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Weberian versus Pluralistic Legal Forces in the Global Political Economy

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Abstract

This picture supports a view that modernization processes lead naturally to legal structures similar to what can be observed in Western societies and that also global structures will emerge on the same model. Together with modernization theory another prominent theory often alluded to as justification for legalization is Institutional Economics where rules and institutions are considered mechanisms for effective transaction costs avoidance. My earlier publications compare these and other approaches for explaining the role of law in the economy. A third theory is Max Weber's legal rationalization, an evolutionary process running from traditional irrational forms to formal, bureaucratic forms of legal domination. Weber's view that legal rationalization is our "fate" and informal rules and institutions are necessarily outdated will be reconsidered from a historical perspective and confronted with empirical data gathered in the area of the governance of global business transactions. This article will attempt to show that although Weber's influential approach still helps to explain much of what occurs in domestic models of capitalism it doesn't seem to grasp the growing complexities of globalized capitalism.

Key words

Max Weber; Legal Pluralism; Global Law

Resumen

Este análisis apoya la opinión de que los procesos de modernización conducen naturalmente a las estructuras jurídicas similares a lo que se observa en las sociedades occidentales y que también las estructuras globales surgirán en el mismo modelo. Junto con la teoría de la modernización, otra teoría prominente a menudo aludida como justificación para la legalización es la Economía Institucional, donde las reglas y las instituciones se consideran mecanismos para evitar los costos de transacción de efectivo. Las publicaciones anteriores del autor comparan estos y otros enfoques para explicar el papel de la ley en la economía. Una tercera teoría es

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la racionalización jurídica de Max Weber, un proceso evolutivo que va desde las formas tradicionales a las formas irracionales formales y burocráticas de dominación legal. Desde el punto de vista de Weber la racionalización jurídica es nuestro "destino" y las normas e instituciones informales necesariamente obsoleta serán examinadas de nuevo desde una perspectiva histórica y confrontadas con los datos empíricos recogidos en el ámbito del gobierno de las transacciones comerciales globales. En este artículo trataremos de mostrar que a pesar de que el enfoque influyente de Weber todavía ayuda a explicar gran parte de lo que ocurre en los modelos internos del capitalismo, no parece comprender la creciente complejidad del capitalismo globalizado.

Palabras clave

Max Weber; pluralismo legal; derecho global.

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1. Introduction

Global business practices are subject to legal regulation, are supported by legal institutions which enforce contracts, are secured by property rights and are coordinated by international law firms which draft contracts, create new legal instruments and lobby domestically and globally for a business friendly legal environment. In the international realm legal rules are developed for public policy areas like trade, environment, labor, money loundering, copyrights as well as for contract enforcement. Countless international conventions, uniform laws, codes, and rules of conduct attempt to regulate the most varied aspects of global dealings by means of uniform rulings. Regional business areas develop a thick legal institutional network similar to the ones created in nation states. A search in the Melvyl catalogue produces 2,500 legal books on NAFTA, 600 on Mercosur and 26,500 on the European Union. Global business law is a mandatory assignment in all law schools around the world. A recent textbook on Law of International Trade shows on 33 pages a list of no less than 1,300 international cases in English jurisdictions only (Chuah 2005). In an empirical court file analysis within the commercial case load in Germany 10% of the cases were international (Gessner 1996a).

This picture supports a view that modernization processes lead naturally to legal structures similar to what can be observed in Western societies and that also global structures will emerge on the same model. Together with modernization theory another prominent theory often alluded to as justification for legalization is Institutional Economics where rules and institutions are considered mechanisms for effective transaction costs avoidance. My earlier publications compare these and other approaches for explaining the role of law in the economy (Gessner 1994, 2007, 2009a. A third theory is Max Weber's legal rationalization, an evolutionary process running from traditional irrational forms to formal, bureaucratic forms of legal domination. Weber's view that legal rationalization is our "fate" and informal rules and institutions are necessarily outdated will be reconsidered from a historical perspective and confronted with empirical data gathered in the area of the governance of global business transactions.

This article will attempt to show that although Weber's influential approach still helps to explain much of what occurs in domestic models of capitalism it doesn't seem to grasp the growing complexities of globalized capitalism. This comparison of domestic and global capitalism may often overstate differences. As Cutler (2013 quoting Van Apeldoorn 2004) emphasizes, the transnational is not a level of analysis distinct from the domestic level but rather extends across different territorial levels.

Two elements of Weber's theory may illustrate its inadequacy for global approaches in law & society: the gapless legal order and the link of instrumental rationality to law.

