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The New Lex Mercatoria

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I. THE LAW IN POST-INDUSTRIAL SOCIETY

We live in a post-industrial era. We learn this from sociologists who demonstrate it by showing the index of the number of industrial employees is lower than that of service employees, thus, a transition from an industrial to a post-industrial era. The United States was the first to pass this point in 1956, while Italy passed it in 1982.[1] Post-industrial society is not just a society of automation. The prefix "post" implies other aspects as well. Besides an industrial society there is also a financial society. What is new is not only how the goods are produced (with machines controlled by computers and not people) but also what is produced. The word "product", originally used to designate material goods, has now become a metaphor used to indicate "financial products".

In this era of finance, contractual techniques are substituted for industrial technology. Financial products are created and exist only as a result of the expert use of juridical concepts. Once, contracts were used for the circulation of goods, but today they are also used in the creation of financial products. A shrewd arrangement of words — since contracts are made with words — can create wealth. The alchemy of old failed in its objective to make gold from nothing; the new juridical alchemy has reached this objective. Now an investment in immovables can be changed into goods destined for a securities market. Juridical techniques have come so far as to invent an

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* Edited by Daniel Alweiss. *Editors' note*: In this article Professor Galgano addresses the new *Lex Mercatoria* using, as a basis for comparison, Italian law, unless otherwise specifically stated.

1. *See* D. DE MASI, L'AVVENTO POST-INDUSTRIALE [THE POST-INDUSTRIAL ERA] 32 *et. seq.* (1987).

atypical security incorporating in a circulating document the position of a participating partner of a real estate company.[2] Another invention is a financial-insurance product based on the contractual connection between a life insurance policy and a contract for an investment in mutual funds.[3] Again, juridical techniques connecting a legal commitment and an autonomous contract of warranty are at the basis of the already famous commercial papers.[4]

It cannot be said that financial products are only products in a metaphorical sense. By contract, it is possible to create goods such as "timeshare" property. These goods were neither pre-existent nor produced by industry, but rather by financial creativity. They are quadrimensional goods whose boundaries are not only in space, but also in time.

The future naturally has its roots in the past. Already a century ago, Henry Dunning McLeod wrote: "If someone asked me which discovery has most influenced the fortunes of the human race, I would probably declare: the discovery that debts are salable goods." If we think of public securities which in Italy amount to more than the Gross National Product (GNP), we realize how far-sighted the Scottish economist was at that time. Still, during the industrial era of the 1920's, the American economist John Roger Commons realized that "[i]ntangible and immaterial goods are more important than all material goods". He concluded: "The invisible capital of many enterprises has a value higher than that of all the machines, land, buildings and stocks they have; if this invisible capital lost its value all the visible capital would probably become scrap-metal."[5]

Coming back to the present, we can look at the quantifiable fact that the increase of the GNP is no longer a

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2. *See* Judgement of May 19, 1988, Corte app. Genoa, 1989 Nuova giuruprudenza civile commentata, 7 (It.).

3. *See* Francesco Galgano, *Il produotto misto assicurativo-finanziario* [*The Mixed Product of Finance and Insurance*], Banca borsa e titoli di credito 91, (1987).

4. *See* A. Atti, *Commercial Papers,* Contratto e impresa 626, (1988).

5. *See* JOHN ROGERS COMMONS, I FONDAMENTI GIURIDICI DEL CAPITALISMO [THE LEGAL FOUNDATIONS OF CAPITALISM] 335 (trans., 1981) (1924).

variable dependent on the increase in industrial production. Alan Greenspan, Chairman of the U.S. Federal Reserve Bank, writes: "The increase of non-physical components of the GNP, that is whatever reflects the progress of culture and ideas, can at this point explain most of the increase of the GNP in the United States and, presumably, in all industrialized countries."[6] The process of dematerialization advances on various fronts. The industrial era was the era of the production of goods, where a trademark was just the distinctive mark of goods produced by industry. In the post-industrial era trademarks have become goods themselves. They are immaterial goods that can be exchanged independently from the goods produced, or by merchandising, can be objects of license. They are immaterial goods that circulate independently from the acts or branches of a company or the "know-how" of its original creator[7]. While clothes and accessories are still products of industry, the material support of the trademark is merely produced by industry putting the label on them. These are the immaterial goods which the consumer mainly desires. They are the real products that the producer puts on the market and the real source of his income.

