

Genealogies of Soft Law*

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Abstract

The relatively recent blossoming of multiple soft law tools and the calls for a soft harmonization of European private law have invited reflection on the *genealogy of soft law*. Genealogical arguments have come to play a critical role in the heated European soft law v. hard law debate. While some find the ancestors of soft law in the medieval legal regime and particularly the *lex mercatoria*, others link soft law to a prolific strand of 19th and early 20th century theories of social law and legal pluralism. At times explicitly invoked, more often implicitly alluded to, the neo-medieval genealogy and the social genealogy perform a crucial ideological function, legitimizing different political and professional agendas of soft harmonization and obfuscating their failures and distributive consequences.

1 Introduction

“Softness” may well be among the defining features of post-modern epistemology. “Soft” logic has come to play a significant role in scientific and mathematical reasoning. A “soft” sensibility and a “soft” heuristics pervade philosophy, aesthetics and art.¹ Lawyers have also engaged in the quest for softness. In its broadest scope, the formula “soft law” labels those regulatory instruments and mechanisms of governance that, while implicating some kind of normative commitment, do not rely on binding rules or on a regime of formal sanctions.² First developed in the sphere of public international law,³ the formula has spread to other fields, becoming a buzz word in the professional vocabulary of private international lawyers, E.U. lawyers and sociologists of law. The notion of soft law reflects two major trends in the globalization of law: the striking multiplication of producers of law and, in turn, of bodies of law and the privatization of legal regimes. A negative concept of soft law usually amounts to a critique of the state-centered vertical and hierarchical law-making model. A positive definition, however, appears more problematic, given the multiplicity and the complexity of soft legal regimes. A variety of institutional, social and academic actors produce soft law. At the level of European legal institutions, Recommendations and Opinions, while devoid of legally binding character, according to art. 249 of the EC Treaty, are not entirely without legal weight, though this weight may not be constant.⁴ The Commission's Communications and Guidelines as well as Inter-Institutional Agreements are further examples of

1 Joseph Grunfeld, *Soft Logic* (1999).

2 Francis Snyder, *The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques*, 56 Mod. L. Rev. 19 (1993); K.C. Wellens & G.M. Borchardt, *Soft Law in European Community Law*, 14 Eur. L. Rev. 267 (1989).

3 For a discussion of the role of soft law in international law see Christine M. Chinkin, *The Challenge of Soft Law: Development and Change in International Law*, 38 Int'l & Comp. L. Q. 850 (1989); Alan. E. Boyle, *Some Reflections on the Relationship of Treaties and Soft Law*, 48 Int'l & Comp. L. Q. 901 (1999); Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 Int'l. Org. 421 (2000).

4 Wellens & Borchardt, *supra* note 2.

institutional soft law. Social actors are also active producers of soft law; while private actors such as multinational corporations issue codes of conduct, quasi-public bodies such as trade associations and standardization bodies may develop guidelines and codes of practice as well. The so-called “New Lex Mercatoria” may be seen as soft law generated by global merchants; the Unidroit Principles and the standard contracts developed by the International Chamber of Commerce (ICC) and other arbitration bodies are also among the multiple species of soft law. Finally, academics may take the lead in developing soft law; The Lando Principles on European Contract Law (PECL) are a prominent soft tool developed by a group of self-appointed academics and tailored on the model of the American Restatements.

The blossoming of soft normative instruments has sparked theoretical debate, leading to a resurgence of notions of legal pluralism and reinvigorating interest in social norms. Sociological approaches have, so far, proved best suited for a study of soft regulatory regimes and legal pluralism. Law and Society scholars and sociologists of law have devoted a great deal of energy to the empirical and conceptual analysis of soft law and legal pluralism. My inquiry will pursue a different course. I will attempt an intellectual history of soft law, investigating its alleged remote origins.⁵ Private international lawyers, legal historians and comparative lawyers have questioned the origins of soft law. In the effort to unveil the lineage of soft law, two family trees are often sketched. The first genealogy is of truly venerable age: the ancestors of soft law are identified in medieval legal pluralism and the *lex mercatoria*. The second genealogy links soft law to notions of social law and legal pluralism developed by European anti-formalist jurists at the end of the 19th century and beyond. The two genealogies differ as to their status. The former is a recurrent motif in the debate over the European legal space. It is explicitly invoked by participants in the debate who appropriate the image of the Middle Ages sketched by a generation of post-war legal historians. Its adherents deploy it in their discussion of the harmonization of European law, the role of scholarship in the making of European private law and the transformation of legal education and pedagogy in Europe.⁶ The latter, on the other hand, is rarely explicitly delineated as a parentage of

5 For an intellectual history of soft law that focuses on rationalist and constructivist theories of soft law in the literature on international relations and international law, see David M. Trubek et al., *Soft Law, Hard Law and EU Integration*, in *Law and Governance in the EU and the US* 65 (Grainne de Burca & Joan Scott eds., 2006).

6 The neo-medievalist imagery is recurrent in the literature on the shaping of the European legal order; see *Symposium, L'ordine Giuridico Europeo: Radici e Prospettive*, 31 Quaderni fiorentini (2002); See also Thijmen Koopmans, *Towards a New “Ius Commune”*, in *The Common Law of Europe and the Future of Legal Education* 49 (Bruno de Witte & Caroline Forder eds., 1992); Hector L. MacQueen, *Scots Law and the Road to the New Ius Commune*, 4 *Electronic Journal of Comparative Law* (2000), “www.ejcl.org/ejcl/44/art44-1.htm”. Michael Joachim Bonell, *Legal Studies in Today's Europe: Towards a European Lawyer?*, 41 *Am. J. Comp. L.* 489 (1993); Jan Smits, *The Making of European Private Law: Towards a Ius Commune Europaeum as a Mixed Legal System* (2002); Romeu P. Casanovas, *Las Formas Sociales del Derecho Contemporaneo: el Nuevo “Ius Commune”* (1998); Lex Mercatoria and Arbitration: A Discussion of the New Law Merchant (Thomas Carbonneau ed., 1998); Fabrizio Marrella, *La Nuova Lex Mercatoria: Principi Unidroit e Usi Dei Contratti del Commercio Internazionale* (2003).

authors directly involved in the soft law controversy; rather it translates into a set of widely recurrent slogans, loudly voiced by advocates of soft harmonization and soft governance. “Flexibility,” “adaptability,” “problem-solving capacity,” “participation” and “coping with diversity” are powerful mottos echoing notions of organicism and pluralism elaborated by Savigny, Ehrlich, Gurvitch and Santi Romano.

Whether fully articulated, explicitly alluded to, or hidden between the lines, the two genealogies have come to pervade crucial debates over the globalization of law and the harmonization of European law. In the last decade soft law, in the form of recommendations, opinions, restatement-like codes and soft modes of governance has come to be seen as a promising tool for the harmonization of European law, providing a viable complement, or even alternative, to traditional hard law. The soft law v. hard law controversy has polarized the community of scholars and policymakers. While some argue for the enduring efficacy and normative preferability of traditional hard law mechanisms, others advocate a soft harmonization, calling attention to the merits of soft law. In short, the two genealogies are among the weapons used by the advocates of soft law and champions of hard law wage in their war over the shaping of the European legal order. In addition, the two genealogies are also the weapons with which proponents of competing projects of soft harmonization fight their duels. Far from advancing a unitary and cohesive project, the soft law camp is itself politically kaleidoscopic. In particular, two groups confront each other, promoting widely different political agendas.⁷ Some envisage soft law as the ideal tool for strengthening the European market, eliminating the obstacles resulting from the diversity of national laws and responding to the actual needs and demands of the business community.⁸ Others see soft law as the most effective means to implement a new social policy vision, coupling efficiency and solidarity, flexibility and security.⁹ The neo-medievalist genealogy and the social genealogy provide

7 For a critical overview of the positions in the debate about European private law see Fernanda Nicola, *Another View on European Integration. Distributive Stakes in the Harmonization of European Law*, in *Progressive Lawyering, Globalization and Markets: Rethinking Ideology and Strategy* (Claire Dalton & Dan Danielsen eds., 2006).

8 *Principles of European Contract Law*, Parts I and II, (Combined and Revised) (Ole Lando & Hugh Beale eds., 2000); *Principles of European Contract Law*, Part III (Ole Lando et al. eds., 2003); Ole Lando, *Optional or Mandatory Europeanization of Contract Law*, 8 Eur. Rev. Priv. L. 59 (2000); Ole Lando, *Principles of European Contract Law: An Alternative or a Precursor of European Legislation?* RabelsZ 261 (1992); Klaus Peter Berger, *The Creeping Codification of the Lex Mercatoria* (1997); Klaus Peter Berger, *Harmonization of European Contract Law: The Influence of Comparative Law*, 50 Int'l & Comp. L. Q. 877 (2001); Klaus Peter Berger, *The Principles of European Contract Law and the Concept of the Creeping Codification of Law*, 9 Eur. Rev. Priv. L. 21 (2001); Christian von Bar & Ole Lando, *Communication on European Contract Law: A Joint Response of the Commission on European Contract Law and the Study Group on a European Civil Code*, 10 Eur. Rev. Priv. L. 183 (2002); Christian von Bar & Stephen Swann, *Response to the Action Plan on European Contract Law: A More Coherent Contract Law* (COM(2003) 63), 11 Eur. Rev. Priv. L. 592 (2003). For a critical assessment of the latter see Martin W. Hesselink, *The European Commission's Action Plan: Towards a More Coherent European Contract Law?*, 12 Eur. Rev. Priv. L. 397 (2004).

9 These slogans are recurrent in the extremely prolific literature on soft law; see Joanne Scott & David M. Trubek, *Mind the Gap: Law and New Approaches to Governance in the Euro-*

the two factions with a powerful rhetorical armory. The neo-medievalist genealogy is often drawn upon by proponents of the market making agenda, who wish to highlight and romanticize soft law's efficient, flexible and organic nature. Conversely, the social genealogy tends to be appropriated by advocates of the new social policy vision who are keen on emphasizing soft law's pluralistic dimension and social potential. Closer inspection reveals, however, that the relation between the two agendas and the two genealogies is less compelling and more uncertain than one may think at first glance. The ambiguity and the indeterminacy of the respective arguments invite unexpected rhetorical and political alliances and odd pairings. Savigny's analogy between law and language and Ehrlich's notion of living law, for example, can easily serve the argumentative and rhetorical needs of both agendas.

Rather than clarifying the normative status of soft law or assessing its merits and pitfalls, this essay explores the rhetorical power and the ideological implications of its genealogies. A genealogical study of soft law as a legal structure affecting legal consciousness proves valuable in several respects. First, it de-naturalizes familiar narratives, revealing the legitimizing purposes behind notions of "softness," "social law" and "pluralism" as well as uncovering actual power struggles. Further, it exposes soft law as a structure designed to mediate between contradictory legal form and ideologies. Finally, a genealogical inquiry has transformative potential, undermining the rhetorical power of softness and pluralism, and fostering creative thinking about global legal regimes.

The aim of this essay is threefold. First, I wish to reconstruct and spell out the neo-medievalist genealogy and the social genealogy as they are invoked, or alluded to, in the European discourse on soft law. Hence, Part I of this essay sets the stage, outlining the main arguments and positions in the hard law v. soft law debate. Part II is devoted to tracing and investigating the neo-medievalist genealogy. Its proponents, I suggest, envisage continuities between the medieval legal order and contemporary soft legal regimes. Highly pluralistic, deeply factual and allowing broad autonomy to the merchants' self-regulating capacities, the medieval legal order is said to bear striking resemblances to the current

pean Union, 8 Eur. L. J. 1 (2002); David M. Trubek & Louise G. Trubek, *Hard and Soft Law in the Construction of Social Europe: The Role of the Open Method of Coordination*, 11 Eur. L. J. 343 (2005); Janine Goetschy, *The European Employment Strategy, Multilevel Governance and Policy Coordination: Past, Present and Future*, in *Governing Work and Welfare in a New Economy: European and American Experiments* 59 (Jonathan Zeitlin & David M. Trubek eds., 2003); Caroline de la Porte, *Is the Open Method of Coordination Appropriate for Organising Activities at the European Level in Sensitive Policy Areas?*, 8 Eur. L. J. 38 (2002); David M. Trubek et al., *supra* note 5; *Soft Law and Governance and Regulation: An Interdisciplinary Analysis* (Ulrika Morth ed., 2004); Stephane de la Rosa, *The Open Method of Coordination in the New Member States - the Perspectives for its Use as a Tool of Soft Law*, 11 Eur. L. J. 618 (2005); Sabrina Regent, *The Open Method of Coordination: A New Supranational Form of Governance?*, 9 Eur. L. J. 190 (2003); Catherine Barnard, *The Social Partners and the Governance Agenda*, 8 Eur. L. J. 80 (2002); Colin Scott, *The Governance of the European Union: The Potential for Multilevel Control*, 8 Eur. L. J. 59 (2002); Mario Telo, *Strengths and Deficits of the Open Method*, in *Integration in an Expanding European Union* 135 (Joseph H. H. Weiler, Iain Beggs & John Peterson eds., 2003); Johan P. Olsen, *Reforming European Institutions of Governance*, in *Integration in an expanding European Union*, *id.* at 45.

proliferation of multiple, highly privatized and largely autonomous soft bodies of law. Similarly, Part IV reconstructs and presents the social genealogy. Its adherents acclaim soft law as a form of deeply pluralist social law and embrace slogans echoing Savigny's organicism, Ehrlich's notion of living law as well as theories of legal pluralism developed by Gierke, Gurvitch and Santi Romano.

Second, I wish to unveil and expose the ruptures, jolts and ambiguities that mark the *genealogies of soft law*.¹⁰ Far from tracing obvious continuities, the neo-medievalist genealogy and the social genealogy combine apparent carry-overs and innovative ruptures. Therefore, Part III and Part V present a critical assessment and investigate the fractures and the ambiguities that pervade these genealogies. Legal pluralism, “living law” and *lex mercatoria*, I argue, are highly indeterminate and ambiguous concepts employed to designate widely differing phenomena and capable of serving radically different purposes.

Third, I wish to suggest that both genealogies, while evoking appealing consonances, are ultimately driven by purposes of legitimation. Thus, Part VI explores the role played by the two genealogies in the heated debate over the vices and virtues of soft law as a tool for the harmonization of European law. Both versions, I argue, are powerful ideological devices serving widely different professional and political agendas. The former, evoking ideas of organic efficiency and autonomy is well-suited to fit an agenda pursuing market integration and deregulation. The latter, invoking notions of living law, social law and pluralism, serves an agenda pursuing both social protection and efficient flexibility. Buttressing their arguments with appealing and universalizing genealogies enables proponents of the two agendas to obfuscate the particularized interests that lie behind the projects as well as to disguise their side effects and distributional implications.

2 Harmonizing European Law: The Hard Law v. Soft Law Debate

Starting from the early 1990s, a new wave of experimentalism has revolutionized the field of European law-and policy-making, triggering the development of a vast array of soft law tools. These tools, notably the European Employment Strategy (EES) and the Open Method of Coordination (OMC), allow for decentralized multilevel governance processes yielding voluntary guidelines and standards rather than compulsory regulation. Boosted by the 2000 Lisbon Council, soft law mechanisms have sparked vivid debates among scholars and policy-makers. The controversy touches upon a number of critical issues: the goals of European integration, the means of harmonization and, ultimately, the very “European-ness” of contemporary European legal culture. Conflicting images of Europe are at stake: a Europe committed to social protection and

10 Michel Foucault, *Nietzsche, Genealogy and History*, in *Language, Counter Memory, Practice* 139 (Donald Bouchard ed., 1977). “A genealogy,” Foucault writes, “will never confuse itself with a quest for the origins; on the contrary, it will cultivate the details and the accidents that accompany every beginning.” *Id.* at 144.

equality as opposed to a Europe of economic integration and market liberalization.

The very idea of soft law mechanisms as alternatives or complements to traditional hard law arose a decade ago from the acknowledgement that European integration had created a fundamental asymmetry between policies promoting market efficiency and policies aimed at social protection. While the former have been progressively and heavily Europeanized, the latter have received episodic attention, mostly remaining confined to the national level.¹¹ As a result, national welfare states are legally and economically constrained by European rules of economic integration, liberalization and competition law.¹² The EES, the OMC and other soft approaches were conceived as tools aimed at redressing this asymmetry by fostering social integration. While they share a commitment to European social policy, participants in the debate disagree about the appropriate means to pursue it. Advocates of soft law claim that social integration is best effected through multilevel decentralized processes resulting in open-ended and flexible guidelines and standards. Conversely, defenders of hard law insist that social policies must be pursued through a centralized, vertical and formal decision-making process yielding uniform and binding rules creating justiciable rights.

Positions in the hard v. soft controversy are highly varied and nuanced. The soft law party enlists both the “enthusiasts” of soft law and the advocates of “hybridity” while the hard law camp comprises the “skeptics” as well as the “detractors” of softness. Both the “enthusiasts”¹³ and the proponents of hybridity¹⁴ are strongly committed to the “Social Europe” agenda. They emphasize the richness and diversity of European welfare regimes, view the social model as part and parcel of the European tradition and signal the need to modernize it, combining dynamism and competitiveness with social cohesion. Following the lead of the Lisbon summit¹⁵ and deviating from previous welfare state policies,

11 Fritz W. Scharpf, *The European Social Model*, 40 J. Common Mkt. Stud. 645, 665 (2002), suggesting that in the nation state, both types of policy had been in political competition at the same constitutional level, while in the process of European integration the relationship has become asymmetric.

12 Id. at 647-48.

13 With various nuances and qualifications, an optimistic assessment of soft multilevel governance is shared by Armin Schafer, *Beyond the Community Method. Why the Open Method of Coordination was Introduced to EU Policy Making*, European Integration online papers EIoP vol. 8 (2004), n.13, “eiop.or.at/eiop/texte/2004-013a.htm”; Claudio M. Radaelli, *A New Governance Architecture for The European Union*, Swedish Institute for European Policy Study, 2003, available at www.sieps.su.se; Janine Goetschy, *The European Employment Strategy. Genesis and Development*, 5 Eur. J. Ind. Rel. 2 (1999); Goetschy, supra note 9; Scott & Trubek, supra note 9; Regent, supra note 9. See also *Building Social Europe Through the Open Method of Coordination* (Caroline De La Porte & Philippe Pochet eds., 2002).

