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## **Contracting Worlds: The Many Autonomies of Private Law: — [Source link](#)**

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**CONTRACTING WORLDS**  
**THE MANY AUTONOMIES OF PRIVATE LAW<sup>1</sup>**

(to appear in: Social and Legal Studies 2000, with comments by Ian Macneil, David Campbell and Oliver Gerstenberg)

I. IL BUON GOVERNO REVISITED

Private law theory should begin with a question where other theories end with a result. The question is: After deconstruction? Critical Legal Studies and Legal Deconstructivism have relentlessly and successfully attacked *la distinction directrice* of private law, the perennial debate between a formalist and substantive orientation, between individualist and collectivist concepts, between neo-liberal and state-interventionist policies.<sup>2</sup> Simultaneously in the real world, the foundations of modern private law have been shaken by the brutal shock waves of globalisation and privatisation.<sup>3</sup> Both the neo-liberal and the state-interventionist project of private law have become victim of the globalisation catastrophe. Regulatory regimes of the welfare state are being dismantled, the world markets are, of course, not in a position to produce public goods, but at the same time more and more social activities are taken over by private governance regimes. In such a post-catastrophic situation is there a re-constructive project of private law thinkable? And in what direction could institutional imagination develop?

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<sup>1</sup> For critical comments I would like to thank Hugh Collins and Oliver Gerstenberg.

<sup>2</sup> Kennedy, 1997; Unger, 1996; Derrida, 1990a; Schlag, 1991, 1994.

<sup>3</sup> See the various dimensions of law and globalisation in the contributions to the collective volume Teubner, 1997c; jurisprudential aspects in Twining, 1996. On law and privatisation Graham & Prosser, 1991; Prosser, 1997.

Perhaps we should take advice from arguably the greatest expert in the reconstruction of private law, Jacques Derrida, who comes up with the following epigrammatic formula:

"The obligation or the contract does not exist between the person who gives and the person to whom something is given, rather it exists between two texts (between two "products" or two "productions")".<sup>4</sup>

Are these *ipsissima verba* a new version of relational contracting?<sup>5</sup> Indeed, I shall argue that contract law needs to be reconstructed as relational, but not in the usual communitarian sense of the word as a nice and warm co-operative relation between human beings, rather as a cool and impersonal relation of intertextuality. I shall make a strictly anti-individualistic, strictly anti-economic argument for the many autonomies of private law in which contract appears no longer merely as an economic exchange relation between persons but as a space of compatibility between different discursive projects, different contracting worlds. And I shall make a normative argument that in these contracting worlds, emerging "discourse rights" which are still incipient and inchoate need to be firmly institutionalised. More generally, I want to put these arguments in the broader context of contemporary private law which needs to transform itself into a constitutional law for global regimes of private governance.

For such an intertextual or interdiscursive understanding of contract, many of the predominant theories of private law are not helpful. By defining contract as the legal formalisation of an economic transaction they exclude a priori more significant political and social dimensions of contracting. As Hugh Collins has argued, the sanctimony of contract in modern legal doctrine means nothing but "the reduction of agreements and exchanges to the limited form of monetary transaction; the sanctity is attached to money, in a word: sanctimony".<sup>6</sup> This is of course true for neo-liberal concepts which subsume any social

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<sup>4</sup> Derrida, 1987: (dt. 1997: 135) (my translation).

<sup>5</sup> McNeil, 1980; Gordon, 1987; Eisenberg, 1994.

<sup>6</sup> Collins, 1997: 80

elements of contracting under the criterion of efficiency and transaction cost reduction,<sup>7</sup> but it is also true for state interventionist projects.<sup>8</sup> While urging an external political regulation of contracts they accept implicitly the economic reduction of contracting itself to a sheer market transaction. And it is true for traditional legal doctrine which for the last 200 years has used the commercial contract as the master plan for any contractual activity and systematically neglected alternative traditions of contractual thinking. Indeed, one needs to go further back in the history of legal thinking if one wants to widen this somewhat unidimensional view of contract and private law.