The era of finance, which follows the era of industry, has wider implications than a reference to "financial products" and trademarks can express. One of these implications is the fact that the entrepreneur's activity is no longer limited to single product sectors. At one time, concentrations of capital worked in a particular sector of industry, commerce, services, banks, and so on. Today, they show a more and more marked attitude to pass quickly from one sector to another. Entrepreneurship now appears as a pure entrepreneurial skill and is no longer connected to particular products and markets. The parcels of shares that control the big companies frequently pass from hand to hand. We are no longer surprised by an entrepreneur who once in office machines moves into food production, or leaves the building sector for television networks or, likewise, moves from television networks into the department store sector.

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6. DALLE RES ALLE NEW PROPERTIES 4 (1990).
7. *See* Council Directive 89/104, 1989 O.J. (L 40).

Sometimes an entrepreneur buys a company only to sell it. The profit is sought not in the management of a company but in the difference between the price of sale and purchase. Thus, the post-industrial economy becomes an economy in which industry ceases to be a subject and becomes an object on the market. Capital venture is now the subject; industry becomes a mere exchange value.

At other times different companies are purchased to be jointly managed. A big company in our day is a conglomerate engaged in different activities, from industry to commerce to finance. In the big conglomerates it is possible to see the essence of the modern economy of finance. If we study the balance sheets of big conglomerates we discover their financial activities are complementary and not supplementary to their industrial ones; and, likewise, their industrial activities could not generate profits without financial activities.

II. THE CONTRACT AS A SOURCE OF LAW

We have the impression that the advent of the post-industrial era does not imply as profound upheavals as those brought about by the Industrial Revolution in the field of law. The law created in the industrial era can, without great changes, also rule relationships in the post-industrial era. We may suppose that since the codes have general and abstract norms, the rules originally drawn up for the sale and rent of material goods and for building contracts can also be applied to the sale, lease and license of software. The era of electronics may not seem to require a special law, and the transition from industrial to post-industrial era may appear to have been continuous and not imply a change in legal structures.

However, this impression is modified by the fact that the advent of the post-industrial era did not require profound law reforms, as did the advent of the industrial era, since the framework of the codified law remained unchanged. But the reason this law did not change is that now the instruments that make legal transformations are no longer statutes. It is the contract which now constitutes a legal change. Traditional legal concepts do not include the contract among sources of law. But if we continue to conceive of the contract as a mere

application of the law, and not as a source of law, we will preclude the possibility of understanding how the law of our times is changing. The contract is taking the place of the law, even in the organization of society. Some decades ago Millibad wrote that, more than ever, people considered the state as a source of all provisions and even as a source of their happiness. Today we must say that this notion is disappearing. Society now looks after itself and tends toward self-organization.

A contract between private citizens takes the place of the law in many sectors of social life. A contract even substitutes for public powers in the protection of general interests, that is collective interests. Such cases are consumers' interests which are protected against advertising fraud through mechanisms of self-discipline, or the interest in a well-balanced layout of territory through the creation of large districts made by urbanization consortia.

The code of self-discipline in advertising and private justice for the enforcement of self-discipline in advertising came about through a contract between elements of the mass media.[8] Self-discipline in "door-to-door" selling arose from an agreement between the associations of various categories of traders, again with the aim of protecting consumers.[9] Urbanization consortia, which administer town planning and perform tasks usually performed by local authorities, originated from a contract between private owners.[10] In all these cases another myth is destroyed because the protection of the general interest becomes a component of the profit motive. This is shown in protection of consumers which is intended to increase sales and protection of the environment which is intended to protect property. Also in these cases we can find another element of the post-industrial era, that of the supremacy of commerce. Since the subject of the post-industrial change is never industry, the old supremacy of commerce which marked pre-industrial capitalism seems to re-emerge in the post-industrial era.