2. Max Weber's legal background: the gapless legal order

Max Weber (1864-1920) was a lawyer by training. His father was a lawyer and a prominent politician who served in the German Reichstag. Max Weber's academic patron was Theodor Mommsen, the doyen of Roman law in a legal science which then was the discipline at the top of the academic hierarchy. In his academic studies Max Weber dealt with the law of medieval trading companies and the law of Roman land tenure until he became a law professor for Roman, German and commercial law (Turner and Factor 1994, 3-7). Only later Weber became interested in economics and sociology which were "young" disciplines in comparison to law. Even then legal sciences did provide the framework and ideological background for Weber's version of sociology. This framework and ideology led him to place legal rationality on top of a scale of determinants of social action (with value-rational, affectual and traditional determinants arranged along a diminishing scale of

rationality) and to observe an evolution towards formal rational law. Due to the *Zeitgeist* of his time his background also was national rather than cosmopolitan. Law was domestic law (in his case German law), the monopoly of power was given to the state (in his case the German state). Economics was taught as *Nationalökonomie*.

A theory built on this background may still be valid in the European context. Its explanatory value diminished in other legal cultures and more so in the context of a global legal culture of an emerging world society. The latter shall be discussed mainly by emphasizing two elements of Weber's theory which have no or little empirical value in the 21 century global economy: the gaplessness of the legal system and the importance of law for the calculability of economic action.

Irrespective of its position in Weber's theory as ideal type, normative proposition or empirical observation[1], the gaplessness is described in the following way:

> "First, that every concrete legal decision be the 'application' of a concrete legal proposition to the concrete 'factual situation'; second, that it must be possible in every concrete case to derive the decision from abstract legal propositions by means of legal logic; third, that the law must actually constitute a gapless system… or must, at least, be treated as if it were such a gapless system." (Weber 1968, p. 658).

According to Weber, a legal system represents an integration of all analytically derived legal propositions in such a way that they constitute a logically clear, internally consistent and gapless system of rules, under which all conceivable fact situations must be capable of being logically subsumed lest their order lack an effective guaranty (Weber 1968, p. 656).

As controversial this may be today there is little doubt that Weber understands perfectly well and accepts the legal ideology at his time and in his country. It is equally observable that this ideology hasn't lost its power up to present times. Certainly, the complexities of a modern legal system cause contradictions between areas of legal regulation, between judicial and between bureaucratic structures (Macdonald 1998, Würtenberger, 1995). But legal science in civil law countries is permanently preoccupied with the systematization of abstract legal propositions and with the filling of gaps by formulating new abstract legal propositions (called "theories"). The aim of consistency dominates all other considerations which leads judges to present even their most creative solutions as the application of existing legal rules or of new rules which are in accordance with existing rules.[2] In order to consider non-legal norms 'linkage mechanisms' are needed "which 'authorize the 'inclusion' of relevant norms in the 'official' rules" (Schanze 2007, p. 170).

For a while the author has worked as a first instance judge in Germany. This experience was fascinating but also frustrating since he could not make use of his knowledge as a legal sociologist. He clearly worked in a "gapless" legal system with almost no "linkage mechanisms" authorizing the application of informal social norms. Such a gapless legal system is achieved by accessible courts, multiple remedies against legal decisions, many years of legal education, the use of comprehensive commentaries which exist for all legal fields, the obligation to update the judges' and the lawyers' legal knowledge once a week (by reading a specialized journal), the easy access to case law and legal literature in daily

[1] The original (German) version insofar is ambivalent: „Die heutige juristische Arbeit… geht von den Postulaten aus,…. dass also das geltende objektive Recht ein ‚lückenloses' System von Rechtssätzen darstellen oder latent in sich enthalten oder doch als solches für die Zwecke der Rechtsanwendung behandelt werden müsse." (Weber 1956, p. 507-8). The meaning is that gaplessness is a reality as a normative program of legal science and judicial practice.

[2] Law students in civil law countries are resolving thousands of fictitious cases and without exception are expected to find a legal solution. A statement of a legal gap or the proposition of a non-legal solution leads necessarily to a fail grade. Of course, nobody ever dares to give such an answer and instead tries hard to force the case into existing abstract rules – whatever the outcome.

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updated electronic data bases, and the permanent oversight of legal science exercising consistency control and gap filling. As a result a legally trained person is able to resolve most cases in daily life within a few minutes' time. Hence, Weber's legal rationalization is a reality in highly sophisticated legal systems and even state law in countries with less elaborated legal systems may be superior to any other of their normative (even including religious) orders. None of the above qualities are available for informal norms: no access to courts (only expensive private arbitration), no remedies, no specialized literature or education, no transparency of decisions, no academic oversight etc. State law is far ahead from other normative systems in institutional elaboration and performance. The inflationary use of the terms "law" and "legalization" for all kinds of social control in the legal pluralism and "governance without government" debates is therefore misleading.