I suggest to go back to the year 1338 when in a time of political turmoil and confusion, Ambrogio Lorenzetti, a famous late-mediaeval painter from Siena, Italy, composed his masterpiece "Il Buon Governo" as part of a cycle of four paintings "Allegorie ed effetti del buono e cattivo governo in città ed in campagna". Lorenzetti symbolised to his contemporaries the perversions of political power but also possible paths to a good political government of society.<sup>9</sup> In this painting a vision of private law and contracting emerges which is far away from today's reductionist economic concept, that instead sees contracting as a rich and multidimensional activity as an integral part of "Il Buon Governo" (Lorenzetti, Frescoes of the Good and Bad Government

<http://gallery.euroweb.hu/html/1/lorenzetti/ambrogio/governme/index.html>).

At first sight one sees only the usual natural law hierarchy of the People under the King's Power and the Law which in turn are subsumed under God's Wisdom (Sapientia). But let me draw your attention to two small however revealing details. If you look closely to the people at the bottom of the picture you realise that they all are holding something in their hands. At closer inspection (see left view, detail) it turns out to be a rope that is running through their hands which binds all the different persons together. The origin of this binding rope becomes visible when you look to the left side of the picture. A motherly

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<sup>7</sup> E.g. Posner, 1986; Mestmäcker, 1994; Epstein, 1995.

<sup>8</sup> See for example the contributions in Wilhelmsson, 1993.

<sup>9</sup> For an interpretation of Lorenzetti, see Starn, 1994; Skinner, 1986; Rubinstein, 1959.

person called Concordia assembles the rope out of the components of *justitia distributiva* and *justitia commutativa* which are symbolised by two angels handing out justice to the people and balanced by the majestic Justitia. The rope is in fact the *vinculum juris*, the bond of the law. Coming from above, from Sapientia, it is given shape by Justitia, bound together by Concordia, it runs then through the people's hands. Finally - it should be noticed - the bond of the law makes a sudden upward turn on the middle part of the picture, symbolising the move from the horizontal *jus privatum* to the vertical *jus publicum*, and finally ends in the sceptre of the King, the symbol of effective power, which gives binding effects to the bond of law.

Here we have a highly suggestive vision of contract, embedded in wisdom, justice, consensus and power which is much more than an early version of the social contract where the state's power is constituted by a binding agreement of the citizens. Rather than celebrating the wise exercise of power in a public law regime, it stresses the comprehensive role of *jus privatum* in which *ius* symbolises a rich, multifaceted, internally balanced relation.<sup>10</sup> *Jus privatum* not only facilitates private transactions as we would understand it today, but it binds people together in mutuality and reciprocity, connects them in their diversity of professions into the community, defines their position, their place, their status in society. Moreover, the bond of private law connects people to the political regime of the King which supports private law relations by its power and lends itself to their enforcement which in turn is legitimated by the contracting relation. Concordia is simultaneously producing and product of private law, a relation between private law and the community of the hearts which is almost unthinkable to the modern mind. And finally, private law is nurtured by philosophical and religious sources, by its origins in Justitia who in her turn is not an end in herself but derived from Divine Sapientia, thus protecting the *buon Governo* and its society from all the perplexities of self-foundation and grounding them firmly in philosophical and moral reason.

There is a second revealing detail. How many justices do exist in the *buon governo*?

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<sup>10</sup> Villey, 1957: 249ff.

The painting reveals that *Il buon Governo* has not only One Justitia; surprisingly, in the perfect society Justitia has two bodies. Her one body is detached from power, independent and sovereign. Note the subtleties of the hierarchical positions: Justitia is positioned a bit lower than the King while her celestial source, the angelic Sapiencia is a bit higher than the King. Autonomous against the realm of power and insulated from political influences, she resolves conflicts and hands out justice to the citizens and creates consensus (Concordia) among the citizens. But there is a second Justitia, this time residing within the realm of power, involved now in a political role as one of the virtues (councillors to the king) who constrain the crude power of the King (*pax, fortitudo, prudentia, magnanimità, temperantia, justitia*). In this double representation of justice - in modern terminology: in its autonomy from politics and its re-entry into politics -, we have an early symbolisation of the idea of the *Rechtsstaat*, on the one side the independence of the judicial process, on the other side the rule of law and constitutional rights, as inherent and effective self-limitations of political power which protects the sphere of actions of the citizens against the encroachments of politics.