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8. *See* N. Zorzi, *L'autodisciplina pubblicitaria* [*The Public Self-Discipline*], Contratto e impresa 549, 595 (1985).

9. *See* Pittalis, *L'autodisciplina delle vendite a domicilio* [*The Self-Discipline of Door to Door Salesmen*], Contratto e impresa 115 (1990).

10. *See* Francesco Galgano, *L'autodisciplina urbanistica* [*The Urban Self-Discipline*], Contratto e impresa 573 (1985).

Self-discipline in advertising has been considered a sort of temporary substitution of the legislature by private citizens induced by the inertia of the former. But this is not true when the legislature, in particular that of the European Community, decides to protect consumers against advertising fraud, where the self-discipline rules do not cease to exist. By law, the jurisdiction of the state and private jurisdiction co-exist. Parties can in any case choose private justice and, if they do not agree about this, the state judge can stay proceedings until the self-discipline judge decides the case.

The inadequacy of the law to make changes derives from two characteristics of contemporary economy. The first is the meta-national nature of the economy which is antithetical to the national character of the legal systems. The second is that the economy is in continuous change which demands flexible instruments of adaptation from the law to change, in antithesis to the rigidity of the laws. In the traditional industrial economy, production was on a national scale and only exchanges were international. In the post-industrial era the entire economic organization is on a planetary scale. Circulation has not been limited to goods. Well before the post-industrial era, "know-how" and production licenses circulated. Other instances are joint venture contracts which link companies of different and distant countries and multinational companies which control production in all six continents. Mass production on a planetary scale needs mass bargaining. Multinationals have to contract at uniform conditions on world markets. But the world markets are made up of a multitude of states, each with its own national laws.

International conventions which are uniform laws are rare and their range of action is limited. The poor results reached in this field demonstrate the great attachment of states to their national laws. The recent Vienna Convention on International Sales of Goods has had to exclude the main problem concerning sales contracts, that is, the effect of the contract on the property of goods.

In our times neither the international conventions which are uniform laws nor the directives issued for the harmonization of the law in European Community countries dominate

the legal scene. Rather, the dominant factor is the circulation of uniform contractual models. In most cases they are atypical contracts, created not by legislators but by the legal offices of big multinationals or by the legal advisers of international associations of the various entrepreneurial categories. Their names, which are always in English, testify to the American origin of those models: leasing, franchising, performance bonds, etc., have spread from their country of origin around the world. These elements have no nationality. Their function is to create a legal unity within the unity of markets.

The international uniformity of these models has great value for the companies that use them. For example, the head office of a multinational corporation transmits to its branches, operating in all six continents, the stipulations of contracts to be concluded and the mandatory recommendation to merely translate the stipulations to the national laws of different states. This is done without any adjustment, even conceptual, since such could endanger the international uniformity of the contracts.

If national legislators are disinclined to accept the international integration of the law, judges take the opposite stand. Hegel's intuition, that a judge is an organ of society and not of the state, shows a new and unexpected meaning. The judge tends to become an organ of an internationally integrated society. Some old convictions that finally seemed settled have been abandoned. For instance, once it was stated that the principle *iura novit curia* was valid only within domestic law. Also a foreign law was considered a fact, not a law, to be proved by the interested party. Today the Italian Court of Cassation states that a judge must know foreign laws and that he/she must apply them, if necessary, even if the interested party has not proved their existence.[11]

Another example is the following: each state watches over its legal borders, checks any foreign laws, acts, or conventions impacting its laws, and asks judges to limit their effect if they are against the principles of domestic public order. However,

11. *See* Judgment of August 13, 1981, Cass., 1982 Riv. Dir. Int., 79 (It.).

according to some recent judicial decisions, these principles are no longer determined by domestic law. Even a foreign permissive norm which contrasts with a domestic prohibitive norm can be deemed consistent with the public order.[12] One must instead look to principles accepted in countries of a similar culture, even if they are not to be found in Italy.[13]