A quick look at socio-linguistics may clarify this position. The sociology of language also rejects the undifferentiated use of the term "language" as a meaningful description of social reality. Different languages in speech communities (separated by class, regional, ethnic and functional barriers) show different degrees of complexities. The most famous distinctions are Bernstein's elaborated and restricted codes, where on the one side everyday language is attributed a low, and on the other side standard and classical language a high degree of complexity. Just like state law, standard and classical language is elaborated, monitored by academies of experts, sometimes defined in official dictionaries, and subject of basic school training as well as university education. Just like Weber's rational law the standard/classical language is ideal typically gapless. Other types of languages within societies normally do not get much - if any - institutional support and always have a precarious existence. They may be important for identity and integration of speech communities but offer less opportunities of expression and differentiation.

Sociolinguistics doesn't seem to have already used this knowledge for situations where - as in transnational communication - speakers do not share a single elaborated code. For non-native speakers the English language is definitely not the adequate tool for differentiated expression. The level of complexity and elaboration is mostly dramatically reduced. Translated into our global legal pluralism discourse, transnational actors do not share a single elaborated normative order and have to cope with more rudimentary normative guidance. The different degree of elaboration is mostly disregarded in political-science (also observable in contributions to this Oñati collection) if legal and non-legal normative orders are compared.

Weber describes long periods in European history where local and customary norms were considered legitimate, leaving little space for legislated law and intellectually created Roman law. The European state building process, culminating in the Treaty of Westphalia (1648), initiated a long period where state law assumed a central role among the norms and rules in societies. Non-legal rules became semi-autonomous due to the fact that they were embedded in a legal system either tolerating or suppressing them. Legal pluralism within nation-states became precarious and for most regulatory areas almost irrelevant. Under the dominant ideology (and practice) of legal centralism legal pluralist approaches had a very limited explanatory power and tended to overstate the importance of autochtonous rule-making. Globalization has again changed the situation and these approaches are in high demand in a sociology of global law. The idea of a gapless, fully systematized and coherent *global* legal system would sound bizarre (Picciotto 2013). The emergence of norms and rules above the level of the nation-state is unsystematic, forcing legal norms to compete with other societal norms on an equal footing and, hence, lacking consistency and rationality.

Although legal centralism is on the retreat, unification (or only harmonization) of law keeps occupying international organizations and international legal scholars. In most cases NGOs are invited to participate and to bring in elements which seem

foreign to formal legal considerations and reduce the coherence of the legal output. Nevertheless, one area which looks like an opening of the legal debate for non-legal norms is rather an example of the still well preserved ideology of gaplessness: the famous *lex mercatoria*. Feeling the need of recognizing norms created within communities of global merchants and practised in international transactions some international legal scholars promote their application in arbitration cases and even state courts. Legal pluralists would simply consider and apply these norms in legal decisions but legal centralists need an intermediate step: those autonomous business norms first have to be defined as law. And, of course, this process of definition is highly selective considering only a tiny part of business norms as worth of being applied by judges and arbitrators. Rather than finally making peace with legal pluralism these scholars in the classical tradition promote the gaplessness of global law.[3]

A competition of norms can be observed everywhere on the global level (Berman 2007, 2005, Gessner 2002, 2010, Quack 2013). Legal norms compete because states compete with each other. State law also competes with international unified law (e.g. state contract law with the UN Convention on the International Sale of Goods) and with rules set by international commercial associations. Businesses regulate their relations in complex contracts attempting to limit the relevance of state contract law. There are clusters of norms in international political economics frequently called regimes and defined as *social institutions consisting of agreed upon principles, norms, rules, procedures and programs that govern the interactions of actors in specific issue areas* (Levy *et al* 1995, p. 274). All this is multiplied by the varieties of capitalism with their specific idiosyncrasies from the mafias, Asian ethnic networks, global financial networks, ethical trade (fair trade etc) and the mix of soft law, codes of conduct, standards (ISO, ILO Labour Standards), contractual clauses and legal norms to be found differently in every single branch of global trade (Appelbaum *et al.* 2001). Although the competition of many norm-creating actors is a common observation also in domestic legal cultures these actors have more influence and more authority in a global context where a state monopoly of power is absent or weak. Some regimes and in particular the European Union are coping well with this heterogeneity of norms and actors without reaching or only claiming the constitution of a gapless legal order in the Weberian sense (Joerges and Vos 1999). Regulation does not equal legalization.