14 Trubek & Trubek, supra note 9; Claire Kilpatrick, *New EU Employment Governance and Constitutionalism*, in *Law and Governance in the EU and the US*, supra note 5, 121; Scharpf, supra note 11; Grainne de Burca, *EU Race Discrimination Law: A Hybrid Model?*, in *Law and Governance in the EU and the US*, supra note 5, 97.

15 On the key developments in the field of social inclusion from the Lisbon European Council of March 2000 (which set the goal that Europe should become the most competitive among world economies and a dynamic knowledge based economy with more and better jobs and

the new European social vision pursues equality, solidarity and “flexsecurity,” fostering competitiveness and productivity while ensuring adequate standards of employment security.¹⁶ However, the two groups differ in their assessment of the merits of soft law. The “enthusiasts” combine commitment to the modernization of the European social model with a wholehearted faith in the virtues of soft law mechanisms. While hard law is deemed inadequate, either because it inhibits effective and experimental solutions or because it fails to meet the need for a radically different normativity reflecting broader global transformations,¹⁷ soft law is praised for its flexibility, its organic responsiveness to social goals and its pluralistic thrust. The enthusiasts consider soft law to be blessed with both “input legitimacy” as well as “output legitimacy.”¹⁸ Soft law is said to foster active and pluralistic deliberation, encourage cultural and political diversity, trigger the production of knowledge and, finally, to be more effective than commonly thought. Soft legal tools, the “enthusiasts” claim, spur the dynamic interaction of multiple levels of government as well as the participation of a variety of social actors. Not only does the OMC foster cooperation between the Commission, Member States and lower levels of government, it also involves a multiplicity of stakeholders, social parties, academics and grass roots organizations.¹⁹ Moreover, soft modes of governance are deemed to allow European policy makers to benefit fully from the rich political and cultural diversity of European welfare traditions. The structural differences between the three worlds of welfare capitalism, the Scandinavian, the British and the Continental, mirroring radically different social philosophies, have high political salience and, so it is believed, would ultimately curb top-down uniform European social policies.²⁰ Further, soft law is said to trigger a pragmatic approach to social reform as well as the production of new knowledge. Mechanisms of comparative bench-marking, information exchange and peer-review foster experimentation

greater social cohesion) to the Laeken Council in December 2001 (animated by the ambition to become a power seeking to set globalization within a moral framework, to anchor it in solidarity and sustainable development), see Tony Atkinson, *Social Inclusion and the European Union*, 40 J. Common Mkt. Stud. 625 (2002). See also Catherine Barnard, *Solidarity and New Governance in Social Policy*, in *Law and Governance in the EU and the US*, supra note 5, 153-78.

16 Ton Wilthagen, Frank Tros & Harm van Lieshout, *Towards Flexicurity: Balancing Flexibility and Security in the EU Member States*, “tilburguniversity.nl/faculties/frw/research/schoordijk/flexicurity/publications/papers/fxp20033.pdf”; See also Ton Wilthagen & Martijn van Velzen, *The Road Towards Adaptability, Flexibility and Security*, www.ettk.ee/upload/koolitusfail/TheRoadTowardsWilthagen.pdf.

17 See Grainne de Burca & Joanne Scott, *New Governance, Law and Constitutionalism*, in *Law and Governance in the EU and the US*, supra note 5, 1.

18 For the concept of “input legitimacy” and “output legitimacy,” see Fritz W. Scharpf, *Problem-Solving Effectiveness and Democratic Accountability in the EU*, (Max Planck Institute for the Study of Societies, Working Paper No. 3, February 1, 2003). See also Andrew Moravcsik, *Reassessing Legitimacy in the European Union*, in *Integration in an Expanding European Union*, supra note 9, at 77.

19 See Atkinson, supra note 15, at 629 and Trubek & Trubek, supra note 9, at 348.

20 Scharpf, supra note 11, at 650-51.

and mutual learning, ultimately stimulating pragmatic deliberation.²¹ Finally, the “enthusiasts” argue, soft legal tools are highly effective and may actually turn out to be less “soft” than is commonly believed. At least in practice, they argue, hard law is more open ended and discretionary than widely assumed whereas soft law's is more effective as a result of combining both bottom-up and top-down mechanisms. The latter implies shaming as well as diffusion through mimesis and discourse; the former involves deliberation expectation and learning. As a result, soft law can be a powerful tool for social reform, bringing about legal change more effectively than traditional hard legislation.²²

More tepid in praising the virtues of soft law, the champions of hybridity call for combinations of traditional hard law and soft law processes. While emphasizing the virtues of soft law as an organic social product ensuring effectiveness and a pluralistic respect for diversity, they claim that it may be most effective if combined with hard law. Hybrids may come in various shapes, the combination of OMC processes with framework directives being a favorite option. Advocates of hybridity differ about the role they attribute to hard law. For some hard law is to secure a regulatory bottom-line below which soft law may not fall; soft standards and guidelines complement a base of binding hard norms securing rights and determining fundamental policy directions. For others hard law constitutes a default regime to be complied with in the absence of soft spontaneous and experimental normative regimes.²³ The champions of hybridity are profuse in emphasizing the organic nature and the pluralistic thrust of soft law as an authentic social, living law that complements traditional hard norms. The social genealogy informs their arguments, occasionally surfacing between the lines of their writings. Hard/soft hybrids are deemed highly effective combinations: their soft components ensure organic responsiveness to social needs, foster pluralism and participation, and fuel mutual learning; their hard elements secure higher compliance, since national policy makers are no longer able to ignore soft norms, and they allow an effective correction of the asymmetry between market harmonization and social integration. While the exclusive reliance on soft law may reinforce the perception of social policies as ancillary, ultimately augmenting the imbalance between the relatively modest harmonization of social policies and far-reaching market harmonization, hybrid mechanisms confer social policies a status coequal with measures fostering market integration.

The skeptics denounce soft law's futile, unrealistic and, at times, perverse nature.²⁴ They call into question the effectiveness of organic and spontaneous soft “living law.” The lack of enforcement power, the insufficiency of peer pressure and bench-marking as well as the space left open for creative compliance hinder the “organic,” so they argue, the efficacy of soft norms. Further, the skeptics highlight the unrealistic character of the advocates' assumption that policy change may occur along planned lines of learning and deliberation rather

21 *Id.* at 654; Trubek & Trubek, *supra* note 9, at 349.

22 Trubek, *supra* note 9, at 356.

23 *See de Burca & Scott, supra* note 17.

24 Damian Chalmers & Martin Lodge, *The OMC and the European Welfare State*, (ESCR, Centre for Analysis of Risk and Regulation, Discussion Paper, No. 11, 06/2003).

than through obligation. Finally, they bring into focus soft law's perverse effects. Spontaneous enforcement mechanisms such as "naming and shaming" may lead to unexpected consequences: refusal to accept shame may be transformed into a powerful national electoral asset or lead to embarrassment and abandonment of soft reform efforts. By the same token, accommodating diversity may discourage further integration or threaten existing policy advances by fostering policies strongly linked to national sovereignty and welfare state diversity.

If the skeptics expose the blind spots of the social genealogy, the detractors of soft law unrelentingly denounce its obfuscating and distorting effects.²⁵ Their primary targets are the rhetorical celebration of pluralism and organicism and the allusions to an alleged continuity with a tradition of European social legal thought. Committed to thorough social reform and suspicious of "flexsecurity" as well as disguised neo-liberalism, they detect, behind references to 19th century theories of legal pluralism, power asymmetries and distributive imbalances. "Pluralistic participation" in soft governance processes is limited to visible and powerful social actors, reinforcing and asserting existing power structures and cleavages rather than encouraging openness. Soft rhetoric, they contend, masks hard practices. The turn to soft law marks a surrender to the market; soft law is "soft with aggressive and opportunistic market actors, who under the shield of soft legality, succeed in transferring costs to society and hard for weak actors."²⁶ Finally, the controversy over soft law strikes highly emotional chords, raising critical questions as to the European-ness of European legal culture and regarding the pattern of circulation of legal ideas in the post-war era. Invoking the specter of "Americanization," the detractors of soft law strike a blow at the social genealogy. Repudiating the social genealogy's emphasis on soft law's "European-ness," they denounce soft normativity as a "United Statesean" import. Rather than the most recent manifestation of a century-old strand of European socio-legal, soft law is "yet another pattern of reception of American categories poorly fitting the fabric of European law."²⁷

Not only does the controversy juxtapose enthusiastic advocates of soft law and staunch defenders of hard law, it also pits against each other radically different agendas of soft harmonization. While scholars and policy makers committed to the Social Europe agenda envisage soft law as the appropriate tool for modernizing the European social model, others deem soft law an effective means for strengthening the European market and for responding to the needs of the global merchant class. Albeit with different tones and nuances, the spokesmen of these projects share a commitment to harmonization as a means for strengthening the European Single Market, a penchant for privileging private

25 Jan Klabbers, *The Redundancy of Soft Law*, 65 *Nordic J. Int'l Law* 167 (1996); Jan Klabbers, *The Undesirability of Soft Law*, 67 *Nordic J. Int'l Law* 381 (1998); Ugo Mattei, *Hard Minimal Code Now! A Critique of Softness and a Plea for Responsibility in the European Debate over Codification*, in *An Academic Green Paper on European Contract Law* 215 (Stephan Grundman & Jan Stuyk eds., 2002).

26 Ugo Mattei, *Hard Code Now! A Critique of Softness and a Plea for Responsibility in the European Debate over Codification*, in *The European Codification Process*. Cut and Paste 107, 115 (2003).

27 *Id.* at 107.

autonomy and freedom of contract and a faith in the social actors' self-regulatory capacity and self-responsibility. Uniformity of rules and conceptual language is said to bolster the European Single Market and the "global market place" by removing obstacles to cross-border trade,²⁸ eliminating the distortions resulting from different national laws and reducing the cost of legal services.²⁹ Commitment to market values translates into a presumptive analytical priority for freedom of contract and party autonomy, mitigated, to be sure, by social correctives. In this respect, the choice of the drafters of the PECL to devote a specific provision to freedom of contract and to placing it right at the beginning of the Principles speaks for itself.³⁰ However, the individualist penchant of the PECL is immediately mitigated by a social corrective, i.e., subjecting the parties' autonomy to the principles of good faith and fair dealing.³¹ Finally, calls for a new soft lex mercatoria often rest on faith in the self-governance of economic actors and on the belief that "international trade and commerce constitutes the ideal climate for the free development of contractual structures."³²

The soft law/liberal market agenda combines commitment to market-promoting objectives with an instrumental preference for soft law tools.³³ The spokesmen of the various soft-harmonization projects share a belief in the effectiveness of soft devices in order to achieve market integration. More specifically, they share an anti-positivist preference for an informal and gradual harmonization, a belief in the possibility of distinguishing between law and politics, between technical rules and policy questions, a commitment to the functional method and a penchant for flexibility and adaptability. Soft law is praised for allowing an informal and gradual harmonization. Uniformity is to be achieved by the private efforts of academics and legal practice, rather than through the formal means of traditional continental codification.³⁴ A soft and

28 See *Principles of European Contract Law*, Parts I and II, supra note 8, at xxi. The Introduction to the Principles emphasizes the need for uniform rules, listing among the benefits arising from uniformity, the facilitation of cross border trade within Europe and the strengthening of the European single market.

29 Von Bar & Swann, supra note 8, at 607.

30 Martin W. Hesselink, *The New European Private Law* 87-110 (2002).

31 *Principles of European Contract Law*, Parts I and II, supra note 8, at 99; freedom of contract is enshrined in art. 1:102: "like the national legal systems of the European Union the principles acknowledge the right of the citizens and their enterprises to decide with whom they will make their contracts and to determine the content of these contracts." This rule, however, is subject to important restrictions.

32 Berger, *The Principles of European Contract Law and the Concept of the Creeping Codification of Law*, supra note 8, at 28.

33 For a sharp critique of this agenda see Study Group on Social Justice in European Private Law, *Social Justice in European Contract Law*, 10 Eur. L. J. 653 (2004); for an alternative version of the soft/market agenda combining pleas for spontaneity, references to European-ness and attention to weak parties and social values, see Jan Smits, *European Private Law. A Plea for a Spontaneous Legal Order*, (Maastricht Faculty of Law, Working Paper No. 3, 2006).

34 Berger, *The Principles of European Contract Law and the Concept of the Creeping Codification of Law*, supra note 8, at 23; Hesselink, supra note 30, at 90.

informal harmonization is said to avoid the difficulties and shortcomings of a formal hard codification by overcoming the reluctance of domestic legislatures, political opposition in the jurisdictions concerned and the delay factor.³⁵ Not only should harmonization be informal, it should also be a gradual and steady process that respects law's organic development and dynamism.³⁶ As to the scope and content of soft harmonization, proponents of the soft law/liberal market agenda believe in the possibility of distinguishing between law and politics, between technical rules susceptible of expert harmonization by legal science or practice on the one hand and policy questions that are best decided by the legislator on the other hand. For instance, the PECL cover "general contract law," perceived to be politically fairly neutral, leaving special contracts, perceived to raise policy issues, to the legislator.³⁷ Methodologically, proponents of soft market integration favor a functionalist comparative approach aimed at identifying a common core of functional equivalents.³⁸ Finally, soft law tools are believed to strike a balance between the need for flexibility and the need for legal certainty,³⁹ allowing organic adaptability while ensuring certainty through the creation of a common infrastructure⁴⁰ governing contracts.

The question of the *genealogy of soft law* is critical to the hard v. soft debate. By investigating its remote origins, supporters of soft law provide what is at first glance a peculiar product of historical texture in late modernity. Soft law is viewed against the backdrop of larger historical patterns: soft normative regimes are said to have emerged at various times and are traced back to categories familiar to European jurists.

35 Berger, *The Principles of European Contract Law and the Concept of the Creeping Codification of Law*, supra note 8, at 26.

36 Emphasis on graduality can be found in both Berger's "creeping codification" project (id. at 24) and in the PECL, where the creation of an infrastructure for community law governing contract is considered a first step towards a future legislative unification of contract law; see *Principles of European Contract Law*, Parts I and II, supra note 8, at xxii and Hesselink, supra note 30, at 76. See also von Bar & Swann, supra note 8, at 599, point 14.

37 *Principles of European Contract Law*, Parts I and II, supra note 8, at xxv, "the principles are confined to the general law of contractual obligations. They do not deal with any specific type of contract nor do they make special provision for consumer contracts which raise policy issues more appropriately determined by Community law and national legislation."

38 Hesselink, supra note 30, at 52-53; *Principles of European Contract Law*, Parts I and II, supra note 8, at xxv, emphasize that the Commission has taken a functionalist approach in deciding which topics to include in the Principles; see also Berger, *The Principles of European Contract Law and the Concept of the Creeping Codification of Law*, supra note 8, at 31, on how an internationally useful construction of domestic law emphasized the increased significance of comparative law in practice.

39 Berger, *The Principles of European Contract Law and the Concept of the Creeping Codification of Law*, supra note 8, at 24, noting that a European civil code would introduce a static element; legal certainty would be achieved at the price of inflexibility. Restatements and other forms of informal codification leave enough room for the adaptation of law to new developments while maintaining an acceptable level of legal certainty. Hesselink, supra note 30, at 96, noting that the style of the Principles is meant to create maximum flexibility in order not to inhibit future development.

40 *Principles of European Contract Law*, Parts I and II, supra note 8, at 22.

3 The Neo-Medievalist Genealogy: The Romance of the Middle Ages

The neo-medievalist genealogy revives the romance of the Middle Ages, casting a soft organicist light with a fairy tale aura on soft law. According to the proponents of the neo-medievalist genealogy, contemporary soft legal regimes resemble the medieval legal order in a number of defining traits: pluralism, facticity and the prominence of the *lex mercatoria* as a private, a-political, and technical system of law. The neo-medievalist genealogy is framed as a narrative. Comparatists, legal sociologists and private international lawyers appropriate the analyses of a generation of post-war legal historians and, turning themselves into story tellers, narrate the romance of medieval legal pluralism, chronicling the emergence of a fertile and dynamic ensemble of multiple organic legal orders. They recite the tale of medieval facticity, portraying a naturalist and spontaneous legal order where facts exert an inherent normative power. Finally, they tell the story of “the venerable old lady,” the *lex mercatoria* who, in Berthold Goldman's words, “has twice disappeared from the face of the earth and twice been resuscitated.”⁴¹

3.1 The Romance of Medieval Legal Pluralism

Paolo Grossi, borrowing from Italian legal philosopher Capograssi, employs the notion of “*esperienza giuridica*”⁴² as an interpretative scheme for investigating the complex and multi-faceted historical and legal reality of the Middle Ages.⁴³ In the debate over legal globalization the medieval legal system and the global soft legal regimes are often approached as two widely diverse, though highly similar, “legal experiences.”

Pluralism, legal historians have observed, is a critical feature of medieval law. Historians with widely diverse agendas and methodologies provide variously nuanced, but overall similar accounts of medieval legal pluralism. Moved by the intent to foster a social theory of law integrating idealism and materialism, Harold Berman challenges the standard narrative of incremental change by claiming that in the 11th and 12th centuries a fundamental legal revolution occurred in Western Europe. Triggered by the “Papal Revolution,” in 1075 Pope Gregory VII affirmed the political and legal supremacy of the papacy over the entire church and the independence of the clergy from secular control. The

41 Berthold Goldman, *Lex Mercatoria*, 1 Forum Internationale, nr. 3, 3, 4 (1983).

42 Giuseppe Capograssi, *Studi sull'esperienza giuridica*, (1932); Giuseppe Capograssi, *Il problema della scienza del diritto* (1937); Georges Gurvitch, *L'expérience juridique et la philosophie pluraliste du droit* (1937). On the notion of “legal experience,” see also Riccardo Orestano, *Diritto. Incontri e Scontri* (1981).

43 Paolo Grossi, *L'ordine giuridico medievale* (2000); See also Manlio Bellomo, *The Common Legal Past of Europe 1000-1800* (1995).