An analogous attitude can be observed when the validity of atypical contracts with an international circulation are to be judged. Here, domestic law requires the evaluation of interests advanced by the contract and this evaluation is influenced by the international uniformity of the contractual model. Even if an Italian judge has to make such an evaluation on the basis of the domestic legal system, he/she is unlikely to deem invalid a contractual model recognized as valid everywhere. He/she will be aware that holding such a contractual model invalid would mean the economic isolation of his/her country in the context of international markets. Thus, the judge will be inclined to evaluate the interests furthered by the contract not only on the basis of domestic laws but also with regard to principles recognized in countries belonging to a similar culture. This is on the theory that what is valid in those countries cannot be invalid in this country. Many countries have explicitly adopted such a *ratio decidendi* which can be considered the tacit *ratio decidendi* of many other judgments on this subject. Through the reception, via judge-made law, of atypical internationally uniform contracts (which can also be typical under the law in some countries) we have another form of international uniformity of private law. This in turn establishes the international uniformity of contractual models.

The performance bond or the *Garantievertrag*, in German law, is a good example of this situation. The principle of the subsidiarity of fidejussory obligations should imply the nullity of such autonomous warranty contracts not following the events of the guaranteed relationship. But the Italian Court of Cassation since the Sixties has felt the need to keep it valid. The Court considers an atypical contract different from fidejussion, and therefore exempt from the application of the norms

12. *See* Judgment of April 5, 1984, Cass., 1984 Giust. Civ. I, 3067 (It.).
13. *See* Judgment of January 8, 1981, Cass., 1981 Riv. Dir. Int., 787 (It.).

on fidejussion. The most recent decision on this subject goes still farther and bases its *ratio decidendi* on the needs of international trade:[14] the performance bond is recognized as a valid atypical contract, which pursues interests worthy of protection connected to the growth of international trade and related interbank relations. Even more significant are other decisions of the lower courts. One of them points out that "not to recognize the validity of such a contract would mean impeding a great quantity of legal transactions that have found in this instrument a consolidated factor of speed and reliability."[15] Another decision allows the "permeability of our legal system not only to economic needs but also to influences of legal models already codified abroad."[16]

In this way Italian judge-made law opens national borders to the international circulation of legal models. Foreign norms without corresponding norms in Italian law, provided they come from countries of a similar legal culture, are considered consistent with domestic public order. In the same way some interests already recognized as worthy of protection in countries with a legal culture similar to that of Italy are considered worthy of protection in the Italian system.

III. THE REBIRTH OF THE *LEX MERCATORIA*

Another law with a meta-national character whose range tends to coincide with international markets is the *lex mercatoria*. This expression has a great heritage which alludes to the rebirth in the modern era of a law as universal as the law of medieval merchants. The latter was the *lex mercatoria*, or *ius mercatorum*, not only because it ruled the relationships between merchants, but also, above all, because it was a law created by merchants. Its sources were the statutes of powerful trade-guilds, the customary laws of merchants, and the case law of the *curiae mercatorum*. In the same way, with the new term *lex mercatoria* means a law created by the entrepreneur-

14. *See* Judgment of October 1, 1987, Cass., 1988 Foro It. I, 106 (It.).

15. *See* Judgment of September 22, 1986, Trib. Milano, 1987 Banca borsa e titoli di credito II, 331 (It.).

16. *See* Judgment of October 9, 1986, Trib. Milano, 1986 Banca borsa e titoli di credito, 337 (It.).

ial class without State intervention. The law is formed with rules aimed at uniformly governing commercial relationships set up within the economic unity of markets, without regard to political boundaries.[17]

The old *lex mercatoria* preceded the advent of the modern state, which changed it into a state law and included it in commercial codes. Its function was to derogate from the civil law of that time, Roman law, which was not suited to the needs of commercial relationships. The new *lex mercatoria* — an expression now widespread throughout the world — acts on the contrary, within a world where markets are politically divided into many states. Its function is to overcome the legal diversities created by this division. The factors that produced these internationally uniform rules are basically the international diffusion of contractual practices in the world of business, trade usages, and awards of international arbitral chambers. The *ratio decidendi* adopted by international arbiters to solve disputes submitted to them acquires the value of precedent that other arbiters usually follow. In this way there is the creation of a body of *regulae iuris* that the business community is induced to observe on the basis of the expectation that, in case of a dispute, these rules will be applied. Sometimes the *lex mercatoria* has been defined as a legal system, created by the mercantile *societas*, which is separate from the statutory legal system. These are words used by the Italian Court of Cassation.[18]