A final comment on gaplessness. Even assuming some state legal systems to be gapless does not lead to a kind of conclusion that they are efficient. And pluralism of normative orders in the world society does not mean chaos and crime. Weber's theory refers only to the availability of a legal norm for any social action[4] rather than to its efficient implementation. Hence, a gapless domestic legal system may be poorly implemented and a plural, internally inconsistent global regime may produce the desired order.[5]

[3] The position that the *lex mercatoria* is only an element in a legal discourse has been developed in Gessner (2007) but differs from my previous publications where I was in accordance with Teubner (1997) and a vast literature following his "global law without a state"- approach.

[4] Quoting Weber (1968, p. 657) again: "In a true legal system "every social action of human beings must always be visualized as either an 'application' or 'execution' of legal propositions, or as an 'infringement' thereof, since the 'gaplessness' of the legal system must result in a gapless 'legal ordering' of all social conduct."

[5] Civil law countries which all share the ideology of gaplessness show remarkable differences in the implementation of law. Surprisingly, even taking the implementation of law into account economic performance is not linked to the qualities of the legal system. In an empirical study Trebilcock and Leng (2006) found no strong correlation between a country's economic growth and legal (as opposed to non-legal) enforcement of contracts in business practice.

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3. Max Weber's theory of action: purposive rationality

A second element of Max Weber's theory which also seems inadequate for understanding global legal cultures is purposive rationality (*Zweckrationalität*). Placing it at the centre of his theory of social action and at the apex of an evolution towards human freedom confines the sociological relevance of his approach to his time and his geographical and cultural environment.[6] He himself admits this when he states that his typologies of human action do not inhere in the nature of those phenomena but are constructed in accord with the interest of the researcher. When those interests change – "when the light of the great cultural problems moves on" – then the human sciences change their standpoint and their analytical apparatus (Levine 2005, pp. 108-9). What has changed since Weber is the analytical apparatus as well as the relevance of the non-purposive-rational types of action.

Weber's typology of action is arranged along a diminishing scale of rationality: Social action may be instrumentally (purposive) rational, value rational, affectual or traditional (Weber 1968, pp. 24-25, Emirbayer 2005).[7] Instrumental rationality is determined by expectations of other human beings which are conditions or means for the attainment of the actor's own rationally pursued and calculated ends. This abstraction was based on the modern occidental type of human being and his economic conduct (Levine 2005, p. 109). Expectations can be best understood and calculated if they are in accordance with legal rules. Formal, calculatory rationality presupposes a market with a specific legal structure, a market based upon a particular system of entitlements or property rights. Markets have different legal structures but only the formal occidental structures permit the complete rationalization of economic action (Kronman 1983, p. 135). And calculability is crucial for the capitalist enterprise:

> "The modern capitalist enterprise rests primarily on *calculation* and presupposes a legal and administrative system, whose functioning can be rationally predicted, at least in principle, by virtue of its fixed general norms, just like the expected performance of a machine" (Weber 1968, p. 1394).

Although this model of economic action was built in a period when empirical research was scarce and undeveloped, Weber was well aware of non-legal governance structures in all varieties of business cultures and also in occidental economies. His – in view of current socio-legal research – overstated reliance on law as the decisive support for purposive rationality is due mainly to his legal background but also to the coincidence that occidental economies prospered enormously at the time (turn of the 19th and 20th centuries) of the great Civil Law codifications. There was, of course, no causal link between these two developments but since that time legal scholars keep insisting in their crucial role as institution builders for capitalism. The empirical evidence for this hypothesis is limited to a few northern European countries so that Weber's and the legal scholars' claim of expressing a general evolution towards formal legal rationality in the economy is not sufficiently supported. The approaches which emphasize the varieties of capitalism (Hollingsworth and Boyer 1997) point to other non-legal support structures enhancing the calculability of economic action (Gessner 2007).

The global economy is certainly not based on a single type of action orientation. Since globalization has reached practically all cultures around the globe and nearly

[6] For Weber's intellectual sources see Turner and Factor (1994), Roth (2005) and Levine (2005).