Revolution was a motivating force in the rise of organic and autonomous legal systems, beginning with the canon law developed by the Roman Catholic Church. Legal pluralism originated in the differentiation of the ecclesiastical polity from secular polities.⁴⁴ Against the background of canon law, several secular legal systems began to emerge. Organic and coherent bodies of feudal law, manorial law, mercantile law and urban law arose in response to new social and economic needs. The delicate balance between unity and plurality proved a dynamic and productive force. The very complexity of a common legal order containing diverse legal systems, Berman notes, contributed to legal sophistication.⁴⁵ In sum, Berman argues that medieval legal pluralism, reflecting and reinforcing political and economic diversity, prompted growth, development and freedom.⁴⁶

In a similar vein, though with a different agenda, Paolo Grossi portrays complexity and pluralism as central traits of the medieval legal experience. Challenging methodological anachronisms and striving to unveil law's intrinsic humanity and historicity, Grossi sees unbound pluralism as the critical feature of medieval law. The medieval legal order is to be perceived as a single unitary legal experience, consisting of a plurality of legal orders and of multiple local autonomies spontaneously springing from social life. While in the Early Middle Ages, pluralism mirrored a gradual "vulgarization" of law, in the Late Middle Ages, it was nourished by the coexistence of the *ius commune* and the multiple *iura propria*.⁴⁷ In the Early Middle Ages the progressive collapse of the Roman state structure liberated and reinvigorated multiple social autonomies, long repressed by the central administrative apparatus. From the 4th century on, starting at the peripheries of the Empire, a thread of "vulgar" law developed and gained strength alongside "official law," dramatically transforming the structure of the legal order. In Grossi's analysis, vulgarization of law implies a multiplicity of social forces filling the void left by the disintegration of the Roman political and administrative apparatus. "Vulgar" law refers to multiple legal styles, mentalities and solutions spontaneously arising within social groups in response to their peculiar needs, gradually displacing "official" law.⁴⁸ In early-medieval

44 Harold Berman, *Law and Revolution. The Formation of the Western Legal Tradition* 10-11 (1983).

45 *Id.* at 10. The very complexity of a common legal order containing diverse legal systems contributed to legal sophistication. Which court has jurisdiction? Which law is applicable? How are legal differences to be reconciled? Behind the technical questions lay important political and economic considerations: church versus crown, crown versus town, town versus lord, lord versus merchant and so on. Law was a way of resolving the political and economic conflicts. Yet law could also serve to exacerbate them.

46 *Id.* at 10. The pluralism of Western law, which has both reflected and reinforced the pluralism of Western political and economic life has been, or once was, a source of development, or growth, legal growth as well as political and economic growth. It has also been, or once was, a source of freedom.

47 Grossi, *supra* note 43, at 53-54. Grossi distinguishes between "primo medioevo" and "secondo medioevo," or "medioevo sapienziale," the end of the 11th century being the dividing line.

48 *Id.* at 53.

society, governed by the personality principle each individual carried his or her own specific and differentiated legal regime wherever he or she went. The Roman and the Lombard, the cleric and the merchant invoked their self-created and self-enforced law. On the other hand, in the Late Middle Ages, a dynamic legal pluralism arose from the coexistence of the *ius commune*, the universal *droit savant* elaborated by continental European legal science on the basis of Roman and canon law, and the multiple *iura propria*, the highly diverse norms posited by local institutions, i.e., kingdoms, principalities, lordships and corporations.

For Grossi, as for Berman, medieval pluralism is a dynamic, organic and protective force. It is dynamic because it creates a fertile tension between unity and plurality, illustrated by the image of a harmonic chorus of producers as well as of bodies of law. Political authorities, merchant associations, guilds and clerical bodies are among the multiple “voices” concurring in the construction of the medieval legal order. Furthermore, medieval legal pluralism is a deeply organic force highly responsive to factual experience and actual social needs. Although variable, amorphous and alluvial, the medieval pluralistic legal structure is peculiarly congenial to the factual demands of the multiple intermediate social formations. Finally, in the unruly medieval world, legal pluralism is a guarantee against the perils of everyday life, providing groups and individuals with safe protective niches.⁴⁹

The romance of medieval legal pluralism is a recurrent motif in the discourse on soft normativity. The highly fragmented and soft global legal order is considered strikingly similar to the unbound medieval legal pluralism. As in the Middle Ages, legal pluralism today entails both a multiplicity of producers as well as of bodies of law. Various global social sub-sectors, it is said, are developing a law of their own, in relative insulation from the state. Whereas a harmonic ensemble of manorial law, feudal law, mercantile law and urban law enlivened the medieval legal order, a dynamic coexistence of a soft and global mercantile law, sports law, cyber law, social services law, and even tourist law characterizes the postmodern era.⁵⁰ Not only is the medieval imagery well-suited for descriptive purposes, it also provides a profitable normative perspective. Similar to medieval legal pluralism, global legal pluralism is portrayed as a source of freedom and efficiency, being both deeply organic and ultimately socially protective. The multiple bodies of soft law are regarded in technical, functional and apolitical terms. While their spontaneous and factual nature is seen as a sign of both efficiency and effectiveness, their self-produced character is regarded as a warrant of freedom and autonomy.

49 *Id.* at 31.

50 Gunther Teubner, *Global Bukowina: Legal Pluralism in the World Society*, in *Global Law Without a State* 3, 7 (1997).

3.2 Romantic Facticity

A further aspect under which soft law is often compared with medieval law is the relationship between facticity⁵¹ and normativity. Medieval law, historians contend, was deeply organic and factual, arising spontaneously from the different forms of social aggregation. The building of the legal order, far from being the result of a conscious centralized effort, occurred in a relatively ad hoc and haphazard manner.⁵² In Grossi's narrative, while law in the Early Middle Ages was crafted in the workshop of practice, in the Late Middle Ages, a profoundly "sapiential" age, law is shaped by two mutually integrating forces, science and practice.

In the early medieval world where, as Marc Bloch vividly suggests, men were close to nature and subjected to ungovernable forces,⁵³ "custom had become the sole living source of law and princes even in their legislation scarcely claimed to do more than interpret it."⁵⁴ Whole aspects of social life were at best imperfectly covered by written law next to which there was a wide margin of purely oral tradition.⁵⁵ One of the central features of the early medieval era is

51 For Grossi's definition of law's "facticity" (*fattualita del diritto*) see Grossi, *supra* note 43, at 58: "... law's facticity means the desperate effort to find solid certainties beyond the conventional and the artificial, in a realm of mere facts that the observer respects with deep humility. Clear of any sense of pretentious superiority, the observer turn to facts mysterious and ungovernable though powerful facts trying to decipher the message they carry, the rule they bear inscribed from time immemorial." (My translation from the Italian.)

52 *Id.* at 57: The law of the prince is a minor vehicle for the development of the medieval legal order. The production of law happens mainly through other channels. Because of law's relative indifference towards political power, the construction of the legal order happened in relative spontaneity. No longer the product of a programmed and centralized initiative, law is restored to its factual origins, retrieving its nature of spontaneous scansion of the social fabric. Free from inhibiting constraints, the law springs from facts and is built upon facts. In a world where the political power seems to renounce its ordaining function, the sphere of the legal and the sphere of the factual tend to merge and validity yields to efficacy.

For a different image of the medieval legal order, with stronger emphasis on vertical power, see Paul Hyams, *Rancor and Reconciliation in Medieval England* (2003). For a discussion of structures of governance in the medieval legal order, see Otto Brunner, *Land Und herrschaft, grundfragen der territorialen verfassungsgeschichte Sudostdeutschlands im mittelalter* (1941); *Land and Lordship. Structures of governance in medieval austria* (Howard Kaminsky & James Van Horn Melton trans., 1992).

53 Marc Bloch, *La Societe Feodale* (1940); 1 *Feudal Society*, 72 (F. Manyon trans., 1961): "The men of the two feudal ages were close to nature-much closer than we are; and nature as they knew it was much less tamed and softened than we see it today [...] There is no means of measuring the influence which such an environment was capable of exerting on the minds of men, but it could hardly have failed to contribute to their uncouthness."

54 *Id.* at 111.

55 *Id.* at 109, Bloch describes the growing relevance of custom as a source of law in the pre-feudal period: "If a judge in pre-feudal Europe of the early ninth century had to say what the law was how did he proceed? His first task was to examine the texts [...] But the task was not always so simple. Let us leave aside those cases, in practice no doubt quite frequent, in which since the manuscript was lacking or, as with the massive Roman collections, inconvenient to consult, the rule in question, although the source might have been the law-book, was in fact only known by usage. The most serious problem was that no book was capable of deciding everything. Whole aspects of social life-relations inside the manor, ties between

that “this margin increased beyond all bounds, to the point where, in certain countries, it encroached on the whole domain of law.”⁵⁶ In Germany and France, where this trend was particularly significant, law, no longer based on the written word, consisted of long-established rules of diverse origin orally preserved and transmitted.⁵⁷ Similarly, in the countries where the old texts survived as objects of study and knowledge, “social needs had brought with them a great number of new usages, some complimentary to them, other superseding them.”⁵⁸ Grossi describes the early medieval legal system as rei-centric (rei-centrico), i.e., as infused with an all-pervading naturalism; legal rule are inscribed in the nature of things, which, no longer repressed or sublimated, fully exerts their own normative power.

Conversely, the Late Middle Ages witnessed a fertile symbiosis of practice and science. The Renaissance of the 12th century rang in an age of “fresh and vigorous life,”⁵⁹ leaving its signature on philosophy, art, architecture and law. Formerly a mere spontaneous emanation of social life, law was now the product of a legal science that was both highly sophisticated and grounded in factual experience. Law was crafted in the “sapiential workshop” of the jurists, in close adherence to social facts and needs. Sensitive to the urgencies of social life, the jurists turned to the rich repository of usages and custom to find the raw material for their craft; they organized the legal inventions of social practice in refined conceptual architectures, though preserving their pragmatic vitality.⁶⁰

man and man, in which feudalism was already foreshadowed-were very only imperfectly covered by the texts and often not at all. Thus by the side of the written law there already existed a zone of purely oral tradition.”

56 Id. at 109.

57 Id. at 109-11. In Germany and France, Bloch notes, the disappearance of written sources and the significance of custom reached its extreme limits. “In France the last capitulary dates from 884, while in Germany the spring seems to have run dry from the dismemberment of the Empire after the death of Louis the Pious. At most, a few territorial princes - a duke of Normandy, a duke of Bavaria, promulgated here and there one or two measures of fairly general application.” Bloch searches for the reasons of this failure. According to Bloch, while the weakness into which the royal power had fallen might be an explanation for France, it doesn't hold true for Germany where the Saxon or Salian emperors were powerful. Instead, Bloch emphasizes the close relation that existed in France and Germany between the decay of the old barbarian laws and the decline of education among the laity.

58 Id. at 111. In Italy, the barbarian laws, the Carolingian capitularies as well as the Roman law, continued to be studied, summarized and glossed. In England, the rulers until Cnut codified or completed the customs and even modified them specifically by their edicts. After the Norman conquest, a legal literature developed which though written in Latin was based essentially on Anglo-Saxon sources.

59 Charles Homer Haskins, *The Renaissance of the Twelfth Century* vi (6th ed. 1976).

60 Grossi, *supra* note 43, at 184, “the new legal science developed in Bologna is highly sensitive to custom and practice. It is eager to accommodate custom in the theory of the sources of law, giving it full appreciation and it is keen on appropriating the solutions devised by everyday practice perfecting them and strengthening them in solid conceptual architectures” (my translation from the Italian). For a discussion of custom as a source of law, Grossi refers to the well known *Summa Trecensis* redacted in the first half of the 12th century. He quotes Cino da Pistoia who said that non written law “in facto consistit” and Baldo de Ubaldis who wrote that “consuetudo est quoddam tempus complexum et formatum,” thus emphasizing the role played by both time and human activity in the formation of custom.

Hence, in both the earlier and the later Middle Ages, facticity was a critical feature of law.⁶¹ Emphasizing the profound facticity of the medieval legal experience is not merely to say that law springs from facts, but also to note the vitality and self-sufficiency of such its genesis. In the absence of a centralized institutional structure, facts displayed a high degree of vitality, functioning as sources of law in a formal sense. In the medieval legal experience, Grossi suggests, facts exerted an actual inner normative power, shaping the jurists' consciousness and generating legal norms and structures. Grossi's narrative, though in itself refraining from any romantic de-politicization of the medieval legal order, has nourished romanticizing interpretations stressing the organicist and factual genesis of medieval law and eclipsing the genetic link between law, power and sovereignty. Stripped of its vertical dimension, law is seen as emanating spontaneously from social forces lying beyond and above political power.

The romance of medieval facticity pervades the hard v. soft debate. Soft law is said to spring organically from the social peripheries rather than from the political centers of nation states and international institutions.⁶² As in the medieval legal experience, observers note, social and economic facts display an effective normative power. Soft law's intense facticity is envisaged as a warrant of flexibility and efficiency. Soft economic law develops and evolves according to the needs of global economic transactions and organizations and is thus extremely plastic in responding to the interests of global economic actors. In Gunther Teubner's words, the deep social embeddedness of its "quasi-legislative" power renders soft economic law a "corrupt law - in the technical sense of the Latin word *corrumpere*."⁶³ Soft law mirrors "the advent of patterns of flexible accumulation associated with post-Fordist production and efforts to improve productivity and competitiveness."⁶⁴ Due to its facticity and plasticity, soft law is said to be highly efficient in accommodating fast-changing economic needs and processes of integration.⁶⁵

3.3 *The Romance of the Venerable Old Lady*

The romance of the venerable old lady is the highlight of the neo-medievalist genealogy, allowing global jurists to find the roots of contemporary soft legal regimes in the medieval *lex mercatoria*, the largely self-enforced body of norms stemming from the customs and practices of medieval merchants.⁶⁶ The

61 Grossi, *supra* note 43, at 57.

62 Teubner, *supra* note 50, at 7.

63 *Id.* at 19.

64 A. Claire Cutler, *Private Power and Global Authority* 30 (2003). See also Peer Zumbansen, *Sustaining Paradox Boundaries: Perspectives on Internal Affairs In Domestic and International Law*, 15 *Eur. J. Int'l L.* 197 (2004).

65 For a discussion of the role which the new soft private law has played in the emergence of new forms of sovereignty, see Daniela Caruso, *Private Law and State Making in the Age of Globalization*, 39 *N. Y. U. J. Int'l L. & Pol.* (2006).

66 Harold Berman & Colin Kaufman, *The Law of International Commercial Transactions* (*Lex mercatoria*), 19 *Harv. Int'l L. J.* 221 (1978); Bernardo M. Cremades & Steven L. Plehn, *The*

chronicle of the centuries-long development of commercial law is presented as suspenseful story of the *lex mercatoria* which has twice disappeared from the face of the earth and twice been resuscitated.”⁶⁷ The narrative is vivid and captivating, evoking a magic world of Italian silks and Flemish linens and intriguing the reader with sensational coups de theatre and masquerades. Although fiercely challenged by a strand of revisionist scholarship, this narrative has been widely circulated and endorsed.⁶⁸ The plot is seductive, unfolding in three episodes.

The venerable old lady is said to have first appeared under the semblances of the Roman *ius gentium*, as the formally autonomous source of law regulating the economic relations between Roman citizens and foreigners. An organic body of law administered by the *praetor peregrinus*, the *ius gentium* consisted of rules and institutions borrowed from the customs of international commerce. The old lady's life was severely endangered when the Antonian Constitution of 212 A.D. extended Roman citizenship to all the inhabitants of the Empire, triggering legal and ethnic homogenization. The calamitous recession triggered by the collapse of the Roman Empire was fatal to the old lady. In Marc Bloch's words, the civilization of the West, “forged several centuries earlier in the fiery crucible of the Germanic invasions, seemed like a citadel besieged from three sides”⁶⁹: by the Arabs in the south, the Magyars in the east and the Scandinavians in the north. The Western Mediterranean lost its centrality, long-distance navigation declined, commerce shrank dramatically in volume and was restricted to a few routes.

Vanished for centuries, the lady reappeared in the 11th century under the guise of the *lex mercatoria*. The economic revolution of the second feudal age breathed new life into her. As Bloch reminds us, in the course of the 12th century, many bridges were thrown over the rivers of Europe.⁷⁰ Healthy and dy-

New Lex Mercatoria and the Harmonization of the Laws of International Commercial Transactions, 2 B.U. Int'l L.J. 317 (1984); See also Celia Wasserstein Fassberg, *Lex Mercatoria-Hoist with Its Own Petard*, 5 Chi. J. Int'l L. 67 (2004).

67 Goldman, *supra* note 41, at 4.

68 For an overview of the traditional vision and the revisionist position, see Emily Kadens, *Order Within Law, Variety Within Custom: The Character of the Medieval Merchant Law*, 5 Chi. J. Int'l L. 40 (2004); for the traditional position see Francis M. Burdick, *What is the Law Merchant*, 2 Colum. L. Rev. 470 (1902); Thomas E. Scrutton, *General Survey of the History of the Law Merchant*, in 3 *Select Essays in Anglo-American Legal History* 7 (1909); Berman, *supra* note 44, at 333; Wyndham A. Bewes, *The Romance of the Law Merchant* (1923, reprint 1986); Francesco Galgano, *Lex Mercatoria* (2001). See also the essays in *The Courts and the Development of Commercial Law* (Comparative Studies in Continental and Anglo-American Legal History) (Vito Piergiovanni ed., 1987). For the revisionist view see Charles Donahue, *Medieval and Early Modern Lex Mercatoria: An Attempt at the probatio diabolica*, 5 Chi. J. Int'l L. 21 (2004) [hereinafter Donahue, *Medieval and Early Lex Mercatoria*]; Charles Donahue, Benvenuto Stracca's *De Mercatura: Was There a Lex Mercatoria in Sixteenth Century Italy?*, in *From Lex Mercatoria to Commercial Law* (Comparative Studies in Continental and Anglo-American Legal History) 69 (Vito Piergiovanni ed., 2005); Albrecht Cordes, *A la recherche d'une Lex mercatoria au Moyen Age*, in *Stadt und Recht in Mittelalter: La Ville et le Droit au Moyen Age* 117 (Pierre Monet & Otto G. Oexle eds., 2003).