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17. *See* B. GOLDMAN, LEX MERCATORIA, Deventer (1984). *See also*, for an extensive bibliography, A. FRIGNANI, IL CONTRATTO INTERNAZIONALE [THE INTERNATIONAL CONTRACT], TRATTO DI DIRITTO COMMERCIALE E DI DIRITTO PUBBLICO DELL'ECONOMIA XII, 14 *et seq.* Padova (1990).

18. *See* Judgment of February 8, 1982, Cass., 1982 Foro It. I, 2285 (It.):

> A law within which arbitration works independently of the laws of various states should be considered a transnational law. This is the case of the "mercantile" law that exists through the adhesion of the business community to the values of its environment, through its conforming to those values induced by the *opinio necessitatis* that it has with regard to these values, i.e. the prevailing conviction that they are binding. Since the business community — independently of citizenship and/or place of business — agrees upon some basic values regarding its business and agrees upon the aforementioned *opinio necessitatis* (even for simply practical reasons) we should admit that a *lex*

In this way trade usages have become customary law. This is a source of law, not of statutory law but of ultra-national law, of *societas mercatorum* law. This ultra-national law, the Italian Court of Cassation adds, does not have organs in charge of its compulsory application when it uses the organs of various states which, from time to time, have territorial jurisdiction. Thus, the business community acquires sovereignty and national states become its arms.

The post-industrial society is a society without frontiers, in which markets are international and traders tend to avoid state control. It is also a society in which the law tends to overcome any political fragmentation and aims to set itself up as a universal law. This aim is reached through the non-political creation of the law, as it was for the great universal law of the past and is for common law.

For the Anglo-Saxon jurist, the independence of the United States of America from the United Kingdom was merely a

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mercatoria exists (and we identify it with a set of rules whose content changes but has *pro tempore* a fixed content). In this way the mercantile law comes about when the common conviction of the existence of common binding values takes shape and when people having such a common conviction co-ordinate their behaviour on the basis of common rules (in this way forming a mercantile *societas*). In such a *societas* — which does not have a stable organization —the law is informally applied; even when it is applied by an organization, such as arbitration organs, the mercantile law, while it becomes more consistent, does not change its nature. The rules governing "mercantile" arbitration are formed by values considered binding by members of the mercantile society, because mercantile arbitration (impromptu or pre-organized) is a part of "mercantile" law (that is, independent of the law of the state). We also need to recognise that the acts and decisions carried out by the organizations of the mercantile society, and particularly the arbitration organs, have effect not only within the field of *lex mercatoria*, but also in the state in which they operate. This acknowledgement by states is made necessary because the lack of sovereignty of mercantile *societas* and the lack of coercive power of its organs oblige recourse to the coercive power of states to make the works of these organs effective, both in the mercantile environment and, in general, within the state.

political event without legal implications, since American judges have until now applied the same common law as do English judges. The legal formula that now circulates in the world, that of the new *lex mercatoria*, has the heritage of old and new cosmo-political aspirations of humanity. But the new law expresses them without over-emphasizing the idea of a universal brotherhood. It outlines the image of a possible future, even if not everybody is ready to consider it a desirable future. The future that appears shows a disarticulation that, on the one hand, there is a society without a state, the *societas mercatorum* or the business community, ruled by the new *lex mercatoria* which consolidates its planetary dimension by taking on the statutory function and, with the international arbitration chambers, the jurisdictional function. Yet, on the other hand, there is a growing multitude of national communities organized as states and bearers of domestic interests not represented in the *societas mercatorum*, which are progressively deprived of statutory and jurisdictional powers and of the control of the circulation of wealth.