Altogether Lorenzetti constructs the image of a closely integrated society. The interesting nuance, however, is that it is no longer simply the socio-religious hierarchy which integrates society. Rather society is composed of different bodies (the king, the nobility, the people, *justitia, sapientia, fedes*). And it is the law, justice in its two embodiments, that holds this society together: the binding force of an independent private law and the re-entry of law into the realm of politics binding the exercise of power to the rule of law.

## II. PRIVATE LAW IN A FRAGMENTED SOCIETY

In the *buon Governo* private law was an integral part of the unity of political, economic, moral and religious aspects of society and at the same time it was contributing to this unity by the binding force of contracts. Contract had a multi-faceted role to play. This is strikingly different from the modern unidimensionality which instrumentalises contract as an economic transaction for the efficient allocation of resources. Can we render this *unitas multiplex* of private law relations again relevant for our post-catastrophic reality - without at the same time indulging into a romanticising nostalgia for the mediaeval unity of law and society?

The greatest challenge for private law today which excludes this romantic unity from the outset is that in the global arena there exists a bewildering multiplicity of different private law regimes. *Lex mercatoria* and other types of rules are basically law without the state. They are the product of a number of highly specialised governance regimes that develop autonomous political and legal orders independently from the law of the nation state and public international law.<sup>11</sup> At the same time we face on the global as well as on the national level a massive retreat of government and public law regimes. This is not only the result of privatisation strategies of neo-liberal political parties and governments which may be easily redressed by social democratic governments but a secular realignment of the balance between the political and the economic system. Both these tendencies, legal globalisation and privatisation, make it inevitable to rethink the rules of private governments and private regulation. They are - we should admit against our sympathies for a law-making monopoly of political democracy and popular sovereignty - genuine law. They fulfil the legislative, administrative, regulatory and conflict-resolving role of classical public law in different forms and contexts. At the same time one should realise how much private governance regimes are being intertwined in the dialectics of their apolitical character and their re-politicisation. When private governance regimes organise a take-over of public tasks on a massive scale they will have to swallow a "poisoned pill": Massive political

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<sup>11</sup> See the diverse analyses of different regimes of stateless law in Teubner, 1997c.

conflicts that once had been absorbed by a public law regime will not vanish by a gracious gesture of the invisible hand. After the take-over by the market they will have to be resolved within the framework of the new private governments. They cannot be resolved by the market mechanisms alone. When the successful private raiders are swallowing the poisoned pills they are being driven into a new politicisation. And this re-politicisation is not necessarily limited to the establishment of public law structures on an international scale à la United Nations or European Union but it entails at the same time the politicisation of private governance itself.<sup>12</sup> The pressing question after the successful take-over will be: What are the conditions of the possibility for private law regimes producing public goods?

What are the crucial historical circumstances that render plausible a reconstruction of private law? Private law needs to be reconstructed in the face of a thoroughgoing fragmentation of world society. This has found its most extreme formulation in François Lyotard's *différend*: the world society is fragmented into different discourses, into mutually incompatible systems, into diverse language games which are hostile to each other, inflicting violence upon each other.<sup>13</sup> The challenge is that private law needs to reconstruct itself according to this conflictual polycontextuality<sup>14</sup>. This is the decisive difference to the social unity of the *buon governo*. Contracting worlds! Global society consists of a plurality of contracting worlds which display the double meaning of this expression. Various social systems are contracting, shrinking, specialising toward only one orientation, one function, one code externalising everything else and simultaneously the regulation of their interrelations is not governed by hierarchical co-ordination but by heterarchical contracting. Contracting that is supposed to play its multifaceted role today must do so under the new condition of fragmentation of global society into a plurality of specialised discourses. Here we see the historical background of Derrida's somewhat enigmatic formulation on private law: Contract today can only be an interrelation between discourses. Contract is intertextuality. It is no longer possible to maintain the unity of contract in today's babylonian language confusion. The price of such a unity would be a reductionism, an economic or

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<sup>12</sup> For this argument, Teubner, 1997c: 27.

<sup>13</sup> Lyotard, 1987.



a legal unidimensionality. In a time where the Old European unity of society which is so beautifully symbolised in the *buon Governo* is lost and dissolved into a multiplicity of diverse discourses on the global level, the unity of contract, too, is lost for ever and dissolved into a multiplicity of projects within different worlds of meaning.