69 Bloch, *supra* note 53, at 3.

70 *Id.* at 69.

namic, the lady crosses them unrelentingly for several centuries. In the heart of the West, the increase in population, the greater ease of communications, the end of the foreign invasions and of the Crusades sparked a revival of commerce,⁷¹ fostering the coalescence of a vigorous and powerful mercantile class. According to the proponents of this traditional narrative, the *lex mercatoria* was the organic body of norms governing relations among merchants in fairs, markets and seaports. It displayed a number of crucial features: integration, self-creation, self-enforcement and universality. Integration implies organic development. Conceived as a structurally integrated body of law consisting of principles, concepts, rules and procedures, the law merchant is deemed to have developed organically according to an internal logic.⁷² Adherents of this story also emphasize the spontaneous and self-generated nature of the *lex mercatoria*, and downplay the input of principalities and political authorities. While it was borrowing concepts and tools from canon law, as well as from the *ius gentium* and the newly rediscovered Roman civil law, the *lex mercatoria* was largely the product of the customs and practices of the mercantile class. The usages of the fairs, it is argued, were the “true and transcendental spring” from which it flowed.⁷³ Secular rulers played a limited role, securing the *lex mercatoria* by treaties amongst themselves.⁷⁴ Being a spontaneous creation of the merchants, organically reflecting their needs and interests, the *lex mercatoria* bore two fundamental character traits: informality and equality. The perils and the intricacies of international commerce called for a body of law based on good faith, reciprocity of rights, which entails both a procedural and a substantive aspect, as well as evidentiary and procedural informality.⁷⁵ Moreover, historians suggest, the *lex mercatoria* was self-enforced by the very merchant class that generated it, dispute settlement being organized through private merchant arbitration and enforcement. Guild courts, market courts and fair courts were non-professional tribunals consisting of merchants or guild members elected by their fellows and occasionally assisted by professional notaries. An efficient system of merchant consular courts originated in Italy around 1150 and spread all over Europe; consulados were formed in Valencia, Mallorca, Perpignan and Bilbao in the

71 *Id.* at 71.

72 Berman, *supra* note 44, at 348-49.

73 Bewes, *supra* note 68, at 13; Berman, *supra* note 44, at 340. Berman notes that, “nevertheless neither the newly rediscovered Roman civil law nor the barely surviving Roman customary law including the *ius gentium* was adequate to meet the kind of domestic and international commercial problems that arose in Western Europe in the late 11th and 12th century,” and a few passages later: “It is characteristic of the time that the initial development of mercantile law was left largely, though not entirely, to the merchants themselves who organized international fairs and markets formed mercantile courts and established mercantile offices in the new urban communities that were springing up throughout western Europe.”

74 Berman, *supra* note 44, at 343.

75 Bewes, *supra* note 68, at 19. Now it is above all things necessary to bear in mind that the courts enforced the customs of merchants and the customs made the law: as we may well remember that the two great distinctive elements in the merchant's law as enforced by their own courts were good faith and dispatch for speed and honesty must be obtained, though by means not sanctioned by the common law, which was and ever has been a laggard, and by its halting procedure hinders the rapid course of commercial justice.

1280s. Finally, it is claimed, the *lex mercatoria* was universal in scope⁷⁶ in trying to protect merchants against the vagaries of local law. Evidence of the universality of the law merchant is found in a variety of sources, from a 1473 declaration of the Chancellor of England to Gerard Malynes, author of the “*Consuetudo vel Lex Mercatoria*” published in 1622, to Blackstone.⁷⁷ Among the crucial concerns driving the development of a European-wide law merchant were not only the disabilities of aliens under local laws but also the violence of pirates and robbers and the rapacity of local tax authorities.⁷⁸

However, the vicissitudes of the state-building era led to the old lady's second disappearance. With the development of a system of territorial-based sovereign states, merchant autonomy in law-making and law-enforcement shrank dramatically until nationalist sentiments and legal positivism sealed the fate of the *lex mercatoria*. The law merchant underwent a process of localization and positivization. While the organic body of mercantile rules and customs was incorporated in national positive law, dispute settlement and enforcement were also assigned to state courts.⁷⁹

In the late 20th century, however, the old lady reappeared under the guise of the “new *lex mercatoria*” regaining vitality from the intensification of juridified commercial relations and their increasingly pluralistic and privatized character.⁸⁰ Beginning in the 1960s, commentators have saluted the reappearance of the old lady, “wistfully tipping their hats to a perceived medieval idyll.”⁸¹ The 20th century, observers suggest, has witnessed the revitalization of an international community of merchants effectively exerting law-making and law-enforcement power.⁸² At an institutional level, this evolution is mirrored by the emergence of professional organizations and international efforts at legal unification. Already since the end of the 19th century, model contracts and standard terms provided by the London Corn Trade Association and other private merchant associations, the International Chamber of Commerce, the Hague Conference on Private International Law, later on the Unidroit and various UN agencies, such as IMO and UNCITRAL set the basis for the development of a new transnational law merchant.⁸³ The critical feature of this new *lex mercatoria*

76 Bewes, *supra* note 68, at 81; Berman *supra* note 44, at 346.

77 Berman *supra* note 44, at 343.

78 *Id.*

79 Goldman, *supra* note 41, at 4. Goldman notes that this development was marked by Colbert's codifications, (1673 codification of terrestrial commerce, 1681 codification of maritime commerce). The emergence of national particularities in the 19th century completed “the evolution toward subjection of international economic relations to state laws, designated by such rules of conflict of laws as each state had established for itself.” *See also* Berman & Kaufman, *supra* note 66, at 221; Cutler, *supra* note 64, at 141; Galgano, *supra* note 68, at 98 *et. seq.*

80 Cutler, *supra* note 64, at 180-85.

81 Kadens, *supra* note 68, at 39; Goldman, *supra* note 41, at 5.

82 Berman & Kaufman, *supra* note 66, at 228.

83 *Id.* The twentieth century has seen the revitalization of the international community of merchants engaged in trade across national boundaries, including not only importers and

is said to be its customary origin and its spontaneous nature.⁸⁴ While the early unification efforts reflected a tendency to unify through binding international treaties, recent efforts have focused more on model codes and voluntary soft law.⁸⁵ The Unidroit Principles and the Lando Principles are seen as paradigmatic of this new, soft economic law favoring merchant autonomy, freedom of contract and flexibility. Thus, in a world of global markets, multinational corporations, non-governmental actors, and calls for a unified European law, a transnational body of soft substantive law is developing, closely resembling the cosmopolitan medieval law merchant.

4 A Critique of the Neo-Medievalist Genealogy

The neo-medievalist genealogy is suspect in many regards. Especially the politics of medievalism, the ambiguities of romanticizing pluralism, the mystifications of the tale of the *lex mercatoria*, deserve critical scrutiny.

The Middle Ages have been pressed into the service of ideology and instrumentalized as historical inspiration for social and political visions from the 18th century to the present. In various fields, the romance of the Middle Ages has been employed to camouflage political and professional projects. At the level of popular culture, late 20th century medievalism, filtered through the lenses of Tolkien and Disney, is synonymous with an escapist desire of licensing innocence; in contrast, 19th century medievalism, portrayed by Sir Walter Scott, William Ruskin and William Morris, had a deeply critical thrust, reflecting projects as diverse as conservative paternalism and socialist utopianism.⁸⁶ In a recent study, medievalist John Ganim looks at the genre of medieval romance as a crucial focus for tracing the politics of English literary medievalism. As form of escapist aristocratic antiquarianism in the 18th century, medievalism came to stand for an anti-revolutionary political and religious agenda of return to Anglican ritual in the early 19th century. At mid-century, medievalism covered a more pluralistic ideal of educational populism sustained by German scientific philology and by the end of the 19th century it acquired a nationalist and fundamentally anti-modernist thrust.⁸⁷ Legal medievalism may perform an ideological function similar to that played by literary medievalism. The current wave of pan-European neo-medievalism is hardly a valuable analytical device but rather a powerful ideological tool, serving the needs of the global “mercato-

exporters of goods and technology but also shipowners, marine insurance underwriters, commercial bankers and others involved in such trade. Through their contracts and more visibly through their trade associations these various groups have created autonomous legal orders on a trans-national scale.

84 Goldman, *supra* note 41, at 6.

85 See Cutler, *supra* note 64, at 217-19.

86 John Ganim, *The Myth of Medieval Romance*, in *Medievalism and the Modernist Temper* 148 (R. Howard Bloch & Stephen G. Nichols eds., 1996).

87 *Id.* at 152-54.

racy”⁸⁸ as well as the political and professional projects of legal scholars endorsing a market-making agenda. In the field of law, the neo-medievalist imagery, evoking a fabled world of social and economic actors who autonomously crafted their own normative systems organically reflecting their needs and practices, highlights spontaneity and efficiency while obfuscating particularized interest, power asymmetries and distributive consequences. At closer inspection, the romance of medieval pluralism, the romanticization of medieval facticity and the fairy tale of the venerable old lady prove highly ambiguous and historically anachronistic argumentative devices.

First, evoking the romance of medieval pluralism to describe global soft legal regimes or the European legal space overlooks the peculiarity of the medieval legal order. The two legal experiences, the medieval and the global, although *prima facie* similar, should be kept distinct. While the defining features of the medieval legal order are the absence of a powerful state in the modern sense and the incompleteness of political control, the global legal order features the re-location of the state rather than its disappearance. The medieval legal experience confronts the observer with the challenging hypothesis of a law without a state. The period between the 4th and the 14th centuries is characterized by a relative political vacuum; Grossi's formula “incompleteness of political power” alludes to the lack of any unifying vocation of the political dimension, in particular its inability to unify and absorb the variety of social phenomena. In contrast, modern theories of legal pluralism are often pervaded by a tacit state-centrism, the underlying assumption being that, among the plural legal orders, state law retains a central role. Thus, efforts to account for medieval pluralism through the lens of modern methodological approaches are often filled with state-centric biases. Deeply committed to a mode of Enlightenment, rationalistic statism, modern observers seem unable to imagine a medieval order without the mighty and overarching presence of the state.⁸⁹ Hence, in order to grasp the central features of the medieval legal consciousness, the observer would have to get rid of her “psychological statism,” i.e., to abandon her deeply entrenched state-centered perspective. Rather than approaching medieval pluralism through the lens of modern theories, she would have to “to listen to the chorus of voices coming from the medieval world with full receptiveness in order to capture their authentic timbre.”⁹⁰

By contrast, global interlegality is marked by the weakness, not the absence, of the modern scheme of the nation state. Soft law proliferates against the backdrop of a contradictory movement: on the one hand, the shift towards a society without a state and on the other hand, and the persistence of the system of sovereign nation states.⁹¹ A society without a state, the global business com-

88 I take the word “mercatorocracy” from Cutler, *supra* note 64.

89 According to Grossi, *supra* note 43, at 32-33, Francesco Calasso's magisterial effort to grasp the peculiarity of the medieval legal order through the lens of Santi Romano's pluralistic theory is an “incomplete pluralism” (*pluralismo incompiuto*); in the vast array of normative orders to which Calasso accords full legal dignity, the state emerges as a qualitatively different one.

90 *Id.* at 33.

91 See Gunther Teubner, *Altera Pars Audiatur: Law in the Collision of Legal Discourses*, in

munity, taking over both the legislative function (new *lex mercatoria*) and the adjudicative function (international commercial arbitration) coexists with a multitude of states, bearers of domestic interests and thus struggling to maintain their legislative and jurisdictional powers. The central political forms of capitalism, the nation-state, and the interstate system are now competing for terrain. However, far from receding, the state is re-located, remaining a crucial space in the global landscape, a space in which non-state, local and global actors interact and multiple alliances are formed.⁹² Therefore, the neo-medievalist lens proves anachronistic, failing to capture the intricacies of the global horizontal legal order in which the state, though re-located, is still central, being the site of both oppressive power relations as well as unexpected possibilities of emancipation.⁹³

Second, the romance of facticity is both anachronistic and ambiguous. Providing soft law with an aura of medieval romantic organicism is anachronistic because it eclipses the peculiar mixture of spontaneous and organized processes that characterizes soft legal regimes. The intimate connection linking medieval law to the immediacy of social life is severed in the modern era and only partially restored in the post-modern era. In the medieval order, the void left by the incompleteness of political power was filled by society's spontaneous and factual relations. It is in the modern era that, in Grossi's words, "despite the fig leaves of 18th century natural law and 19th century codification, law is impoverished and its intimate link with society severed."⁹⁴ In the post-modern era, the proliferation of soft legal regimes restores law's facticity and spontaneity partially at best. Soft law displays a peculiar mixture of spontaneous and organized processes; it is based less on the spontaneous coordination of conduct and more frequently created through highly organized hybrid private-public decision making processes. For instance, the "new *lex mercatoria*" blurs the distinction between private and public as well as between spontaneous and organized processes, developing in the interstices of the relations between intergovernmental agencies and organizations (UNCITRAL, UNIDROIT, IMO) and private, highly organized, bodies (ICC, ILA).⁹⁵ Similarly, soft mechanisms of governance (e.g., OMC) entail the interpenetration of different levels of governance

Law, Society and Economy 149 (Richard Rawlings ed., 1997). Maria Rosaria Ferrarese, *Le Istituzioni della Globalizzazione* (2000); Boaventura de Sousa Santos, *Toward a New Legal Common Sense: Law, Globalization and Emancipation* 94-96 (2002). For an analysis of soft private law's ambiguous relationship with sovereignty and the state, see Caruso, *supra* note 64.

92 de Sousa Santos, *supra* note 91, at 94.

93 See Peer Zumbansen, *Piercing the Legal Veil: Commercial Arbitration and Transnational Law*, 8 Eur. L. J. 400 (2002), who urges global jurists to "attentively build upon on the lessons on private and public ordering learned in the nation state."

94 Grossi, *supra* note 43, at 31.

95 Cutler, *supra* note 64, at 193; see also 185 where Cutler notes: "The unification movement is blurring the distinction between private and public authority because states in their public capacities are negotiating laws that govern commercial transactions which have traditionally been regarded as private by liberal theories of international political economy and of international law; while private actors are increasingly participating in the settlement of matters that were previously regarded as public."

and involve the highly structured interaction between a variety of actors, from member states to social partners and civil society.⁹⁶ Moreover, the neo-medievalist romance of soft law's facticity is highly ambiguous, foregrounding private autonomy, freedom of contract, efficient flexibility and organic adaptability, while obscuring distributive inequalities, power differences and structural constraints.

Finally, the fairy tale of the venerable old lady as a whole is dubious and fraught with ambiguities. The very existence of the old lady is surrounded by mystery. While many claim to have seen her, others consider her a mere apparition. Historians question the romance of the *lex mercatoria* in the medieval and early modern period. The sources, they claim, belie much of the traditional understanding of the *lex mercatoria*. While some argue that the medieval law merchant was significantly more complex than the fairy tale assumes,⁹⁷ others cast doubt on its actual existence and relevance, questioning whether anything like an "autonomous customary legal system governing commerce" actually existed.⁹⁸ The evidence is conflicting. First, while traceable in medieval and early modern Northern Europe, the term *lex mercatoria* was rarely used in Southern Europe; the term is absent from the primary sources that survived as well as from the works of the writers on the *ius commune*. While several collections of medieval maritime customs have survived, no reasonably coherent and autonomous body of mercantile customary law has lived on. Mercantile customs varied slightly from the *jus commune* and could easily be accommodated with it. There was also no universally accepted body of mercantile procedural rules.⁹⁹ The second reappearance of the Old Lady is equally mysterious. The very notion of a novel *lex mercatoria* has sparked a vivid scholarly debate in the past decades.¹⁰⁰ Believers in the resurgence of a transnational law merchant confront those regarding it as a myth¹⁰¹ or, at best, an enigma.¹⁰² Doubt is

96 See *European Commission White Paper on European Governance*, COM (2001) 482 final (July 25, 2001).

97 Kadens, *supra* note 68, at 42, argues that an identifiable merchant law of sorts did indeed exist; but it was very different from the traditional portrait. The historical *lex mercatoria* was not a single, uniform essentially private legal system, but rather *iura mercatorum*, the law of merchants, bundles of privileges and private practices, public statutes and private customs sheltered under the umbrella concept of merchant law by their association with a particular sort of supra-local trade and the people who carried it out. Some customary norms were similar over vast areas, many were local or regional. In addition, this was not a purely customary regime independent of local law and local courts but a hybrid creation depending upon a scaffolding of legislation and intimately tied to local municipal and guild law.

98 Donahue, *Medieval and Early Modern Lex Mercatoria*, *supra* note 68, at 27; "Was there a *lex mercatoria* in the medieval and early modern periods? My answer to that question is 'no,' at least not in the sense that the term is normally used, and my attempt to prove this involves the *probatio diabolica* of my title. The non existence of something cannot be proved."

99 *Id.* at 27-31.

100 For an introduction to the "New *Lex Mercatoria*" debate, see *Lex Mercatoria and arbitration: A Discussion of the New Law Merchant*, *supra* note 6.

101 Georges R. Delaume, *Comparative Analysis as a Basis of Law in State Contracts: The Myth of the Lex Mercatoria*, 63 Tul. L.R. 577 (1988-89).

102 Keith Highet, *The Enigma of the Lex Mercatoria*, 63 Tul. L. R. 613 (1988-89).

cast on its very existence, its content and its nature. One observer reminds us that “myth is the name of all that exists and subsists having merely language as its cause.”¹⁰³ The *lex mercatoria* exists “at least to the extent that scholars and practitioners discuss it.”¹⁰⁴

It is noteworthy that the romance of the *lex mercatoria* is a myth subject to cyclical revivals in different cultural and historical contexts.¹⁰⁵ The very idea of a cosmopolitan *lex mercatoria* has been employed as a powerful legitimating device in order to promote diverse agendas. The revival of the idea of a *lex mercatoria* in Germany after the revolution of 1848 reflected a Romantic, nationalist sensitivity. Based on the Romantic notion that law should spring from the spirit of the Volk, Levin Goldschmidt¹⁰⁶ considered merchants as potential or actual representatives of the Volk and viewed mercantile law as the ultimate product of an organic and historical development, relatively immune from alien contaminations. In France, the revival of legal history at the end of the 19th century and the renewed attention devoted to commercial customs and usages took on a deeply anti-formalist flavor in reaction against classical legal thought.¹⁰⁷ The romance of the *lex mercatoria* fostered a broadening of the horizon after almost a century of formalism under the *ecole de l'exegese*. In 19th century England, the newly arising interest in mercantile law reflected the widespread dissatisfaction with ordinary common law procedure and the effort to promote the establishment of a separate commercial court.¹⁰⁸ In the late 20th century the idea of a new *lex mercatoria* again serves a crucial legitimating function because it supports the romance of a new global merchant class of freely bargaining autonomous economic actors who shape their own flexible and organic law.¹⁰⁹

103 See *Lex Mercatoria and arbitration: A Discussion of the New Law Merchant*, supra note 6, at xix.

104 Highet, supra note 102, at 615-17.

105 Donahue, *Medieval and Early Modern Lex Mercatoria*, supra note 68, at 25 notes that: “The late nineteenth century saw an explosion of interest in *lex mercatoria*. As the revival of romantic mercantilism spread from Germany to France to England to the United States it was used for different purposes—purposes that reflected what was important at the time in the countries in question.” See also the introduction to Mary Elisabeth Basile, Jane Fair Bestor, Daniel R. Coquillette & Charles Donahue, *Lex Mercatoria and Legal Pluralism: A Late Thirteenth Century Treatise and Its Afterlife* (1998).