[7] Emirbayer (2005, p. 186) offers concise definitions of Weber's typologies: „Social action, like all action, may be oriented in four ways. It may be:
instrumentally rational, that is, determined by expectations as to the behaviour of objects in the environment and of other human beings; these expectations are used as 'conditions' or 'means' for the attainment of the actor's own rationally pursued and calculated ends;
value-rational, that is, determined by a conscious belief in the value for its own sake of some ethical, aesthetic, religious, or other forms of behaviour, independently of its prospects of success;
affectual (especially emotional), that is, determined by the actor's specific affects and feeling states;
traditional, that is, determined by ingrained habituation."

all participate to some degree on the global market all four types in Weber's ideal-typical model and many more developed in other classifications are represented on the global level of economic exchange. Despite this often described complexity it seems justified to focus the attention only on the most rational action orientation, namely Weber's instrumentally rational type of action. Success on the global market requires the highest degree of rationality and cannot be achieved by ethical, aesthetic, religious, emotional or traditional action orientations. Nevertheless, accepting instrumental rationality as condition for successfully doing business in the global economy does not mean to follow Weber insofar as he considers law as the only tool.

There are many arguments in economics, political sciences and in the sociology of law which question the overstated link between rational action and law. Law may be an obstacle to rationality, it may hinder efficient business dealings, it may express power relations rather than rationality, etcetera. But even accepting Weber's idealized concept of law as the guarantor of freedom and transparency (which enhances calculability of expectations generally and in particular within market relations) one has to consider an intermediate step in Weber's theory which severely questions its claimed universal relevance.

The actor takes the expectations of other actors into account. "These expectations are used as 'conditions' or 'means' for the attainment of the actor's own rationally pursued and calculated ends" (Weber 1968, p. 24). But what remains to explain is the actor's anticipation of other actors' expectations. Instrumental rationality is predictable because the actor orients his or her act *towards law-abiding* behaviour of other actors. This is an ambitious hypothesis. How can the actor with a reasonable certainty assume other actors to follow the law? Weber's answer is *legitimacy* which is conceived as a fact about the beliefs of the governed, their recognition of the state's and its administrative staff's monopoly of force (Kronman 1983, pp. 100-18).

The empirical evidence for a generalized belief of this kind in any country's population is already doubtful. The acceptance of law, of courts, of administrative staffs, of police and of lawyers varies enormously among legal cultures and is relatively low everywhere. Rule of Law initiatives and the Law and Development movement have improvements on their agenda. Explicitly Max Weber's theory of (economic) action is in the background of these strategies. As regards the culture of global business – whether defined as a mix of domestic legal cultures or as an emerging new legal culture – any generalized assumption of a legitimate legal order would be farfetched. Only on the level of global regimes (defined earlier) may one find a legitimate legal order in Weber's sense and the predictability founded on law-abiding behaviour. As a theoretical assumption and as an ideal type the link between instrumental rationality and law seems to be misleading in a context of social action away from or less embedded in a domestic culture.

A radical alternative to linking instrumental rationality to law was developed by Niklas Luhmann (1971) with his distinction between cognitive and normative expectations. Expectations are maintained in case actors do not comply (*normative expectations*), or they are adapted to the new "unexpected" situation (*cognitive expectations*). This adaptation is a learning process, mostly accomplished through rational communication. Social organization occurs in all societies both by normative and cognitive expectations, although in varying degrees. In recent decades, Western societies have developed a greater number of cognitive structures (as opposed to formal legal structures) to cope with problems of order and change. In particular the complex global environment shows cognitive elements. The overemphasis on normative expectations in discourses about the globalization of law ignores the learning capacity of the global actor. In an environment of legal pluralism a cognitive adaptation to an unexpected situation may be easier calculable than the maintenance of a normative expectation. If any

generalization about a legal culture in the global environment is permissible, it should state that cognitive attitudes compete with or complement normative attitudes.[8]

It follows from the above that instrumental rationality which is a condition of successful business in the global market cannot be assumed to be mainly oriented toward legal expectations. Some well institutionalized regimes are the exceptions. Institutional economics, sociology of law and economic sociology have begun to study the various ways global merchants use to establish the necessary predictability of commercial interactions. In the same vein political science discovers regulatory alternatives to law. Examples for the former are complex contracts, methods of relationship management, close monitoring of contractual obligations. Examples for the latter are CO2 certificates, negotiated agreements or monetary gratifications. Although these practises leave many gaps as can be observed in our daily experience like internet frauds, cyber wars, drug trafficking, financial speculation the concluding section will deal with some empirical evidence of successful non-legal practises in the area of contract enforcement in international trade.

4. The global economy: Legal and pluralist phenomena in contract enforcement

Law has two faces: *regulation* and *support*. Both faces or functions should be clearly separated when one is interested in their sociological description.