This leads us directly to our central thesis. The unity of contract today is fractured in the endless play of discourses. It sounds paradoxical, but one contract is in reality broken up into a multiplicity of contracts. The fragmentation of the social world in different dynamics of rationality means that one and the same contract is reappearing as at least three projects in different social worlds: (1) a productive agreement, (2) an economic transaction and (3) a legal promise. Firstly, the contract is reconstructed as a "productive" project in one of the many social worlds, either in distribution, production, services, engineering, science, medicine, journalism, sports, tourism, education, or in art. Secondly, in the economic world, the same contract is reconstructed as an entrepreneurial project, as a profit-seeking monetary transaction under more or less competitive market conditions. And thirdly, in the world of law, the contract is reconstructed as a legal project as a time-binding promise and a rule producing obligation. It should be noted that this splitting of the one contract into three diverse projects is not just the result of applying simultaneously competing contract theories from different academic disciplines. Nor are these projects just three different aspects of one and the same contractual relation viewed from a different analytical perspectives. Rather these are empirical observations about three existing independent projects each participating in a different social dynamic that is operatively closed to others.<sup>15</sup> Each project is part of an autonomous path-dependent evolutionary trajectory which propels them into quite different directions. And the unity of contract today is no longer Concordia of People, King and Law in the *buon governo* but the precarious and provisional relation of compatibility between those fragmented discursive projects.

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<sup>14</sup> For this concept see Günther, 1976; Luhmann, 1992; Teubner, 1997a.

<sup>15</sup> "Each functional subsystem re-interprets events autonomously and processes them according to its own rules. This suggests that the social event of contracting cannot be analysed in a unitary way, rather needs to be scrutinized separately for each subsystem." Müller, 1997 distinguishes between legal, economic and political "levels" of contracting while Crone, 1993 speaks of the interaction between the legal and economic "level".

### III. RECONSTRUCTING "RELATIONAL CONTRACT"

In this way, interdiscursivity re-introduces the social dimension into a rigid economic view of contract which has dominated modern contract doctrine, but it does so in a different way from current ideas about social embeddedness. Interdiscursivity has something in common with the famous relational contract that Ian McNeil has developed in opposition to what he called classical contracting. Against the image of a discrete exchange transaction where self-interested rational actors formulates at the moment of conclusion precisely defined rights and duties, he stresses the social embeddedness of contracting, the rule producing role of long-term interaction and co-operation, the value orientation of the actors, the processual character of contracting as a full-fledged social relation.<sup>16</sup> Indeed, these relational aspects overcome successfully a unidimensional economic view of contracting. Not only do they re-introduce the dimension of time in which expectations grow and change, but also the institutionalisation in Philip Selznick's sense which thickens exchange obligations into institutional commitments, the production of rules beyond the conclusion of contract out of ongoing interaction, and above all the co-operation of the parties as opposed to mere exchange.<sup>17</sup> Thus, relational contracting takes account of mutual informal adaptation, of new common interpretations in the light of new events, and of an interactive morality.

But relational contract creates a wrong juxtaposition between an economic and a sociological interpretation of contract where economics stands for self-interest, rational choice, market exchange and sociology for solidarity, co-operation, community. Like hard cases that make bad law, communitarian engagements make bad sociology. Relational contracting expresses indeed the romantic yearning for a mediaeval unity of the *buon governo*. Ian McNeil may not be aware of it, but his never-mentioned spiritual mentor, Otto von Gierke, who actually invented relational contracting in his recourse to mediaeval Germanic social institutions surely was.<sup>18</sup> It is a fatal error to understand the social

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<sup>16</sup> McNeil 1980; 1983; Gordon, 1987; Eisenberg, 1994.

<sup>17</sup> Selznick, 1969.

<sup>18</sup> Gierke, 1863; 1902.

embeddedness of modern contract simply as communal co-operation and solidarity. Social embeddedness today is not protection by a coherent community but the exposure of contract to a fractured and contradictory multiplicity of highly developed social rationalities. Sociology's legitimate role today is not the academic pursuit of the noble ideal of solidarity, rather the epistemology of many different social practices, the systematic reconstruction of different and contradictory epistemes which co-exist within one society, where the economic episteme is only one among conflicting social epistemes, among them the science, technology, politics, health, law and art.<sup>19</sup> An adequate concept of relational contracting can no longer take recourse to communal norms which unites Concordia with Justitia, rather needs to take into account the different colliding epistemes that exist in one society.<sup>20</sup> Therefore, relational does not mean only to relate contract to the requirements of co-operation, adaptation and good faith, but to the often conflictual requirements of different fields of action that are bound together by the institution of contract.