106 Levin Goldschmidt, *Handbuch des Handelsrechts* (1868); Levin Goldschmidt, *Universalgeschichte des Handelsrechts* (1891).

107 See Donahue, *Medieval and Early Modern Lex Mercatoria*, supra note 68, at 25-26.

108 Thomas E. Scrutton, *The influence of the Roman Law on the law of England* (1884, reprinted 1985).

109 For a thorough critique of this romanticized image see Zumbansen, supra note 93.

5 The Social Genealogy: The Development of a Social Mode of Legal Consciousness

The “social genealogy” amounts to a discursive argument rather than a narrative. The argument relies on an organicist mode of explanation that depicts individual entities as components of a larger synthetic process. Soft law may be seen as the most recent instance of a broader phenomenon: the development of a “social” mode of legal consciousness spurred by European anti-formalist jurists writing in the 19th and early 20th centuries. The slogans insistently voiced by the advocates of soft law as a tool for social policy, emphasizing “flexibility,” “social responsiveness,” “pluralism” and “participation,” seem to suggest that the roots of soft law lie in the organicist and pluralist theories of law advanced by Savigny, Ehrlich, Gierke and Santi Romano. The analogy between law and language, central to Savigny's *Volkgeistlehre*, may provide a useful magnifying lens for inspecting the defining features of soft legal regimes. Furthermore, Ehrlich's notion of “living law” may illuminate the deeply social nature of contemporary soft law tools. Finally, the theory of a “plurality of legal orders,” sketched by Gierke and further developed by Santi Romano and Gurvitch, may be seen as foreshadowing current notions of global “interlegality” or “polycentricity.”

5.1 Law as Language

Savigny's jurisprudence may play a prominent role in the *genealogy of soft law*.¹¹⁰ The spokesman of the “Romanist” branch of the Historical School, Savigny conceived of, and promoted, a theory of law that is both historical and systematic. It is historical in that it freely employs historical materials that are the accumulation of the organic emanations of society. It is systematic in that the historical materials are to be assembled in a will-based, formal and universalizing system.¹¹¹ Central to Savigny's theory is the analogy between law and

110 On Friedrich Karl von Savigny (1779-1881) see (in English): Susan Gaylord Gayle, *A Very German Legal Science: Savigny and the Historical School*, 18 Stan. Int'l L.J. 123 (1982); Mathias Reimann, *Nineteenth Century German Legal Science*, 31 B. C. L. Rev. 837 (1990); John E. Toews, *The Immanent Genesis and Transcendent Goal of Law: Savigny, Stahl and the Ideology of The Christian German State*, 37 Am. J. Comp. L. 139 (1989); Karl A. Mollnau, *The Contributions of Savigny to The Theory of Legislation*, 37 Am. J. Comp. L. 81 (1989); Edwin W. Patterson, *Historical and Evolutionary Theories of Law*, 51 Colum. L. Rev. 681 (1951); Hermann U. Kantorowicz, *Savigny and the Historical School of Law*, 53 Law Q. Rev. 326 (1937); Richard A. Posner, *Savigny, Holmes and the Law and Economics of Possession*, 86 Va. L. Rev. 535 (2000).

111 The twofold nature of Savigny's jurisprudence is well captured in *Vom Beruf*, the short and renowned tract first published in 1814. Discussing the necessity of a code for Germany, Savigny warns his fellow jurists that a twofold scientific spirit is indispensable; while the historical spirit allows a prompt grasp of the peculiarities of every age and every form of law, the systematic spirit enables the jurist “to view every notion and every rule in lively connection and cooperation with the whole.” Equipped with this truly scientific method, the jurist readily perceives the living connection which links the present to the past as well as the system's geometrical perfection. Legal doctrines, legal relations and modes of

language: law, like custom and language, develops from the consciousness of the people. The most genuinely Romantic formulation of the analogy between law and language is to be found in the second chapter of Savigny's *Vom Beruf unsrer Zeit für Gesetzgebung und Rechtswissenschaft*. Delving into the origins of positive law, Savigny notes that "in the earliest times to which documented history extends, the law will be found to have already attained a fixed character, peculiar to the people, like their language, manners and constitution."¹¹² Law is associated with language and custom as the unique and distinct expressions of the "Spirit of the People."¹¹³ Moreover, Savigny warns, these phenomena have no separate existence, "they are but the particular faculties and tendencies of an individual people, inseparably united in nature, and only wearing the semblance of distinct attributes to our view."¹¹⁴

Savigny's theory of the genesis of positive law is further developed in section VII of the *System*: "It is the spirit of a people living and working in common in all the individuals, which gives birth to positive law."¹¹⁵ The invisible origin of positive law eludes any documentary evidence; however, Savigny argues, "there are not wanting proofs of another sort and suitable to the special nature of the object matter."¹¹⁶ While a first kind of proof lies in the universal and uniform recognition of positive law as well as in the feeling of inner necessity which emanates from it, a second type lies in the analogy with other peculiarities of the

thought develop gradually through the stratification of historical materials; they reveal the "indissoluble organic connection of generations and ages between which development only, not absolute end or absolute beginning, is conceivable." A linear pattern of systematic relations confers upon these stratified historical materials a greater formal unity. The formal arrangement of the system reflects the "richness of living reality," where all jural relations stand in an innate and organic connection; the geometric perfection of the system mirrors the living and organic unity of jural relations. The twofold historical and systematic spirit endows the jurist with creative energy. Far from stifling the jurist's creativity, the recognition of the deeply historical nature of legal materials as well as of their innate systematic connection motivates the jurist's ingenious efforts. Rather than passively submitting to the overwhelming influence of the existing historical matter, jurists are called to gain mastery over them with creative energy. Similarly, recognition of the innate systematic connection of all jural relations in a formal system leaves leeway for the individual writer rendering especially fruitful the subjective technical choices and methodological preferences. See Friedrich Carl von Savigny, *vom Beruf unsrer Zeit für Gesetzgebung und Rechtswissenschaft* (1814); Friedrich Carl von Savigny, *On the Vocation of Our Age for Legislation and Jurisprudence* (Abraham Hayward trans., 1999) [hereinafter Savigny, *On the Vocation*]; Friedrich Carl von Savigny, *System des heutigen Römischen Rechts* (1951); *System of the Modern Roman Law*, (William Holloway trans., 1980) [hereinafter Savigny, *System*].

112 Savigny, *On the Vocation*, supra note 111, at 17.

113 Savigny speaks of "common consciousness" of a people in the *Beruf* and of "Spirit of the People" in the *System*. Savigny's idea of "Spirit of the People" betrays Georg Friedrich Puchta's influence. See Georg Friedrich Puchta, *Das Gewohnheitsrecht* (vol. I 1828, vol. II 1837); Bruno Montanari, *Arbitrio Normativo e Sapere Giuridico a partire da G. F. Puchta* (1984).

114 Savigny, *On the Vocation*, supra note 111, at 17.

115 Savigny, *System*, supra note 111, at 12.

116 *Id.* at 12.

peoples which likewise have an origin invisible and reaching beyond recorded history, such as language and custom. Law as language springs from the Volkgeist, independently of accident and individual choice. Indeed, Savigny notes, “the individual nature of a particular people is determined and recognized solely by those common directions and activities of which speech as the most evident obtains the first place.”¹¹⁷

The analogy between law and language highlights two elements crucial to Savigny's “living jurisprudence”: organicism and pluralism.

Savigny's analogy is organicist in that it reveals a concept of law intimately connected with other social and cultural phenomena that are the unique expression of the spirit of the people and, therefore, gradually evolving according to an “inner power” or “inward necessity.” Savigny detects two subsequent stages in the organic development of law. In an early phase, corresponding to the youth of nations, which is poor in ideas but rich and vivid as to the perception of relations and circumstances, law and language exist in the consciousness of the people, being palpable in external acts and manifestations.¹¹⁸ Whereas language finds a fixed form in its constant uninterrupted use, law is fixed in “symbolical acts universally employed where rights and duties are to be created or extinguished.”¹¹⁹ Further stretching the analogy between law and language, Savigny regards these formal acts as the true grammar of the law: they confer external palpability upon the law, while expressing the different weight and solemnity of the corresponding legal relations.¹²⁰ Over time, law like language, evolves organically according to an inward progressive tendency. In Savigny's words, law “grows with the growth and strengthens with the strength of the people.”¹²¹ As language undergoes a constant and gradual reshaping driven by an inner power independent of accident and individual will, so does law. Therefore, in a later phase, corresponding to the maturity of civilization, law takes on a scientific character and becomes more complex and artificial. The sharpening of peculiar national cultural tendencies leads to the specialization and professionalization of the jurists as a distinct class. Law becomes the province of the jurists who, acting as representatives of the people, perfect its language and give it a scientific form. However, Savigny is eager to emphasize the persistence of the law's organic and spiritual nature. In the phase of maturity, law, far from weakening its intimate connection with the spirit of the people, enjoys a twofold life. First, it continues to live in the consciousness of the people, being part of the aggregate experience of the community; second, it becomes a distinct branch of knowledge in the hands of the jurists.¹²²

117 Id. at 13.

118 Savigny, *On the Vocation*, supra note 111, at 17; Savigny, *System*, supra note 111, at 13.

119 Savigny, *On the Vocation*, supra note 111, at 18.

120 Id. at 18.

121 Id. at 19.

122 Id. at 19; Savigny, *System*, supra note 111, at 36-37. Organicism is law's most intimate feature. Having posited the origins of positive law in the spirit of the people, Savigny moves on to clarify the relation between “people's law,” on the one hand, and customary law and legislation, on the other hand. Law's intimate nature, Savigny warns, is often ob-

Savigny's analogy between law and language is not only organicist, it also has a vigorous pluralist thrust, resting on a legal phenomenology which is both highly unitary and deeply pluralist. The analogy between law and language reveals a tension between law as the universalizing language of the state and the multiple legal dialects of the intermediate social formations. On the one hand, Savigny is eager to posit the generation of law in the natural spiritual unity of the people that has its visible and organic manifestation in the state. On the other hand, he casts light on the plurality of particular laws arising from the peculiar corporate spirit of the multiple classes, towns and villages.

The unitary nature of Savigny's legal phenomenology lies in the intrinsic and monolithic unity of the Volk, grounded in a common language. Wherever men live together, Savigny notes, "they stand in an intellectual community which reveals as well as establishes and develops itself by the use of speech."¹²³ This communion of thought and action is the source from which law springs; in Savigny's words, "the generation of law is a fact and one common to the whole."¹²⁴ Far from being limited to a particular moment in time, the natural unity of a people runs through generations, connecting the present to the past and the future, and reveals itself in the unchanged continuation and gradual evolution of both language and law.¹²⁵ The invisible spiritual unity of the people finds its visible and organic form in the state. The physical shape of the intellectual communion of a people, Savigny argues, is the state that also marks the definite boundaries of such unity. As the generation of law in the people is driven by an inner necessity, so is the generation of the state; the origin of the state is part of a higher necessity, "a formative power proceeding from within."¹²⁶ Hence, state law is the universalist, formalist and individualist language of the unitary Volk. It is universalist, reflecting the general spirit of humanity as embodied in the German people;¹²⁷ it is formalist being organized in a geometric and systematic

scured by a mistaken understanding of the sources of law, assigning too limited an office to people's law. All law is people's law, its invisible ground of origin being the consciousness of the people. Correcting a common belief, Savigny argues that custom is a badge of positive law rather than its ground of origin: law springs from an invisible source, the Volkgeist, revealing itself in a uniform and continuous manner of action, i.e., custom. The commonly held notion of custom, however, has a grain of truth. Custom may operate as a cooperative ground of origin, exerting an influence upon the formation of practical rules of detail which have a less stringent necessity and a higher degree of flexibility, such as rules determining numeric limits or periods of prescription. As to legislation, the legislator, as the true representative of the people, standing at the center of the nation and embodying its spirit, feelings and needs, bestows upon people's law the highest degree of certainty and definiteness. Hence, legislation operates both as an aid to the extension of people's law as well as a support of its gradual and organic progress.

123 Savigny, *System*, supra note 111, at 15.

124 *Id.* at 17.

125 *Id.* at 16.

126 *Id.* at 18.

127 *Id.* at 17. This view in which the individual people is regarded as the generator and subject of positive or practical law may appear too confined to some who might be inclined to ascribe that generation rather to the general spirit of humanity than to that of a particular people. On closer examination these two views do not appear conflicting. What works in an

grammar based on deductive relations; it is individualist, resting on the dichotomy between the private, the realm of the independent mastery of the individual will, and the public, the realm of the state where the interest of the individual is subordinated to that of the organic whole.

However, alongside state law, Savigny detects a multiplicity of particular laws arising from the peculiar corporate spirit of the intermediate social formations. Although the unity of the Volk is undoubted, Savigny argues, within the Volk there are a number of inner circles, such as guilds, towns, corporations, which live in a special connection with the spirit of the people. In these circles, which are subdivisions of the whole, “a special generation of law may have its seat as particular law side by side with the general law of the nation which by that particular law is on many sides completed or altered.”¹²⁸ The tension between unity and multiplicity is resolved through a biological metaphor. The well-being of every organic being depends on the maintenance of a correct balance between the whole and its parts; the common prosperity gains strength from this heightened and multiplied individuality.¹²⁹ These multiple special laws are the legal dialects of the intermediate social formations. They are particular rather than universal, reflecting the peculiar corporate spirit of guilds, towns and corporations. They are organic rather than formalist, springing from the needs of particular social groups and organized in a minimalist and flexible grammar. Finally, they are social, privileging the wealth and the interests of the group as an organic whole.

5.2 *Soft Law as a Global Lingua Franca*

The epistemological challenge presented by legal globalization seems to have revived the heuristic potential of Savigny's analogy between law and language. In the era of global law, Savigny's analogy is subjected to a “symptomatic reading,” revealing a second facet that, though detectable between the lines, was never made explicit in Savigny's text. Not only is soft law similar to language in that it develops organically from the “spirit” of the multiple globalized intermediate social formations, it is also a peculiar type of language itself.¹³⁰ Images of soft law as a peculiar form of language flourish in legal-theoretical analyses as well as in professional and political projects. In the endless quest for a definition of law, legal sociologists and legal theorists have paid tribute to the “linguistic turn,” casting aside the analytical tools of classical sociology of law, and appropriating concepts such as speech acts, enonce, coding, and grammar.¹³¹ The

individual people is merely the general human spirit which reveals itself in that people in a particular manner.

128 Id. at 16.

129 Savigny, *On the Vocation*, supra note 111, at 34.

130 Giovanni Marini, *Il Paragone tra Diritto e Linguaggio nella Giurisprudenza Romantica*, XIV Atti e Memorie dell'Accademia Toscana di Scienze e Lettere “La Colombaria” 230 (1975).

131 Teubner, supra note 50, at 12; Gunther Teubner, *Law as an Autopoietic System* 25 (1993).

image of soft law as a type of language has also gained wide currency among legal professionals. It is a recurrent theme in the rhetoric bolstering the professional project of the new generation of arbitrators which emerged in the 1980s. Soft law is the professional jargon of the “Young Technocrats” whose expert knowledge and technical competence replaced the aura and the charisma of the “Grand Old Men.”¹³² Similarly, the notion that soft forms of legality function as an efficient facilitative language permeates the professional and political project of the Lando Commission. One of the main purposes underlying the Principles of European Contract Law (PECL) is to provide a common European language for academics and practitioners. The PECL are meant to create a purportedly neutral, accessible and efficient discursive framework for the debate on contract law.¹³³

As Savigny's analogy between law and language evoked ideas of organicism and pluralism, so does its postmodernist reformulation.¹³⁴ The champions of soft normative tools call attention to their deeply organic character. Soft law is seen as a global lingua franca organically springing from the consciousness and the needs of the various global guilds, villages and corporations. The proliferation of soft legal regimes opens up new space for a highly personalized and privatized law. The global “mercatorocracy” shapes the basic norms governing property, contract and dispute resolution to fit its need for autonomy, informality, flexibility and efficiency. Similarly, in the hands of marginalized groups seeking social change, soft law becomes a tool for empowerment and emancipation, reflecting their peculiar lived experience and special needs. Soft law measures, advocates claim, work to women's advantage; due to their flexible and bottom-up character, recommendations and codes of practice profit from women's lived knowledge by providing detailed descriptive accounts and finely tuned policy options.¹³⁵ Soft governance procedures are praised for their ability to foster mutual learning and to incorporate new knowledge in areas such as employment and environmental protection.¹³⁶ According to its paladins, the Open Method of Coordination (OMC) facilitates wide participation as well as the organic development of a social law springing from the expert knowledge of stakeholders.¹³⁷ As in Savigny, the analogy between law and language reveals

132 Yves Dezalay & Bryant G. Garth, *Dealing in Virtue: International commercial arbitration and the construction of a transnational legal order* (1996).

133 Hesselink, *supra* note 30, at 88-97.

134 William Witteveen & Bart van Klink, *Why is Soft Law Really Law? A Communicative Approach to Legislation*, 3 *RegelMaat: Journal for Legislative Studies* (1999).

135 Fiona Beveridge & Sue Nott, *A Hard Look at Soft Law*, in *Lawmaking in the European Union* 285 (Paul Craig & Carol Harlow eds., 1998). See also Susan Sturm, *Gender Equity Regimes and the Architecture of Learning*, in *Law and Governance in the EU and the US*, *supra* note 5, 323.

136 Joanne Scott & Jane Holder, *Law and New Environmental Governance in the European Union*, in *Law and Governance in the EU and the US*, *supra* note 5, 211; Geraint Howells, *Soft Law in EC Consumer Law*, in *Lawmaking in the European Union*, *supra* note 135, 310; Claire Kilpatrick, *New EU Employment Governance and Constitutionalism*, in *Law and Governance in the EU and the US*, *supra* note 5, 121.

137 See the literature on multilevel soft governance, *supra* note 9.

an uneasy tension between unity and multiplicity, between an emerging legal lingua franca and the persistence of a plurality of local legal dialects. On the one hand, the expansion of soft law signifies a drift towards global unification. Soft legal tools harmonize, unify and globalize law. For instance, soft commercial law is the product of the efforts of the unification movement advanced by social forces committed to the facilitation of transnational capital expansion. On the other hand, the multiplication of soft legal regimes mirrors the complexity of global legal pluralism¹³⁸ where multiple regional legal orders coexist with specialized legal regimes.