Global *regulation* concerns international trade (GATT/WTO, EU, NAFTA and many other trade and free market conventions), tax issues, environmental protection, labour standards etc. The ongoing debates about the declining role of the nation-state, the importance of Multinational Enterprises, the phenomenon of codes of conduct and the participation of NGOs in the law-making process refer to the regulatory function of global law. Most contributions to this Oñati collection refer to these issues.

The reason behind state *support* for the economy is, as Max Weber has prominently emphasized, legal certainty. In nation-states' jurisdictions law is supporting economic transactions with its contract law, company law, insolvency law, and state law offers conflict resolution in civil procedures. From the times of Roman Law until the 19th century this support was almost the only task of state law. Still today, in legal practice (lawyers, courts, legal education) this is predominant whereas regulatory aspects play a minor role.

Weber clearly recognizes informal norms and institutions as equivalent to legal coercion in providing calculability and legal certainty. He only believes that those non-legal norms and non-state institutions have ceased to be relevant in a modern economy. But the absence and irrelevance of non-state regulation in general and within the economy in particular can definitely not be assumed for the global economy (Cutler 2003, 2013). Hence Weber's main thesis on the central role of law proves not to be universally applicable.

Power structures, inequalities, discrimination, protection, distribution effects are predominantly discussed within the *regulatory* function of law. This is true for tax law, environmental law, criminal law, competition law etc. (in this collection, Cohen

[8] Regarding normative expectations Luhmann (1972) also distinguishes between different levels of abstraction: expectations can be integrated (kept coherent) either on the level of persons or on the more abstract levels of roles, programs and values. Legal orientation can mainly be achieved on the levels of roles and programs which can be stabilized by the creation of institutions. But this model for institutionalizing normative expectations has cultural and structural prerequisites not to be found in every society. The more societal processes are differentiated – and globalized – the less they may get integrated on the levels of roles and programs. Cognitive mechanisms then prevail over legal certainty (Gessner, 1996, 1998).

(2013) discusses global finance, Avant (2013) the regulation of military and security services, Cornago (2013) the emergence of private authority in international diplomacy). Within legal *support* structures privileges and discriminations are somewhat hidden but equally discernible. Contract law may favour the supplier (*caveat emptor*), insolvency law the secured creditor (like the banks), procedural law the repeat players (like insurance companies), etcetera. Cohen (2013, p. 679-701) provides a complex picture how "key private agents in global finance developed their own regimes of legal rules, practices, and understandings which created structured spaces of rights and power well in advance of any systematic state responses." Picciotto (2013) deals in particular with the role of lawyers in supporting their corporate clients and constructing global governance.

The breach of contract is certainly the best studied risk in social-science research (Gessner 2009b) and is Max Weber's main preoccupation when he talks about the calculability of economic action. There is some risk in every economic exchange but Max Weber considers *law* as the most successful tool for, first of all, avoiding the risk of opportunism or, eventually, for sanctioning breaches of contract. The contracting parties in an instrumentally rational legal order rely on their mutual recognition of contract law as well as on the judicial system to enforce unsatisfied claims. This reduces the risk of economic exchange to a minimum. Institutional economics later make use of Weber's approach: following the rules saves transaction costs.

Current research on the varieties of capitalism has produced an uncountable number of alternatives to Weber's model of securing transactions. Like in many cultures also in global exchanges different modes of instrumental rationality for securing against opportunism have evolved due to the aforementioned problems of using law for instrumental rationality. Firstly, the use of *power* (economic domination) suppresses very successfully any temptation of opportunism. Secondly, the establishment of *personal trust* within business relationships may prevent fraud and conflict. And thirdly, the establishment of *impersonal trust* in social institutions may protect from risk more efficiently than the reliance on law and courts only. These are economic and sociological rather than legal action orientations although the last one is pluralistic and also includes legal institutions.

4.1. Securing transactions through cognitive action orientations

As Luhmann suggests a flexible, adaptive action orientation which instead of following rules allows the actor to learn from unsatisfied expectations is the most common phenomenon in the world society. The result – almost by definition – clashes with existing norms. If this is a cause for criticism from a legal point of view one has to consider that – as Weber has repeatedly emphasized – formal legal rationality also clashes with substantive legal rationality and, of course, with value rational orientations. Civil society in both cases articulates concerns and leads public debates.

In a recent study John Flood and Eleni Skordaki (2009) describe the world of real estate finance. This world of capital flows and investment is impenetrable, intransparent and uncontrollable not only for the normal citizen but also for most lawyers and even for state bureaucrats. This gives a few specialized law firms in collaboration with Big Four accounting firms, banks and credit rating agencies a dominant position over all other actors like the Brussels administration, state regulatory agencies or tax offices. Security (for the money lent by the banks) is the main purpose of these efforts but to call it legal certainty would seem overstated and a bit euphemistic. State law is a tool used unscrupulously in order to set up autonomous structures serving the interests of profit-seeking investors. Specialized law firms do not only support these cross-border capital flows, they create enabling

structures without which investors would be confined to their domestic markets (Picciotto 2013).