Relational contracting is out of step with today's realities if it is understood as the warm, human, co-operative interpersonal relation which overcomes the cold economic instrumentalism with a communitarian orientation, as market transactionalism with a human face. Instead of dreaming of contract as a co-operative exchange relation between human actors, we should face its reality as a conflictual relation between colliding discourses, language games, systems, textualities, projects, trajectories.

What are the consequences of such a situation in which contract is torn apart into three diverse and partially contradictory projects each of them participating in a different logic of action. Such a fragmentation of contract changes profoundly our understanding of contract as a relation between two human actors who exchange their valuable resources for the mutual satisfaction of their subjective needs. Of course, contract always needs at least two actors - whether real people or fictitious legal persons - and an agreement, but

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<sup>19</sup> This is the core message of the theory of autopoietic systems which has radicalised the ideas of functional differentiation. See Luhmann, 1992.

<sup>20</sup> In a slightly different but parallel perspective, Collins, 1997: 78, sees it as the central task of contract law to make recourse to a plurality of conflicting institutions and social groups which produce social norms.

the unmediated relation of such a contractual intersubjectivity is today supervened and dominated by the more complex relation of several intertextualities. To be more precise, intertextualities unfold in three different dimensions: first, in a relation between linguistic artefacts, second, in a relation between two temporal stages of a specific discourse, and third, in a relation between diverse specialised discourses.

### (1) Contract as non-individual obligation

To cite Jacques Derrida again:

"The obligation does not oblige or bind living subjects, but names at the margin of the language; strictly speaking the obligation is a move which founds a binding and contractually obligatory relation, between the subject and his name which is located at the margin of language."<sup>21</sup>

Derrida alludes here to modernity's split between "name" and "subject", between the *personae* (social masks) as a multitude of linguistic constructs and the inner subjective life of thoughts and feelings to which the *persona* refers to but which she never can be part of. An uncomfortable but necessary consequence of this split is a strictly anti-individualistic view of contracting which denies contract the role of mutually fulfilling subjective needs. Against all the rhetoric of a revival of the individual's autonomy in modern private law, the will of the individual subject is not the master of the contractual relation. Rather, the individual of contract suffers the consequences of the subject being de-centred. On the one side the comprehensive *persona* in the rich fullness of its social status as we still experience it in the *buon governo* has been split into diverse semantic artefacts at the margin of different language games - the rational economic actor maximizing his utilities,

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<sup>21</sup> Derrida 1987, (dt. 141) (my translation)

the rule-bound legal subject fulfilling his contractual obligations and the producer/user of valuable objects. None of these fractured contractual *personae* expresses the desires of the full human subject. This is the first dimension of contract as intertextuality: contract does not bind the authentic wills of human beings but the socially constructed interests of contractual partners that exist only as semantic artefacts, as texts, as products of a discourse. The discourses read subjective desires into the texts of their highly artificial language games. Not intersubjectivity but intertextuality is the meaning of the contractual relation insofar as it connects not subjective desires but socially constructed interests.

On the other side the living subjects themselves have become objects of exploitation by the many contractual relations within one contract. Via the construction of *personae*, of semantic artefacts, of names at the margin of the discourses, the contractual relation exploits the psychic energies of the contractual partners, their individual knowledge, their desires and motives, for the purpose of achieving the contractual ends.<sup>22</sup> This is a dramatic reversal of the relation individual-contract which finds no expression at all in the pretty hollow formulae about the revival of individual autonomy in contract law doctrine and which at the same time is not fully reflected in consumer oriented state-interventionist concepts

## (2) Contract as discursive project

The second dimension of intertextuality rejects as too narrow the economic view of contract as exchange. As opposed to a transaction for the mutual benefit of two economic actors on the market, it reconstructs contract as "discursive project". The primary focus shifts from the social to the temporal dimension. Exchange is replaced by project.<sup>23</sup> The duality of the contractual partners is substituted by the duality of two texts: the original text and its transformation by contractual promise and contractual performance. Contract binds not just the will of the two partners; contract binds their conversation, creates an obligation

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<sup>22</sup> For this exploitative relation between social systems and psychic systems, mediated by the social construct of the person, see Hutter & Teubner, 1994.