5.3 Ehrlich's "Living Law"

If Savigny's analogy between law and language features prominently in the genealogy of soft law, Eugen Ehrlich's idea of "living law" is also a recurrent theme in the discourse about soft normativity. Ehrlich presents an organicist and social theory of law, based on two crucial tenets: a pluralistic notion of society as consisting of multiple social associations and the concept of "living law."¹³⁹

138 A core concept of classical sociology of law, legal pluralism has been revisited, acquiring new heuristic value. Some, like Boaventura de Sousa Santos, rejecting as anachronistic and inadequate the paradigm of "legal pluralism," welcome the advent of an era of postmodern "legal plurality" where multiple legalities operate in local, national and global time spaces. In this view, what constitutes legal plurality are "discourses coupled with practices in which sanctions, rules and functions such as social control and dispute resolution play a key role." Others, like Gunther Teubner, reformulate the concept of legal pluralism in light of the "linguistic turn." Legal pluralism is thus described as a multiplicity of diverse communicative processes that observe social action under the binary code legal v. illegal rather than as a set of conflicting social norms. See Sally Engle Merry, *Legal Pluralism*, 22 *Law & Soc'y Rev.* 869 (1988); John Griffiths, *What is Legal Pluralism?*, 24 *J. Leg. Plur.* 1 (1986); de Sousa Santos, *supra* note 91; Teubner, *supra* note 50.

139 Eugen Ehrlich (1862-1922) created a sociological jurisprudence on the foundations laid by the Historical School. While sharing with the champions of historical jurisprudence the assumption that law is found and not made, and with later historical jurists the idea of law as a means of social control, Ehrlich contends that the Historical School "has made a beginning but was not able to carry it out." Drawing on Savigny and Puchta, he articulates a sharp critique of Classical Legal Thought and calls for a "sociological science of law." Ehrlich sets himself a twofold task. First, he is eager to highlight that classical legal thought is a mere technique aimed at transitory practical goals and incapable of grasping the stratified complexity of law. Second he *seeks* to provide a methodologically grounded description of "the integral and spontaneous reality of law in all its levels of profundity." Classical legal thought Ehrlich maintains, amounts to a merely "practical science of law," designed for the use of the judge whom it supplies with abstract legal propositions easily applicable, through deductive reasoning, to specific cases. In Ehrlich's analysis, classical legal thought is marked by two main flaws: abuse of deduction and abstract individualism. Legal science, in its dominant mode, is exclusively concerned with the deductive derivation of rules of decision from abstract legal propositions and with state law as creating individual rights and duties. Such an impoverished state of legal science, Ehrlich argues, is the result of a historical process of the differentiation of legal practice leading to the hypertrophy of modern positive law which obscures law's social reflexivity. Indeed, all law is made of the same material of social life at large, the legal norm being merely one of the various rules of conduct. Law's specialty lies in a historically differentiated and specialized decision-making system; what makes legal propositions "legal" is not logic nor some

Ehrlich's sociology of law rests on broad notions of legal pluralism. In Ehrlich's analysis, society is "the sum total of the human associations that have mutual relations with one another."¹⁴⁰ The social formations intermediate between the state and the individual constitute "a universe of interlacing rings and intersecting circles";¹⁴¹ churches, political parties, corporations, classes and professions constitute a complex web of associations acting upon, and reacting to, one another. In this varied social landscape, Ehrlich detects two kinds of associations, displaying different features and corresponding to distinct stages of social development: genetic associations and specialized, voluntary associations.¹⁴² Both types perform a crucial normative activity, positing rules of conduct that constitute the inner order of each association. The rules organizing and regulating each group's life are uniform as to form, being formulated as abstract norms expressing commands and prohibitions, but multifarious as to content, consisting of rules of law, morality, religion, and ethical custom.¹⁴³

Legal associations are a peculiar type of social associations whose inner order is based upon legal norms; the state, juristic persons, corporations, foundations and institutions are among the most readily recognizable legal associa-

higher or magical normativity, but "the specialized (differentiated) performance of a subset of social operations (legal decision-making) by special people (lawyers) who distil legal propositions." Driven by the professional/political agenda of the "guild of lawyers," this specialized system has burgeoned, rendering invisible law's intimately social nature. In Ehrlich's vision, sociological jurisprudence is called to emancipate legal science from a sterile refinement of legal propositions and to bring it to a "scientific observation of law in its social context." Whereas legal propositions are the subject matter of the practical science of law, "living law" is the methodological focus of the theoretical science of law. Legal science in the proper sense of the term, Ehrlich warns, is "a part of the theoretical science of society, of sociology." Eugen Ehrlich, *Grundlegung der Soziologie des rechts* (1913); *Fundamental Principles of the Sociology of Law* (1936, reprint Transaction Publishers 2002) [hereinafter Ehrlich, *Fundamental Principles*].

140 Id. at 26.

141 Id. at 26-28.

142 At the lower stages of development, Ehrlich suggests, the social order rests exclusively upon genetic associations, such as the clan, the family and the house-community. The "Urform" of any other association, genetic associations are marked by two distinctive traits. First, they are non-voluntary, owing their existence to "unconscious impulses" rather than to free human choice. Second, genetic associations, being at the same time a community of language, ethical customs and social life, fulfill a multiplicity of heterogeneous functions: economic, religious, military and legal. The advancement of civilization triggers the proliferation and specialization of social associations. Ehrlich envisages social development as a struggle for existence, in which the differentiation and complexity of life requires an ever increasing capacity of socialization for human beings to survive. At the highest degree of civilization, we find an almost incalculable number of associations; religious communities, political parties, economic associations, social coteries and social clubs mirror the richness and variety of human life. Free choice and specialized functions are the defining features of these associations. Contrary to genetic associations, these novel social formations are voluntary, membership being a matter of discretionary joining and reception. Moreover, they are highly specialized, pursuing new distinct and specific goals or severing and further developing single functions of the genetic associations. Ehrlich, *Fundamental Principles*, supra note 139, at 26-36.

143 Id. at 27-28.

tions.¹⁴⁴ Legal norms, Ehrlich argues, are rules of conduct just like any other. Like all social norms, legal norms play a crucial organizing role; they constitute the organizational backbone of legal associations, assigning to each member its relative position within the association as well as its task. In Ehrlich's analysis, effective organizing power is the crucial feature of "living law." Not only Staatsrecht (public law in a narrow sense) and the law of corporations but also private law are social, living law in that they forge the inner order of social associations.¹⁴⁵ Whereas Staatsrecht defines the organizational order of the state and articles of association determine the inner order of corporations, private law shapes the organization of economic associations. Private law, Ehrlich suggests, creates associations rather than individual rights and duties. Property law and contract law forge the organizational structure of the farm, the factory the workshop, the bank.¹⁴⁶

Having described the pluralistic character of society and the social nature of legal norms, Ehrlich delves deeply into the analysis of the "living law." Here, Ehrlich's discussion is both a blunt critique of classical legal thought and the mature fruit of his organicist theory of law. The development of classical legal science, Ehrlich warns, has obscured the vitality of the "living law" in that it had focused exclusively on the refinement of legal propositions by judges, legislators and state administrators. The rise to prominence of a merely practical juristic science concerned with the self-aggrandizement of the modern state,¹⁴⁷ claiming a monopoly regarding the administration as well as the creation of law, has rendered the "living law" invisible.¹⁴⁸ By contrast, a theoretical and socio-

144 Id. at 40.

145 Id. at 43. Rejecting Gierke's distinction between social law and individual law, Ehrlich is eager to highlight private law's deeply social and organizational nature. While Gierke contrasts the social and relational character of "social law" (the law of the state and the law of corporations) with the will-based nature of "individual law" (the entire remaining private law), Ehrlich claims that "the entire private law is a law of associations"

146 Ehrlich, *Fundamental Principles*, supra note 139, at 44-53. For instance, ownership, lease, usufruct as well as a complex web of contracts of service, of wage and of employment define the juristic form and the economic content of the factory. Therefore, all private law is social law in the same sense as the law of the state and the law of corporations; it is social, living law insofar as it springs spontaneously from the economic associations and as it organizes the social interrelations within the associations.

147 As to the role of the state in the production of law, Ehrlich notes: "Now, what is the propulsive force in this whole development? What prompts the state to take over to an ever increasing extent the administration of justice and the creation of law which originally belong to the lesser associations of which society is composed and finally to assert, in theory at least, supreme power over all these things? If we consider the state by itself quite apart from society this conduct is incomprehensible, we cannot understand it as long as we think of the state as an institution suspended in mid-air. We must think of it as an organ of society. The cause of it is the steadily progressing unification of society, the quickened consciousness that the lesser associations in society which in part include one another, in part intersect one another, in part are interlaced with one another are merely the building stones of a greater association of which they become parts. The structure of every association is conditioned by the constitution of the individual associations of which it is composed ... this explains the endeavor of society to effect a unitary inner order of the associations according to its needs". Ehrlich, *Fundamental Principles*, supra note 139, at 150.

148 Id. at 9-14.

logical science of law is able to cast new light on the “living law” by elucidating the distinction between legal norms and legal propositions. “Living law” is the law which dominates life itself even though it has not been laid down in legal propositions.¹⁴⁹ Careful scrutiny reveals that law consists of a negligible quantity of abstract legal propositions endowed with authority and universality and of a large number of legal norms characterized by their effectivity and organizing power. The former represent the most static and superficial level of law, exerting a minimal influence on the spontaneous legal order of society and lagging behind it. The latter constitute the deepest and most dynamic level of law, the “living law” ruling society as “an inner pacific order.” Underneath the abstract legal propositions formulated by the state and underneath the norms for decision elaborated by the courts, lies the direct and spontaneous order of the multiple social associations.¹⁵⁰ Crucial historical events such as the abolition of medieval serfdom, the liberation of the English peasants, the formation of trade unions and trusts have occurred independently of legal propositions.¹⁵¹ The inner order of the associations is not only the original but also the basic form of law. In Ehrlich's words, “the legal proposition not only comes into being at a much later time, but is largely derived from the inner order of the associations.”¹⁵² Legal propositions do not arise in popular consciousness; instead, they are the products of the intellectual labor of the jurists who distil them from the inner order of society.¹⁵³ This process of distillation involves two operations: the derivation of norms of decision from the “living law” constituting the spontaneous order of society and the transformation of norms of decision into abstract legal propositions. The first operation is triggered by a state of social war: confronted with the emergence of a conflict between groups or individuals, the judge extracts a norm of decision from the living legal order by means of universalization, reduction to unity or free-finding of norms.¹⁵⁴ Far from operating without bias and in the spirit of pure science, the judge is driven by considerations of power, expediency

149 Id. at 493.

150 Georges Gurvitch, *elements de Sociologie Juridique* (1940); *Sociology of Law* (preface by Roscoe Pound) 118 (1947, reprint Routledge & Kegan Paul 1973) [hereinafter Gurvitch, *Sociology of Law*].

151 Ehrlich, *Fundamental Principles*, supra note 139, at 32-34; Gurvitch, *Sociology of Law*, supra note 150, at 120.

152 Gurvitch, *Sociology of Law*, supra note 150, at 37.

153 Id. at 455, 175, 123.

154 Gurvitch, *Sociology of Law*, supra note 150, at 124, describes the various stages of this process of distillation as follows: Universalization: “social relations are judged according to the form of relations of this kind that prevails in a given locality, or the social relations of a whole country are judged indiscriminately by the forms of these relations that prevails in a certain part of the country or in a certain social class” (at 124). Reduction to unity: “an order which is in conflict with the general norm is held invalid even though its existence is clearly proved” (at 125). As to free-finding of norms, Ehrlich suggests that the judge completes and integrates the inner order of the association; a new situation which has not been anticipated confronts the judge with the necessity of finding a norm of decision that goes beyond the inner order of the association. Since he cannot find a solution in the inner order of the association, he renders the decision according to fairness or morals, i.e., according to non-legal norms (at 127-29).

or justice.¹⁵⁵ However, the distillation of a legal proposition requires a second operation. For a norm of decision to become an abstract legal proposition, it has to pass through the still of juristic science. In the hands of judges, academics or legislators, the norm of decision is reduced to its basic principle, couched in words and proclaimed authoritatively with a claim to universal validity.¹⁵⁶

5.4 From “Living Law” to “Soft Law”

Ehrlich's notion of “living law” is revived time and again in the controversy over soft law. Significantly, the two elements of Ehrlich's approach that best serve the arguments of soft law advocates, i.e., “emanationism” and the idea that living law is ethically sanctioned by virtue of its origins, are those that invited Weber's criticism.¹⁵⁷ “Emanationism” refers to the idea that social change can be explained by reference to some transpersonal entity, Geist or social purpose. Ehrlich's theory of living law betrays a strong emanationist flavor, holding that a higher telos, the maintenance of the inner pacific order of society, drives social development and explains legal change.¹⁵⁸ Consequently, law is reflective of society, rather than constitutive or relatively autonomous: living law springs organically from the multiple intermediate groups and associations, reflecting the immanent logic of social development. Weber sharply criticized this emanationism, claiming that social change results from the play of a variety of material interests, values and ideas and envisaging law as constitutive rather than reflective. Moreover, Weber took issue with Ehrlich's idea that the living law is invested with a special ethical legitimacy because of its organic origin from the “inner order of the social associations.” Ehrlich's sociology of law is permeated by the suggestion that the living law, as an “order of peace” directly and spontaneously arising from society, is endowed with special ethical value and effectiveness.

A novel brand of emanationism and a value-laden notion of soft law are recurrent arguments in the debate over soft legal regimes today. While living law sprang from incarnate social associations, soft legal regimes emanate spontaneously from a plurality of “invisible colleges,” “invisible professional communities” and “invisible social networks” transcending territorial boundaries.¹⁵⁹ The proliferation of a global soft economic law is said to reflect the evolutionary logic driving the transformation of the global political economy in the direction of the “competition state,”¹⁶⁰ the deterritorialization of capital and related processes of flexible accumulation. Emanationism engenders a value-laden notion

155 Id. at 360.

156 Id. at 174-77.

157 Duncan Kennedy, *The Disenchantment of Legal Rationality*, in Max Weber's “*Economy and Society*.” A Critical Companion 322 (Charles Camic, Philip S. Gorski & David M. Trubek eds., 2005).

158 Id. at 323-25.

159 Teubner, *supra* note 50, at 8.

160 Cutler, *supra* note 64, at 186-87.

of soft law. The champions of soft legality emphasize soft law's special ethical or functional value. In the hard v. soft controversy, the ethical argument is often articulated in terms of democracy and deliberation. Soft law, observers suggest, enhances democracy;¹⁶¹ it bridges the gap between transnational governance and its democratic legitimacy by effectively fostering the self-organization of civil society into associations acting in a European public space of discourse and communication.¹⁶² Those who frame the argument in functionalist terms contend that, by virtue of their organic origin, soft legal regimes are highly responsive to social needs, ultimately proving more efficient than hard law measures. While self-regulating contracts and merchant custom are seen as the best way to achieve efficiency and to provide maximum merchant autonomy,¹⁶³ soft consumer law is praised for its peculiar responsiveness to actual needs as well as for the effectiveness of its self-imposed sanctions.

5.5 *Late 19th and Early 20th Century Theories of Legal Pluralism*

Finally, 19th and early 20th century theories of legal pluralism deserve special emphasis in the social genealogy of soft law. Slogans highlighting soft law's "pluralistic," "participatory," and "deliberative" nature as well as its remarkable "input legitimacy" echo a strand of thought running from Gierke's theory of associations to Santi Romano's conception of the plurality of legal orders and Gurvitch's theory of social law. Pluralistic approaches help to conceptualize soft law in two ways. First, by building on an organicist definition of law, they accommodate soft, factual and social norms within the definition of law. Second, by challenging state centrism and highlighting the variety of coexisting legal orders, they account for the multiplicity of soft legal regimes.

5.5.1 *From Gierke's Theory of Associations to Santi Romano's Theory of the Plurality of Legal Orders*

The spokesmen of the Germanist wing of the Historical School, Otto von Gierke sought to establish a theory of law that takes into account the importance of the subsidiary groups within society.¹⁶⁴ Rejecting any notion of the state as the

161 Teubner, *supra* note 50, at 1. Although Eugen Ehrlich's theory turned out to be wrong for the national law of Austria, I believe that it will turn out to be right, both empirically and normatively, for the newly emerging global law. Empirically, he is right, because the political-military-moral complex will lack the power to control the multiple centrifugal tendencies of a civil world society. And normatively he is right, because for democracy, it will in any case be better if politics is as far as possible shaped by its local context.

162 Kenneth A. Armstrong, *Rediscovering Civil Society: The European Union and the White Paper on Governance*, 8 Eur. L. J. 102, 105 (2002).

163 Cutler, *supra* note 64, at 188.

164 For an introduction to Otto von Gierke (1841-1921), see Otto von Gierke, *Community in Historical Perspective. A Translation of Selections from "Das deutsche Genossenschaftsrecht"* [The German Law of Fellowships] xiv (Mary Fischer trans., Anthony Black ed., 1990). Widely known for his concept of "fellowship" (Genossenschaft) and of cor-

exclusive source of law, he turns his gaze to the multiple intermediary bodies, serving as mediating links between the state and the individual. Contrasting the Enlightenment individualist conception of society with an organic theory of state and society, Gierke shifts the focus to the life of the multiple subsidiary groups, fellowships, associations and corporations. Accordingly, he detects two centers of legal existence: the individual and the associated sides of human personality.¹⁶⁵ The two produce a third centre of social power: the will of the association. Social law is a third legal realm between private law and constitutional law, completing and expounding the juridical and social image of the political community.¹⁶⁶ Gierke's social law focuses on the link between the subsidiary groups, on their mutual relationships as well as on their ties to the highest association, the state, which represents the sovereign plenitude of powers. State law cannot exist separately from social law, springing from the multiple intermediary groups. The link between the state and the law is irrevocable, but neither precedes the other.¹⁶⁷ As Santi Romano¹⁶⁸ himself acknowledges, Gierke's theory of associations and Hauriou's notion of "institution" were crucial for the development of the two cardinal ideas informing Santi Romano's own theory of law: the institutionalist concept of law and the notion of the plurality of legal orders.¹⁶⁹

porate group personality (Gesamtpersonlichkeit), Gierke "worked up elements of the German socio-political tradition and romantic and quasi-Hegelian philosophy. What he proposed was a kind of community or common life (Gemeinwesen) expressed by the moral and legal concept of fellowship (Genossenschaft)." (It is from the introduction to the above quoted Community in Historical Perspective, p. x-xv.)

