundation.

Polycontexturality does not intend to be an ideological or futuristic construction of the hypercomplex society. The intention is to construct these systemic differences within a context of globalization. For that reason, some systems acquired operational advantages with the introduction of the modern paradigm, such as the economical system, which has a light-year difference in comparison with the law system. Others had many difficulties, such as the political system, and did not manage to establish other systemic connections with other systems when the states had their sovereignty diluted.

Thus, on the one side, governance is formed in the political system, and, on the other side, _lex mercatoria_ is formed in the law system. This is one of the possibilities of explaining a still sparse emergency, which, however, is solid in the side of _lex mercatoria_ and of the political program of governance. While governance tries to react operatively to the hypercomplexity with operations within other systems, _lex mercatoria_ is, properly, this new type of law that sketches ways of self-regulation, with the rupture of dogmatic concepts of State, government, sovereignty, legislation and law. The regulatory norms do not go through the State, do not have any constitutional control and are used and judged by arbitral courts. The law is not _hard_ anymore, it starts to be _soft_.

Moreover, the appearance of other “lex” in other social systems is notorious: _lex sportivas, lex laboris_, and technical standards. A law that emerges from the peripheries of society and questions the contemporary forms of observation of the legal theory. The polycontextural law is the beginning of the development of a law that is synchronized with society, a law that urges for the participation of new social spheres for its stabilization and future evolution.

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Lex mercatoria and governance


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