<sup>23</sup> For the aspects of planning and time in contract, cf. Esser & Schmidt, 1995: § 1 III.

for the social system that emerges between them. The indebtedness of contract is an indebtedness of a text for its recursive transformation into a different text, with a directionality that is defined by the contract. In short, contract appears as the obligation of a discourse for its self-transformation.

Such a view of contract directs the attention away from the obligation of the parties to its constitutive role for a social system. Contract is constitutive for a discourse insofar as it transforms latent expectations into actual obligations, changes mere projections into binding promises. Here we realise the source of the social dynamics of contract; it binds the actions of a social system in the direction of achieving the contractual purpose. This refers primarily to the project of the special productive discourse involved to which the contract refers. If a medical operation needs to be carried out, an engineering project to be executed, a complex service to be performed, the contractual relation actualises this potential and transforms it into a firm promise, an obligation and an actual performance. In this respect contract is an obligation of the productive system involved to produce a technological product or service, medical treatment, research result, or piece of art. A contract obliges the focal productive social system to perform a specific operation in the course of its self-continuation. Secondly in the economic discourse, a contract transforms the general expectation of market prices into the concrete payment obligation and its performance, the obligation for the syphoning off of profit for the satisfaction of future needs. Third, in the legal system contract creates a performance obligation of the legal discourse, it obliges the legal process to the produce new rules for future regulations and conflict resolution. Thus, one contract puts at least three discourses under the obligation of their simultaneous self-transformation, toward achieving their respective projects.<sup>24</sup>

### (3) Contract as interdiscursive translation

This raises the question of how these contractual projects of different discourses are related to each other. The answer lies in the third dimension of reconstructing contract

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<sup>24</sup> Müller, 1997: 160f. speaks in this context of the identity of contract as a social system, even of its collective identity.

as interdiscursivity. Contract works as a mutual "translation" of discursive projects. If contract is the simultaneous realisation of several discursive projects then the synchronisation between them is crucial. The bond of contract of the *buon governo* which had once upon a time bound diverse subjects in their reciprocal satisfaction of needs binds today diverse discourses in the direction of their trajectories, in their paths of self-transformation. Contract is a text written in three different languages (legal rights and duties, economic costs and benefits, the project of the work involved, goods and services). Then contracting means essentially "translating" discursive projects.<sup>25</sup> It is permanently translating messages from the productive project into the economic and the legal project and vice versa.

The hidden agenda is this. Via contractual translation each of these language games is potentially in a position to extract a "surplus value" from the other language game. This is to reformulate under new conditions the old idea that the contract gives one individual the power over the will of another individual and vice versa, as an exploitative relation between language games. Surplus value in the strict sense is an additionally created value. The addition stems from the very dynamics of translation. Contractual translation does not just represent the original meaning in a new disguise, this would not be surplus value but recycled value. Moreover, it would ignore the incommensurability of discourses, their closure and mutual inaccessibility which - Lyotard stresses this over and over again - from the outset do not allow for the simple continuation of discursive operations in the other discourse. In a precise sense, interdiscursive translation is impossible.<sup>26</sup> Here lies the paradox of toady's babylonian language confusion. Between the discourses, the continuation of meaning is impossible and at the same time necessary. The way out of this paradox is - misunderstanding. One discourse cannot but reconstruct the meaning of the other in its own terms and context and at the same time can make use of the meaning material of the other discourse as a external provocation to create internally something new. In this sense, contractual translation basically misunderstands the meaning of the agreement in the other discourse and thus creates something new. Via the

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<sup>25</sup> Crone, 1993: 162ff.; Müller, 1997: 146ff.; Belley, 1996.

<sup>26</sup> Derrida, 1987 (dt. 124).

contractual translation each of these languages is able to distort and misunderstand the other language and from time to time make productive use of the distortion and the misunderstanding.