165 See George Heiman, *Introduction, The Nature of Fellowships and Associations*, in Otto von Gierke, *Associations and Law* 1, 10-16 (George Heiman ed. and trans., University of Toronto Press 1977).

166 Id. at 14-16.

167 Id. at 10-18 and 42-48.

168 Santi Romano (1875-1947) developed a theory of the plurality of legal orders (pluralità degli ordinamenti giuridici) that, although not widely known beyond Italian borders (with the exception of Carl Schmitt; see Carl Schmitt, *On the Types of Juristic Thought*, (J. Bendersky trans., 2004)), is a sophisticated and ambiguous synthesis of 19th and early 20th century legal pluralism. See Santi Romano, *L'Ordinamento Giuridico* (1918) [hereinafter Santi Romano, *L'Ordinamento Giuridico*]; Santi Romano, *Oltre lo Stato. Discorso Inaugurale dell'anno accademico del Regio Istituto di Scienze Sociali "Cesare Alfieri"* (1918) [hereinafter Santi Romano, *Oltre lo Stato*].

169 See Santi Romano, *L'Ordinamento Giuridico*, supra note 168, at 132-34. While paying tribute to Gierke's theory of associations, Santi Romano seeks to differentiate his own institutionalist approach. Yet, while both authors share the same anti-individualist theoretical premises, the very notion of "institution" closely resembles Gierke's Genossenschaft. The core element of Gierke's Genossenschaftstheorie lies in the unseverable link between law and community. Similarly, Santi Romano advances a necessary and absolute equation between the institution and the legal order. As the community is a Sozialkörper, the institution is a corpo sociale. On the relationship between Santi Romano and Gierke, see M. Fuchs, *La Genossenschaftstheorie di Otto von Gierke come fonte primaria della teoria generale del diritto di Santi Romano*, in 9 *Materiali per una Storia della Cultura Giuridica* 65 (1979). On the existence of two separate strands in Santi Romano's work, see Norberto Bobbio, *Teoria e ideologia nella dottrina di Santi Romano*, in *Le dottrine giuridiche di oggi e l'insegnamento di Santi Romano*, 25 (Paolo Biscaretti di Ruffia ed., 1977).

In Santi Romano's work institutionalism and pluralism are highly complementary, the latter being a corollary of the former. The definition of law as an order-institution rather than as a system of norms is a necessary premise of the idea of the coexistence of multiple legal orders-institutions. Santi Romano's institutionalism is both innovative and deeply ambiguous. Targeting Kelsenian normativism, Santi Romano emphasizes the inadequacy of the concept of law as a system of norms and advances a notion of law as an organizational entity.¹⁷⁰ Law, Santi Romano claims, is to be approached as an "ordinamento giuridico," a legal order, an organic whole, consisting of norms, organizational mechanisms, authority and force.¹⁷¹ In Santi Romano's words, a legal order, far from being a mere ensemble of norms, is a lively unitary entity that "moves norms like pawns on a chessboard." Attempting further to clarify the notion of ordinamento giuridico, Santi Romano introduces the rather obscure concept of "institution." Drawing on Hauriou's notion of institution, he advances a two-fold equation: every legal order is an institution and, conversely, every institution is a legal order; the equation between the two concepts being necessary and absolute.¹⁷² While Hauriou articulates a broad notion of institution as a social organization,¹⁷³ Santi Romano seeks to draw a legal definition of institution. For Hauriou an institution is, in its essence, a social organization and law is the product of an institution. By contrast, Santi Romano postulates an identity rather a causal link between the two.¹⁷⁴ As a concrete, stable, closed and permanent social organization, the institution is the primary and essential manifestation of the law.¹⁷⁵

According to Norberto Bobbio the relevance of Santi Romano's work lies in his pluralist theory rather than in his institutionalist paradigm.¹⁷⁶ The definition of law as an order-institution is a necessary premise to the notion of a multi-

170 In Santi Romano's view, not only are normativist definitions of law vague and fuzzy, they also lack any practical relevance, proving empty abstractions of no use for practical legal disciplines. Moreover, normativist concepts of law, originating mainly in the field of private law, betray an obsolete approach that privileges private law over public law. For the inadequacies of normativism to be remedied, a methodological shift is needed, a shift towards an institutionalist theory of law. Santi Romano, *L'Ordinamento Giuridico*, supra note 168, at 1-12.

171 Id. at 15.

172 Id. at 27.

173 Maurice Hauriou, *Aux Sources du droit: le pouvoir, l'ordre et la Liberté* (1933); on Hauriou, see Renato Treves, *Introduzione alla Sociologia de Diritto* (1980); see also Albert Broderick, *The French Institutionalists: Maurice Hauriou, Georges Renard, Joseph T. Delos* (Mary Welling trans., 1970).

174 Santi Romano, *L'ordinamento giuridico*, supra note 168, at 27 and 31-33.

175 The weakness of Santi Romano's institutionalism lies in the vagueness surrounding the concept of legal order and institution. As Norberto Bobbio suggests, Santi Romano fails to provide a definition of institution, merely emphasizing its pre-judicial nature. The notion of institution presents us with a dilemma: either the institution is grounded in material social forces or it is no more than a complex of Hartian secondary rules. While Santi Romano resolutely resists making the first move, the second would lead back to a form of complex normativism; see Bobbio, supra note 169.

176 Id. at 30-31.

plicity of legal orders-institutions. If any organic entity consisting of organizational mechanisms, norms, power and authority is a legal order, it follows that multiple and manifold legal orders coexist and intersect. While normativism is the target of Santi Romano's institutionalism, state-centered monism is the foil of his pluralism. Santi Romano regards monistic approaches as the hybrid product of the encounter between 18th century natural law theories and the Hegelian mystique of the Ethical State. Santi Romano's pluralism is hardly unique, reflecting a widespread sensitivity in early 20th century European legal thought where monistic dogmatism was besieged on several fronts.¹⁷⁷ However, the peculiarity of Santi Romano's pluralism lies in its uninhibited and ambiguous character. Awareness of the crisis of the liberal state that emerged from the French Revolution leads Santi Romano to the notion of a polytypic plurality of legal orders.¹⁷⁸ In Santi Romano's words, "social life, imperious and stronger than state law, has taken revenge, giving rise to a multiplicity of partial legal orders."¹⁷⁹ The state is merely one species of the genus "law." Alongside state law, the Sicilian jurist detects a multiplicity of normative orders claiming legal dignity. Santi Romano's pluralism is uninhibited in that it relentlessly dissects the legal system both at a macro-level and the micro-level. His notion of institution as an entity consisting of organization, authority, norms and power enables him to define as institutions and legal orders not only every non-state organized body but also every autonomous element within the structure of the state. At the macro-level, the state, the international community, the Church, the unions, the firm and the ship are to be reckoned as legal orders-institutions. At the micro-level, municipalities and administrative agencies are minor institutions and legal orders comprised within that larger, complex institution which is the state. Similarly, the so called "ecclesiastical bodies" are minor institutions comprised within the Church.¹⁸⁰

177 Although starting from different assumptions and reaching divergent outcomes, Gierke and Stammler in Germany, Hariou and Duguit in France, and Maitland and Laski in England sparked new interest in social law and legal pluralism. In Italy, where monistic legalism found fierce opponents in Croce and Capograssi, pluralistic theories had, borrowing from Croce himself, the effect of "a stone thrown on the anthill of mainstream legal philosophers" (quella grossa pietra sul formicaio dei compilatori d'Istituzioni di Filosofia del Diritto); Benedetto Croce, *Intorno alla Mia Teoria del Diritto*, *La Critica* 445, 447 (1914). On the Italian debate on legal pluralism, see Virgilio Mura, *Statualismo e Diritto Sociale* (1979).

178 Santi Romano, *Oltre lo stato*, supra note 168.

179 Santi Romano, *L'ordinamento giuridico*, supra note 168, at 201.

180 Santi Romano's pluralism, however, is fraught with ambiguities and pervaded by a deep contradiction between the effort to fragment and pluralize the realm of law and the struggle to contain the multiple legal orders within the state-centered paradigm. See Giovanni Tarullo, *La Dottrina dell'Ordinamento e la Figura Pubblica di Santi Romano*, in *Le Dottrine Giuridiche di Oggi e l'Insegnamento di Santi Romano*, supra note 169, 245. More specifically, Romano's analysis of the types of institutions and legal orders as well as of their reciprocal relationships, reveals an uneasy tension between a polytypic model and a monotypic model, between autonomy and subordination and, finally, between juridical relevance and juridical irrelevance. On the one hand, Santi Romano draws a highly polytypic model, where widely diverse institutions coexist: original and derived, particular and general, simple and complex, perfect and imperfect. On the other hand, Santi Romano's

5.5.2 Gurvitch's *Droit Social*

The rejection of a state-centered conception of norm production and the idea of legal pluralism are further developed in Gurvitch's sociology of law. Gurvitch's *droit social* is based on two crucial tenets: the distinction between individual law and social law, and a pluralistic understanding of the legal order.¹⁸¹ The idea of social law and the notion of legal pluralism have an openly progressive flavor, being the central pillars of a political project aiming at radical social transformation.¹⁸²

Law is the expression of order or harmony of different forms of sociality or collective life. Accordingly, its character varies greatly depending on the nature of the different forms of sociality it represents. The primary source of law is to be detected in the normative facts, at once generating law and grounding their very existence in law. At first glance, Gurvitch's definition of law bears striking resemblances to Santi Romano's equation between institution and legal order. The source of the legitimacy and effectiveness of law is to be found in the active life of the communities that produce law through their social activity. One cannot say either that law pre-dates the community or that the community pre-dates law: the two originate and develop in mutual interdependence. At closer inspection, however, not only does Gurvitch's definition of law take on a progressive and idealistic flavor absent in Santi Romano, but it also rests on a deeper, micro-sociological kind of organicism. As to the idealistic element, in investigating the process by which a social fact becomes a normative fact, Gurvitch employs an "ideal/real" method that emphasizes both the normative fact's capacity to embody positive values as well as its dynamic dimension. Hence, law is both the collective realization of ideal values and notions of justice, and a manifestation of active sociality, of the dynamic life of social groups, villages, factories, industries and unions. As to the micro-sociological and organicist element, normative facts can be grouped in two different categories, reflecting different values and, ultimately, giving rise to two opposite types of law. Gurvitch distinguishes between spontaneous sociality and organized sociality and, further, between different types of spontaneous sociality. While spontaneous sociality refers to immediate states of the collective mind and in collective behaviors, organized sociality arranges collective behaviors in pre-fixed deliberate schemes establishing hierarchy and centralization.¹⁸³ The distinction between these two types of sociality translates into the distinction

pluralistic model remains ultimately monotypic in that the original, general, complex and perfect institution, i.e., the state, is the yardstick for classifying and weighing the other institutions. Moreover, while the state is said to be an autonomous and self-sufficient institution, the other institutions seem to be necessarily either subordinated to, integrated into or derived from the state. Finally, other autonomous and self-sufficient orders may exist at the condition of being irrelevant for the state, i.e., independent from the state as to existence, content or efficacy.

181 Gurvitch, *Sociology of Law*, supra note 150, at 160; Georges Gurvitch, *L'Idée du Droit Social; Notion et Système du Droit Social* (1932, reprint Scientia-Verlag 1972).

182 Georges Gurvitch, *La Déclaration des Droits Sociaux* (1946).

183 Gurvitch, *Sociology of Law*, supra note 150, at 160.

between different types of organized and unorganized law.¹⁸⁴ Organized legal structures are to be normatively assessed in relation to the degree to which they are rooted in spontaneous sociality. For instance, in a capitalist regime, the structure of a firm rests on both spontaneous sociality, the community of the workers, as well as organized sociality, the legal organizational structure based on private property of the means of production. The organized structure, otherwise authoritarian, becomes social and organicist when it opens itself to the workers' spontaneous sociality by including workers' councils in the administrative apparatus. Moreover, different types of spontaneous sociality generate different types of law. Sociality by interpenetration entails partial fusion, reciprocal confidence and peace; by contrast, sociality by interdependence involves mere coordination, mutual distrust and war. The former gives rise to social law animated by an ideal of distributive justice, the latter to individual law, reflecting an ideal of commutative justice.¹⁸⁵

In a similar vein, Gurvitch's legal pluralism is infused with a deeply progressive flavor. Gurvitch draws a distinction between three different notions of pluralism: pluralism as a fact, as an ideal, and as a technique. The first describes the pattern of social life, marked by an intense pluralism of groups, whose number, autonomy and force vary. Unions, workers' councils, but also capitalist corporations are among the plural social groups. The second reflects a legal and moral ideal based on the principle of the autonomy and equivalence, but not the identity, of the multiple social groups. The third entails a political strategy regulating social conflicts through the reciprocal limitation of autonomous groups of equal power and force.

In Gurvitch's theory of *droit social*, social law and legal pluralism are crucial tools serving a political project aimed at triggering the transition to socialism in France. A critique of Bolshevik authoritarianism and an attempt to devise an alternative strategy, Gurvitch's "Declaration of Social Rights" aims at complementing and strengthening the Declaration of Political and Human Rights.¹⁸⁶ In 1944, facing the threats posed by "economic feudalism and financial oligarchy," the autocracy of the employers and the heightened risk of authoritarianism, Gurvitch envisages social law and legal pluralism as critical instruments of emancipation and radical social transformation.

184 Id. at 174. The life of the law unfolds itself through a series of superimposed strata moving from a more or less rigid scheme or external symbolism to an increasing dynamism and immediacy. Six levels of depth can be found within any kind of law: a) organized law fixed in advance, b) flexible organized law, c) organized intuitive law, d) unorganized law fixed in advance, e) flexible unorganized law, and f) unorganized intuitive law. Id. at 172-75.

185 Gurvitch, *Sociology of Law*, supra note 150, at 167.

186 Gurvitch draws on Proudhon's idea of supplementing the political constitution with a social constitution; see Gurvitch, *La Declaration des Droits Sociaux*, supra note 182.

5.5.3 Soft Law as the Product of Postmodern Legal Pluralism

The proliferation of soft normative instruments has sparked a renewed interest in legal pluralism. The most sophisticated contemporary theories of legal pluralism draw heavily on the critical potential of the ideas developed by the notion's founding fathers. Highlighting the flaws of the classical analytical concept of legal pluralism, Boaventura Sousa Santos advocates a deeply political and emancipatory notion of legal plurality. Sousa Santos may be seen as upholding Gurvitch's overtly political legal pluralism, recasting it in oppositional postmodernist terms. Sousa Santos' theory of legal plurality is an attempt to recover the critical potential of early legal pluralism which was tempered, if not lost, in the 1960s when legal pluralism underwent a process of normalization.¹⁸⁷ Eschewing the pitfalls of analytical legal pluralism, Sousa Santos' theory of legal plurality serves a cultural political strategy aimed at unveiling the manifold relations between law, power and knowledge as well as at uncovering unsuspected sources of oppression or emancipation through law.¹⁸⁸

In the postmodern era classical legal pluralism lives multiple lives. A tool of emancipation in Sousa Santos' hands, 19th century legal pluralism becomes a crucial heuristic device in Gunther Teubner's autopoietic theory. Whereas Santos explores global constellations of power and law in order to seek sources of social emancipation, Teubner sees legal pluralism as a tool capable of identifying legal phenomena operating on the global level as well as an instrument suited for dealing productively with the paradox of self-reference. Paying tribute to the linguistic turn, Gunther Teubner breathes new life into 19th century legal pluralism, recasting it in communicative terms. Teubner's theory of legal pluralism is based on two central tenets. First, taking up Santi Romano's challenge to normativism, he defines law as a communicative autopoietic system that eschews the flaws of Santi Romano's institutionalism. Second, imparting a linguistic turn to Ehrlich's pluralism, he argues that plural legal orders arise from

187 As de Sousa Santos notes, legal pluralism became a core debate in legal sociology in the 1960s. With the rise to prominence of pluralistic approaches, legal pluralism underwent a process of normalization. The vibrant political thrust of 19th century pluralistic theories was neutralized by recasting them in analytical terms; legal pluralism was transformed into an analytical device allowing thicker descriptions of law in action, while the political challenge it mounted against state monism was downplayed. *See* de Sousa Santos, *supra* note 91, at 90-92.

188 De Sousa Santos' theory of legal plurality rests on two central tenets: a broad definition of law as a set of practices, sanctions and discourses aimed at social control and dispute resolution and the idea that law operates in different, though intersecting spaces. As to the definition of law, law is seen as resulting from the varying articulation of three structural components: bureaucracy, violence and rhetoric. These components are both communication forms as well as decision-making strategies. While rhetoric is based on the persuasive and argumentative force of verbal and nonverbal sequences, and while violence draws on the threat of force, bureaucracy relies on the authoritative potential of regularized practices. Each of these components is both an "orthotopia," that is an hegemonic mode of production of social action and power through which inequality is reproduced and justified, and an "heterotopia," a site of resistance and emancipation. *See* de Sousa Santos, *supra* note 91, chs. 2 and 3 (esp. pp. 86-88), 8.

self-organized processes of structural coupling of law with communicative networks of an economic, cultural or technological nature.

Teubner's definition of law as an autopoietic communicative system may be seen as an attempt to resolve the dilemma inherent in Santi Romano's institutionalist approach. While Santi Romano failed to provide a legal definition of institution, therefore falling back into either a social notion of institution or a form of complex normativism, Teubner resorts to the idea of a self-regulating system of communication operating on the basis of the binary code legal v. illegal. In Teubner's autopoietic theory, law is envisaged as a network of operations based on information and utterances, as a communicative system that observes social action under the dichotomy of legality v. illegality. The legal system is organizationally closed though cognitively open. Organizational closure entails self-description, self-production and self-maintenance through hypercyclical linking; the legal system produces its own components on the basis of its own self description and it links them in a hypercycle that guarantees the conditions of self-production. Cognitive openness implies that different autonomous systems - law, economy, technology - communicate through a mechanism of reciprocal observation. In other words, the legal system observes other systems and constructs an image of the other system, introducing distinctions within itself.¹⁸⁹

6 A Critique of the Social Genealogy

The social genealogy is recurrently invoked in the debate over the merits of soft law, pervading the discourse of global law and European harmonization. Whether explicitly articulated or implicit between the lines, the social genealogy shapes the vocabulary of private international lawyers, comparatists and sociologists of law, modeling their arguments and their professional agendas. Yet, the social genealogy deserves close scrutiny, raising a number of crucial questions; a critical investigation of the analytical and argumentative strategies employed by its advocates sheds light on the ambiguities and the blind spots that constrain and distort the hard law v. soft law debate. At closer inspection, the three ideas recurrently employed to frame pro-soft law arguments, i.e., law as language, living law, and legal pluralism, appear both analytically dubious and politically ambiguous. Analytically, they turn out to be limited use, a conceptual gap lying between living law and soft law or classical legal pluralism and soft global interlegality. Moreover, in the history of European legal culture, these ideas have proved ambiguous, having been invoked to endorse and support widely different political and professional projects.