State as well as private legal systems are largely irrelevant for securing economic exchange as soon as one party assumes a dominant position in the contractual relationship. The weaker party simply complies in order to stay in business. This is already the typical situation in most manufacturer-supplier relations. But the best example is the Multinational Enterprise where goods and services are moving without any legal risks between legally and economically dependent subsidiaries. The very reason to create these Big Enterprises is their command structure which not only reduces the transaction costs (as emphasized by Ronald Coase 1960) of drafting and enforcing contracts but also minimizes the effects of legal and cultural diversity. In general terms, economic transactions are wherever they are vulnerable internalized within hierarchically organized firms rather than performed by market processes across firms. Borders are a constant temptation for opportunism and make exchanges across firms vulnerable. But unlike what may happen in a market exchange situation no subsidiary of a Multinational Enterprise can take advantage of legal uncertainties wherever the subsidiary is located around the globe. Borders then become insignificant from the compliance point of view. Since it is estimated that 50-70% of global trade takes place within Multinational Enterprises the weakness or absence of enabling law for global trade has no negative consequences for the larger part of the global economy – except if one considers the power shift from support for all economic actors as in Weber's theory of legal certainty toward advantages only for a few wealthy actors in a global legal culture.

Personal trust is emphasized as alternative to institutional and legal support by anthropologists (e.g. Yang 1994, Wiessner 2002), economists (e.g. Landa 1994, Gulati 1995), legal sociologists (Macaulay 1963) and sociologists (Granovetter 1985, Appelbaum 1998). International business transactions seem to be often or even predominantly protected from risk by the careful establishment of trust relationships between firms through employing an intercultural staff, communicating frequently and organizing meetings (Sosa 2007).

A new phenomenon of close business relationships is bilateral contract management facilitated by almost daily electronic control, adaptation of expectations and reorganisation of next steps within the contractual co-operation (Sosa 2007, Dietz and Nieswandt 2009, Dietz 2010, 2011). It seems as if high-speed information creates a kind of cognitive attitude towards those unforeseen events which in previous non-electronic centuries have been defined as normative clashes, breach of contract and fraud. If the exchange cooperation takes an unanticipated development a speedy change of strategies on both sides mostly helps avoiding disappointments. Whether his phenomenon of cognitive management of disappointments can be generalized beyond the exchange within the observed industries and may become a style element of a forthcoming global legal culture (Dietz 2010, p. 183) remains to be seen. Certainly, the empirical research carried out by Dietz and Nieswandt suffers from an ill-chosen sample (the data were gathered from business relationships of German software companies with Rumania, Bulgaria and India - i.e. with countries that have a weak legal infrastructure where non-legal strategies are preferred anyway) and from a lack of comparative data as to the observed industry's *domestic* contract strategies. This is a general problem: what is claimed to be a new global phenomenon is frequently also observable and equally relevant in a domestic context. But the influence of electronic exchanges on business behaviour is of interest wherever contractual risk is at stake. Caution is, of course, advised if an industry-specific and country specific approach (within the software industry) is generalized out of proportion as a substitute for institutional (legal or non-legal) devices and for the efforts of law firms, arbitrators and many other professions involved in international trade - all institutions and professions by now sufficiently well researched to deserve consideration in theory building (see references in Appelbaum *et al.* 2001; Dietz

unfortunately fails to consider earlier empirical research, in particular the data in Sosa 2007). All together, the electronic contract management hypothesis may well be of some relevance in specific circumstances but the ambitious thesis of a substitution of institutional support lacks empirical evidence and sounds just as bizarre as the opposite thesis, the gaplessness of global law.

4.2. Securing transactions through normative and/or utilitarian action orientations

The above summarized insights that power and personal trust substitute for legal support are by now fairly obvious and after two decades of research and debate almost commonplace. It is also obvious that power and personal trust penetrate economic life irregularly and in different degrees (Granovetter 1985, p. 491). Wherever their influence is less relevant we seem to finally have to deal with the classical model, the rational actor in anonymous market exchange. But, as Susan Shapiro (1985) has shown, social control is effective in economic action even beyond hierarchy and social relations. As far as the multiple norms and organizational forms of social control of risk and distrust become relevant rational choice again is pushed to the background. Social differentiation means that all actors ("principals") in society let others ("agents") fulfil most of their tasks on their behalf. This social differentiation requires a complex organisation of risk protection and markets of trust production beyond personal trust created in close social relationships. Governments are next to private organisations and professions among the guardians of trust substituting for kinship and friendship when dealing with strangers. Contracts are the usual strategy by which principals can assume some control over the behaviour of those who act on their behalf. But they provide only limited control over the agency relationship, over future contingencies and over non-compliance.