How does this productive misunderstanding work? Let's take the example of a sponsoring contract. A multinational car producer from the Far East asks an eminent European composer to produce an opera, a Wagnerian *Gesamtkunstwerk* for East Asian business values, an artistic symbolisation of the corporation's infinite spiritual creativity which should boost its corporate image. If the French philosopher and psychoanalyst Lacan is right then the composer and the corporation organise their econo-aesthetic intercourse as a love-relation: "For love means to give what one does not possess". The secret of love is that the beloved one has no property, but the lover creates the gift of love out of the things he fantasises that the beloved one possesses. The eminent artist has in reality nothing to offer to the Japanese corporation. He composes his symphony according to the inner dynamics of the artistic discourse which alone decide about the artistic value and not the market price or the popularity of the public. He possesses nothing which would guarantee the economic success. But the contractual misunderstanding makes it possible that in the world of economic transactions the symphony is interpreted as contributing to the reputation of the corporation enhancing in the long term their profitability. And vice versa, the artistic discourse is productively misunderstanding the mundane profit seeking intentions of the corporation, translating the profit seeking capital which the corporation invested in its economic project into material, temporal and personal energies necessary for the achievement of the great artistic project. There is of course, no built-in guarantee that such a misunderstanding will be productive. You cannot say in advance whether in the famous shell, the irritation of the sand-corn will at the end create the pearl. More probable and more frequent is the case that the symphony becomes a vulgar piece of corporate PR which is aesthetically irrelevant. Or the other way around, if it has artistic values it will be an blatant economic failure. But the trajectory of co-evolution will grow out of the rare and highly improbable cases where the myriads of contracting experiments actually found by chance the hidden space of compatibility between potential economic and artistic projects.



Seen in this way, contract is creating a bundle of different social rationalities, is the interrelation between social languages which binds together (potentially) productively, but only ad hoc and momentarily the centrifugal tendencies of their dynamics. For a short period it binds different logics of action to each other: the productive logic of technologies, sciences and arts with the profit-seeking logic of economic action and with the norm-producing logic of the law. This is a rather improbable event and depends on real people who are inventive and creative enough to spot the rare opportunities of combination that emerge by chance. For a flash-like moment it renders compatible the incompatibilities of diverse language games, not integrating them into a discursive whole, rather creating for a second a black hole of compatibility which by its very empty blackness reinforces at the same time their mutual incompatibility.

Thus contract sets into motion what one could call an ultracyclical movement between different social systems. It makes it possible that in their autopoiesis they can make use of each other's cycles of self-reproduction. Through the contract, they translate their languages into each other in such a way that they can make exploitative use of each other's dynamics. This seems quite plausible for the profit chances that a technical innovation or a research result offers but only under the condition that the productive discourse is allowed to follow its own course. And vice versa, this is plausible for the productive chances which financial capital offers to the productive discourses but only under the condition that it is allowed to follow the logic of profit making.

In what respect is contract law an exploitable dynamics for technology and economy and uses them in turn as exploitable dynamics? The answer is time-binding and indifference. Contract law consists of procedures for the resolution of conflicts and for the termination of the contract under fair conditions. It exploits the conflictual dynamics in the productive and in the economic sphere in order to continue its own self-production, that is to produce legal rules out of social conflicts. On the other side, when the normative rules that the law produces are productively misunderstood as cost factors in the economy they bind investments and allow for longer horizons in economic planning and open new opportunities for risky transactions. And in the productive sphere, the legal rules that are

developed to resolve past conflicts are productively misunderstood as a strengthening of future professional obligations. Thus, the surplus value of legal dynamics for the productive and the economic sphere is time-binding which creates wider time-horizons for productive and economic action.<sup>27</sup>

But there is more to contract law than time-binding. It is the stabilisation of an idiosyncratic discourse: a contracting world. "Contracts stabilise for a certain amount of time a specific difference combined with indifference against everything else, included the effects on non-participating persons and enterprises"<sup>28</sup>. Contract law creates a specific difference in the contractual obligation and a specific indifference by drawing a sharp line between participants and non-participants. The production of indifference allows for contract's interdiscursive role. It makes it possible to combine elements from different discourses by excluding the rest of them.