First, Savigny's analogy between law and language is a powerful though ambiguous image employed to legitimate a variety of political and epistemological agendas. The analogy can be traced back to the Humanist legal culture of the 16th century. Not only was Savigny an outstanding Romanist and Mediaevalist, he was also a cultivator of 16th century Humanist jurisprudence.¹⁹⁰ Sa-

189 Teubner, *Law as an Autopoietic System*, supra note 131, chs. 2 and 3.

190 Riccardo Orestano, *Edificazione e coscienza del giuridico in Savigny. Tre motivi di rifles-*

vigny may have ignored Hotman's definition of the *ius civile* as *ius vernaculum*, but he was certainly acquainted with Doneau's parallel between law and language. As the sovereign cannot alter the meaning of words *ab imperio*, we read in the first pages in Doneau's Commentary,¹⁹¹ so he cannot reform those elements of the law deriving from *natura ipsa rerum et coherentia*. The analogy between law and language fit the Humanist agenda aimed at re-arranging the materials irrationally bundled together in Justinian's *Corpus Iuris* according to a rational and natural scheme.¹⁹²

The natural law flavor perceivable in Doneau's words fades away in Hugo's appraisal of the law-language equation. A forerunner of the Historical School, Hugo, apparently not yet affected by romantic trends, tackles the relationship between law and language with the attitude of an empiricist.¹⁹³ Language develops naturally over time through a self-creating process influenced "by those who speak and read well." Similarly, private law is an historical product evolving in the direction determined by those who master it and use it. The romantic organicist ideal of law as the product of silently operating forces is yet to be articulated. Hugo, while rejecting the two fundamental natural law modes of legitimation, the theological and the social contract foundations, does not fully embrace an organicist approach. Law, as language, is neither imposed by God nor the result of men's agreement but rather the historical product of well determinable individual relationships. The analogy between law and language aptly served Hugo's project aimed at the creation of an autonomous legal science, which was to be both empirical and philosophical, thus overcoming the dualism between antiquarian approaches and natural law speculations, typical of 17th and 18th century legal science.

The equation between law and language is fully developed in the writings of Jacob Grimm, the "poetic mind"¹⁹⁴ of the Historical School. In *Von der Poesie im Recht*,¹⁹⁵ the analogy is pushed one step forward. Not only is law, like language, an historical and organic phenomenon, it is also a peculiar form of poetic language. Grimm perceives law and language as the outcome of an identical, deeply poetic, source: the *Volksgeist*. Against the background of the Romantic revival of the religious and the sacred, the analogy between law and language acquires a mystical flavor, serving Grimm's spiritualist historicism. The foundation of law rests, according to Grimm, on the conscience and, ultimately, in the faith of the people.

sione, in *Quaderni Fiorentini* 21 (1978).

191 Hugues Doneau, *Commentarii de iure civili* (1574, Bauer et Raspe 1822-34).

192 Bellomo, *supra* note 43, at 206.

193 Gustav Hugo (1764-1844) *Lehrbuch der Geschichte des Romischen Rechts bis auf Justinian* (1818); Gustav Hugo, *Lehrbuch eines civilistischen cursus* (1823). See also Marini, *supra* note 130, at 232; Franz Wieacker, *A History of Private Law in Europe* (With Particular Reference to Germany) (Tony Weir trans., Oxford University Press 1995).

194 *Id.* at 234.

195 Jacob Grimm, *Von der Poesie im Recht* (1815); Jacob Grimm, *Geschichte der deutschen Sprache* (1853). See Stephen P. Schwartz, *Poetry and Law in Germanic Myth* (1973).

Savigny employs the analogy between law and language as a powerful image, signifying the spontaneous origin of law and casting light on its historical and popular nature. Jacob Grimm, in a letter to Savigny written in 1814, praises the analogy between law, language and custom as a radical and fundamental move, leading to a deeper understanding of law as a product of the *Volkgeist* and of language as emanating from the *Sprachgeist*. The alignment of law and language is therefore a crucial image employed to promote a profoundly Romantic agenda of legal nationalism. Although evoking appealing similarities, Savigny's analogy is misleading as a tool for conceptualizing soft law. While Savigny's theory of the origins of positive law retains a deeply Romantic, nationalist, and spiritualist thrust, emphasizing the cultural and spiritual unity of the *Volk* as well as the intimate cohesion of the consciousness of the people, the image of soft law as a global legal language has a universalist and functionalist flavor. Soft law arises from the continuously evolving needs of the global corporate elite, operating as a crucial communicative tool, and allowing global legal harmonization. Savigny's Romantic and nationalistic agenda is flipped. Today, the issues at stake are professionalism and efficient trans-national communication. Soft law is a communicative tool that helps to organize and facilitate global exchange. It plays not so much a reflexive, but rather a pro-active role; it is a set of flexible legal schemata anticipating and facilitating the needs of the market, rather than embodying immemorial customs.

Second, Ehrlich's notion of "living law" is of limited use as a tool for conceptualizing soft law. Due to its deeply historical brand of organicism as well as to its predominantly vertical pluralism, Ehrlich's theory fails to capture the peculiarities of global soft law. The historical dimension of Ehrlich's *Fundamental Principles* is not to be overlooked. Although criticizing the Historical School for disregarding the distinction between rules of conduct and legal propositions, Ehrlich relies largely on Savigny's teachings. Historical knowledge dissolves the illusion of the centrality of state law. The "living law" is profoundly social and historical, reflecting the vital social forces that bring about the development of legal institutions. Behind the heterogeneity and contingency of legal propositions lies the solid stability of "the facts of the law." At a deeper level, the law originates from a limited number of factual institutions that become legal relations in the course of legal development. Ehrlich traces law back to four foundational facts: usage, domination, possession, and declaration of will. The living law reflects the normative power of the factual and the historical. Every new development which arises for new purposes and which stands the test of time, "is added to the treasure of social norms." The robust factual solidity of Ehrlich's "living law," grounded in the inner order of the social associations, contrasts with the extreme mobility of the global law stemming from the professional expertise of private legislators, academics or arbitrators. If, on the one hand, the living law reflected deeply rooted social usages, customs, and norms of conduct, on the other hand, the current forms of soft regulation constitute a highly mobile normative universe, performing a facilitative role, rather than a reflexive one. Therefore, soft law stands in an ambiguous relationship to Ehrlich's living law. If, at first glance, it appears its contemporary equivalent, at closer inspection, it turns out to be rather its reverse. While soft law resembles living law in that both are self-produced legal orders, created by the very social groups they are to

serve, it differs from it in its roots. Far from being deeply embedded in long-lasting customs and usages, soft regulations are crafted to respond to rapidly changing market needs. In highlighting the merits of a soft regime of governance as an alternative form of coordinated decentralization, observers point out that it would allow the greatest degree of flexibility and revision accommodating rapid change.

Third, as a lens for investigating global soft interlegality, 19th century legal pluralism is both defective and ambivalent. At a descriptive level, 19th century pluralistic theories are ill-suited to shed light on the horizontal and polycentric structure of global law, ultimately privileging a vertical and hierarchical scheme. While they present a frontal challenge to the modern vertical and centralized law making model, 19th and early 20th century theories of legal pluralism are still deeply entrenched in it. In Gierke's organicist conception, the state, the highest association, as well as the multiple groups that it contains, is endowed with a life emanating from an invisible spiritual bond. This invisibility "does not make its life any less real and there is no need to resort to such allegorical figures as Germania or Britannia to verify the state's organic nature."¹⁹⁶ Similarly, Santi Romano's institutionalist and pluralist approach is marked by a tension between his "realist" attention to social life, imperiously erupting and stronger than the state, and an ideological commitment to a state-centered authoritarian model. The entanglement with the fascist regime frustrated Santi Romano's pluralistic intuitions, leading him to force the plural legal subjectivities into the historical scheme of the modern state. According to Giovanni Tarello, the fundamental thrust driving Santi Romano's work lies in its "pan-juridical ideology." Far from seeking an adaptation of the tools of legal science to the complexity of social reality, Santi Romano moves in the opposite direction. His institutionalist and pluralist theories are crucial for the preservation of the systematic vision of the *allgemeine Rechtslehre* and of the vertical-hierarchical modern legal structure.¹⁹⁷ Such a vertical, state-centered model has lost its descriptive value in the current age of global interlegality where the state is re-located as a peripheral, though crucial, legal space. Law-making models have undergone radical structural changes. Globalization affects law in two ways. Not only does it undermine the control-potential of national policy and therefore the chances of legal regulation, it also deconstructs the dominant law-making processes.¹⁹⁸ The source of global soft law lies in global private regimes rather than in institutional politics. In other words, law-making is happening alongside the state. The hierarchical, state-centered law-making model that emerged from the French Revolution as the convergence of Jacobean-positivist and natural law concepts has been displaced by a horizontal and polycentric legal structure. While the modification of

196 Gierke, *Associations and Law*, supra note 165.

197 Giovanni Tarello, *Prospetto per la voce "Ordinamento Giuridico" di una enciclopedia*, in *Politica del diritto* 63 (1975).

198 Teubner, supra note 50; Gunther Teubner, *Global Private Regimes: Neo-spontaneous Law and Dual Constitution of Autonomous Sectors in World Society?*, in *Public Governance in the Age of Globalization* (Karl Heinz Ladeur ed., 2000).

the structure may eclipse the role of the state, the latter is still a central player, its centrality lying in the way the state organizes its own decentering.¹⁹⁹

At a normative level, legal pluralism is a deeply ambiguous category. As a fact, legal pluralism is not inherently good or progressive; rather it may harbor sources of oppression and inequality. By drawing on 19th century theories of legal pluralism, global jurists may reiterate the social jurists' equation between the social "is" and the legal or political "ought" which attracted the Realists' critique. The existence of intersecting global and privatized legal orders, far from being an organic, inclusive and socially-responsive expression of the variety of social actors, can disguise and obscure manifold relations of power, oppressive forms of knowledge, and unequal forms of distribution. As an epistemological and political project, legal pluralism is capable of conveying radically different agendas. In Bobbio's words, pluralist approaches may hide either a revolutionary agenda, if the plurality of legal orders is envisaged as a tool for liberating social groups from the oppression of the state, or a reactionary ideology if pluralism can be seen as an episode of the fragmentation of the state and a harbinger of anarchy.²⁰⁰ Behind a pluralist theory you may find either Gurvitch or Santi Romano. Santi Romano's legal pluralism is ultimately informed by a conservative agenda. Theoretically a pluralist, ideologically Santi Romano is a monist.²⁰¹ While the notion of institution eclipses social conflict and contradictions by emphasizing the idea of an organic and organized totality, the pluralist approach foregrounds relations of convergence and cooperation between the multiple legal orders. Santi Romano's pluralism, critics claim, ultimately serves the preservation of the modern centralized and verticalized state.²⁰²

7 Conclusions: The Neo-Medievalist and the Social Genealogy as Ideologies

Despite their contradictions and ambiguities, the two genealogies pervade the debate over the vices and virtues of soft law as a tool for the harmonization of European law, setting the terms of the discussion and influencing its outcomes. The pervasiveness of the neo-medievalist romance and the repeated invocation of images and ideas borrowed from 19th and early 20th century social legal thought may be explained by their ideological nature and their powerful legitimizing potential. The two genealogies are forceful ideological constructions. They are the weapons with which European legal intellectuals wage their war

199 De Sousa Santos, *supra* note 91, at 94.

200 Bobbio, *supra* note 169, at 35-39.

201 *Id.* at 41.

202 Tarello, *La Dottrina dell'Ordinamento*, *supra* note 180, at 256, emphasizing Santi Romano's split persona: the theorist of legal pluralism and the president of the Italian Consiglio di Stato.

over the shaping of the European legal order.²⁰³ The debate over soft law has two major dimensions: it is a heated controversy over the respective merits of soft law and hard law as well as a duel between different, and at times opposite, projects of soft harmonization. The neo-medieval genealogy and the social genealogy are crucial for both dimensions of the debate.

In the hard v. soft controversy, the two genealogies provide the advocates of soft law with a vast armory of rhetorical arguments highlighting the virtues of soft harmonization and obliterating its blind spots and perverse effects. Rhetorical emphasis on organic spontaneity eclipses the fact that, at a merely instrumental level, soft law tools often prove deficient as to implementation and effectiveness, at times triggering unpredicted and counterproductive effects. At the level of policy objectives, celebration of pluralistic participation obscures the fact that soft law mechanisms, while involving a plurality of actors, are prone to reinforce entrenched power hierarchies, privileging visible and influential actors, and failing to take into account more marginal agendas. Similarly, accentuating the informal and gradual nature of soft harmonization allows its proponents to leave larger distributive questions unaddressed.

Further, the two genealogies form the terrain on which proponents of competing projects of soft harmonization fight their duels, informing their agendas and measuring their relative forces. The neo-medievalist genealogy, emphasizing the autonomy of the multiple producers of soft law as well soft law's efficiency and organic adaptability, is often invoked upon by those legal intellectuals who envisage soft law as the ideal tool for strengthening the market and for responding to the needs of the international business community. Conversely, the social genealogy, evoking social organic and pluralistic ideas, tends to be relied upon by those who deem soft legal regimes the most effective means to

203 I rely on a Gramscian notion of ideology. See Antonio Gramsci, *I Quaderni del Carcere*, (Valentino Gerratana eds., 1975); *Selections from the Prison Notebooks of Antonio Gramsci*, (Quintin Hoare & Geoffrey Nowell Smith eds. and trans., 1971);

In other words one could say that ideologies for the governed are mere illusions, a deception to which they are subject while for the governing they constitute a willed and a knowing deception. For the philosophy of praxis, ideologies are anything but arbitrary; they are real historical facts which must be combated and their nature as instruments of domination revealed, not for reasons of morality etc., but for reasons of political struggle: in order to make the governed intellectually dependent of the governing, in order to destroy one hegemony and create another, as a necessary moment in the revolutionizing of praxis.

(Q 10, II §41 xii), in *The Antonio Gramsci Reader. Selected Writings 1916-1935*, 196 (David Forgacs ed., 2000). In a subsequent passage, Gramsci notes that, "To the extent that ideologies are necessary they have a validity which is 'psychological,' they 'organize' human masses, they form the terrain on which men move, acquire consciousness of their position, struggle," (Q 7 §19), in *Selections from the Prison Notebooks of Antonio Gramsci*, at 376-7, and in *The Antonio Gramsci Reader* at 199. The genealogy of Gramsci's notion of ideology is widely discussed. Marx's German Ideology was, in all likelihood, unknown to Gramsci. In order to shape his positive notion of ideology as an instrument for political struggle, Gramsci went back to Marx's 1859 Preface to *A Contribution to the Critique of Political Economy* and interpreted it in an anti-economistic way. He also drew upon Benedetto Croce's idealism, detecting in the latter a striking contradiction between a notion of ideology as illusory appearances and ideology as practical constructions and tools for political direction. See Guido Liguori, *Ideologia*, in *Le Parole di Gramsci*. Per un Lessico dei Quaderni del Carcere 132 (Fabio Frosini & Guido Liguori eds., 2004).

implement a new social policy vision. While autonomy and efficiency claims ideally fit the market-making agenda, and while organicist and pluralist assertions best suit social approaches aimed at solidarity and inclusion, these relationships are neither necessary nor exclusive. Occasionally arguments pair in unexpected political and rhetorical alliances - social theories of pluralism or organicist notions of social law serve market-oriented projects while medieval ideas of autonomy and facticity supporting social arguments. Bits and pieces of the two genealogies are appropriated to buttress either agenda. Central to the social genealogy, Savigny and Ehrlich may well become the champions of a soft, highly organic economic law reflecting the Geist of the global "mercatorocracy."²⁰⁴ Similarly, neo-medievalist appeals to the pragmatic efficiency and legitimacy of a pluralistic legal order self-generated by its very actors may well support both the market-oriented agenda and calls for a social model coupling solidarity and efficiency. Thus, both genealogies perform a critical ideological role, obliterating the particularized interests hidden behind different projects of soft harmonization. Emphasis on the autonomy and creativity of the multiple economic actors who spontaneously generate their own soft normative systems masks the privileging of the mercatorocracy's interests and needs. Insistence on soft law's social legacy obscures the particularized interests informing the flexsecurity agenda, marginalizing alternative and more radical versions of the Social Europe project.

This essay has pursued a threefold objective. I have sought to unveil and spell out two alternative genealogies of soft law, persuasively, though often implicitly, invoked in the debate over global law and the making of European law. Further, I have signaled that the two genealogies, though evoking continuities, are marked by jolts, fractures, and ambiguities. Finally, I have argued that the two genealogies operate as powerful ideological devices serving competing professional and political agendas.

We should de-center the rhetoric of softness. The two genealogies operate as powerful ideological tools, muddling and garbling the perception of the impact of soft law as well as of its vices and virtues. Soft law adds a social flavor to the market agenda and an efficiency twist to the social agenda. The rhetoric of softness triggers hyperbolic eulogy as well as dire condemnation, as soft law tends to be seen as either the panacea for all European ills or as a surrender to Americanization and global capitalism. However, behind the rhetorical veil of softness lies a vast array of disparate legal devices, entailing widely diverse institutional mechanisms, serving competing professional agendas and implicating different distributional consequences. These multiple tools and consequences should be stripped of the garnish and frills of softness in order to be assessed on their own merits. Moreover, the relentless emphasis on the dichotomy constrains the terms of the debate: it marginalizes strategies not framed in the soft v. hard law language and thus tends to preclude other approaches. While much thought and a lot of resources are being invested in discussing the respective merits of soft law and hard law, scant attention is being paid to alternative strategies, and different vocabularies, like distribution or discrimina

204 Berger, *The Principles of European Contract Law and the Concept of the Creeping Codification of Law*, *supra* note 8, at 25.

tion, are quietly dropped. Overcoming the discourse on softness and re-appropriating such alternative vocabularies should free political conversations about the making of the European legal order from a self-imposed straight-jacket.