Some aspects of Shapiro's "social organisation of impersonal trust" are discussed in particular in New Institutional Economics as institutions which reduce transaction costs. But an approach which conceives trust as social construction is more general and much more complex. Social control of impersonal trust is neither mainly legal nor is it only based on rational choices by profit seeking actors. Still, in explaining in particular economic behaviour legal as well as economic approaches contribute to the understanding of structures and markets of trust production. In addition cultural variations of social organisation of trust have to be taken into account. According to Hollingsworth & Boyer support structures and social regulation of trust control is achieved in some cultures predominantly by horizontal modes whereas in others by vertical modes of economic co-ordination. Horizontal modes of co-ordination are markets and communities, vertical modes of co-ordination are firms and the state. In addition—placed between the horizontal and vertical modes—networks and associations contribute to the regulatory system (Hollingsworth and Boyer 1997, p. 9, 12).

As all domestic business cultures have their idiosyncrasies also global systems of exchange in addition to a specific regulatory system (mostly in regime structures) show a particular social organisation for securing transactions. States, business actors and law firms have their share in these efforts. States mainly contribute the protection of property rights.[9] Businesspeople need stable expectations in regard of their (and their business partners') right of ownership, value of the currency, access to credit, reliability of banking transfers and security of investments, liabilities in corporations, distribution of assets in case of insolvency, insurability of risk, sanctions against criminal behaviour etc. (Gessner 2009). Merchants build associations which spread information, offer advice, prepare standard contracts and

[9] Cutler (2013) argues that tendencies toward formal and informal modes of regulation operate dialectically, securing private rights through formal, hard, legal disciplines, but framing corporate duties in soft, unenforceable terms.

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soft law and appoint arbitrators. Law firms offer their expertise regarding foreign law and legal cultures and in particular draft complex contracts which aim at avoiding contractual risks without having to go to foreign courts. For obvious reasons the financial sector is most active in protecting its transactions although banks are currently blamed for disregarding risk protection standards. The same is true for rating agencies which are supposed to prevent from risky investments but have been made responsible for failing to deliver the required calculability of financial transactions. Cohen's (2013) analysis exemplifies this public/private interaction in the construction of a global legal field and may easily be generalized for our purpose of theory building.

5. Conclusions

The very visible presence of law in the global economy mentioned in the introduction remains a theoretical challenge. Are modernization processes reaching the level of institutionalization beyond the nation state level? Is the reduction of transaction costs the best explanation? This chapter had a more modest concern. Our short debate and empirical documentation only turned around Max Weber and his theory of legal rationalization. We conclude that neither a gapless rational legal order will ever emerge in the world society nor will instrumental rationality in social action be only or mainly linked to legal rules in the global economy. Law will progressively be used but this is also true for all other rational tools which empirical research in economic sociology and sociology of law is constantly discovering. Nevertheless, the importance of global law confirms Weber's trust in the rationality and in the elevated degree of elaboration of law. In this Oñati collection Cutler (2013) observes law's importance next to private authority and Picciotto shares this trust in law in his conclusions despite his critical attitude in the entire chapter. Without eliminating the importance of states - but questioning Weberian images of legal action and authority - a variety of regimes has emerged with a plural nature of power and authority, attempting to govern global economic relationships. Weber's rather static picture is replaced by analyses of the role of transnational coalitions of legal actors in mobilizing structures and in creating new ones (Cohen 2013, Quack 2013).

Theory development in Sociology (as well as in all other academic disciplines) is best served by analyzing all or some elements of one single theory and by confronting these elements with empirical social realities. This is what has been attempted in our contribution. Implicitly the paper argues against debates on global legal pluralism which mix too many theories in the same pot. Eclecticism[10] has the advantage of covering all possible aspects of social phenomena but does not do justice to the specific contribution the authors of theories bring into the academic discourse. Max Weber is certainly one of those authors who deserve such a specific analysis.

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[10] Wikipedia also recognizes some benefits of this approach:" Eclecticism is a conceptual approach that does not hold rigidly to a single paradigm or set of assumptions, but instead draws upon multiple theories, styles, or ideas to gain complementary insights into a subject, or applies different theories in particular cases."

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