#### IV. NORMATIVE PERSPECTIVES: FREEDOM OF TRANSLATION

This subtle interplay of different worlds of meaning, the fractured dissemination and distortion of meaning in the contractual ultracycle, however, depends basically on a fragile symmetry of chances of translation. It is constructed upon the non-translatable multiplicity of the language games, on their separation, their autonomy, their actual freedom and on their ability to overcome the translation paradox by their own and specific way of productive misunderstanding. This opens new normative perspectives. Freedom of contracting individuals now means freedom of translating discourses. It is no longer just the freedom of economic actors to choose their partners on the market and to strike a voluntary agreement of their choosing under market conditions. This would be only a partial aspect, which reduces freedom of contract to the freedom of the economic discourse to translate other discursive projects into the economic language but not *vice versa*. Freedom of contract today means the freedom of all three discourses involved to translate, to transfer,

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<sup>27</sup> Crone, 1993: 91ff.; Müller, 1997: 147.

<sup>28</sup> Luhmann, 1993: 459.

to reconstruct operations of other discourses into their context, freedom of their productive misunderstanding according to their internal logic. To cite Derrida again who developed his ideas on interdiscursivity and translation in a discussion of Kant and Schelling on academic freedom in relation to the state this freedom

"presupposes separation, heterogeneity of codes and the multiplicity of languages, the non-trespassing of boundaries, the non-transparency."<sup>29</sup>

This freedom is threatened whenever totalising if not totalitarian tendencies of one social system attempt to superimpose its version of translation on the other worlds of meaning. While modern freedom of contract was limited to the protection of free choice in the market against fraud, deception, and particularly against political interference, the new freedom of contract would need to extend to a protection of contract against the free market itself whenever this language game begins to monopolise the right to interdiscursive translation and superimposes the economic translation on the other discourses. Freedom of contractual translation is directed against an economic imperialism, against tendencies of the economic discourse to erect the new tower of rationality. The new babylonian confusion of languages, however, would destroy the project of an economic rationalisation of the world and introduce the obligation of a necessary and simultaneously impossible translation between the different languages of the social world.

An example should make clear that we are not dealing here with academic exercises of translation between esoteric language games but with hard core social problems. A huge infra-structural project which requires the co-operation of diverse engineering, scientific, financial and political skills is organised by a combination of contracting and subcontracting of diverse public and private organisations. If something

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<sup>29</sup> Derrida 1990b, (Dt.29)

goes wrong within this huge network of individual contract and the case goes to the court, the contract law the courts apply will follow the logic of market contracts and will tend to resolve this conflict by isolating in legal terms each of those individual contracts. Thus, it follows the economic perception which translates the complex unity of a productive project into a multiplicity of economic transactions, the allocation of this project to diverse markets. It resolves them without taking into account that the productive project in its turn translates the isolated bilateral transactions into a large network of interdependent social, technical and political relations. The new economic analysis of law which formulates normative criteria for the resolution of legal conflicts would drive this dependency of the law upon economic translation even further. The criteria - allocative efficiency and transaction cost reduction - translate the whole productive world of technical, political, social or artistic projects into the language of economic costs and benefits and makes this translation binding for the law. As against this, symmetry of translation would require the law to take their interdependency from the standpoint of technology and politics into account, even at the expense of allocative inefficiency and increases in transaction costs.

A fundamental change in private law would amount to the following. Of course, private law today is not living in splendid isolation from its environing society, rather it lives in close structural coupling, via the mechanisms of contract, with the economic subsystem of society.<sup>30</sup> But here is where the problem lies. Private law receives thus information about the rest of society quasi automatically and almost exclusively through the cost-benefit calculations of the economic discourse. Any other discourses in society, whether research, education, technology, art, or medicine are first translated into the world of economic calculation, allocative efficiency, transaction costs and then in this translation presented to the law for conflict resolution. This means a serious distortion of social relations. Recently, Hugh Collins has systematically exposed this distortion of social relation by their economic contractualisation within four categories: 1. Bilateralisation: complex social relations are translated into a multitude of closed bilateral relations; 2. Selective performance criteria; 3. externalisation of negative effects; 3. Power relations.<sup>31</sup> This

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<sup>30</sup> Luhmann, 1993: 459ff.

<sup>31</sup> Collins, 1997: 76f.

analysis shows how urgently private law is in need of getting rid of this monopoly of economic calculation and get in direct contact with the many other social subsystems in society that have different criteria of rationality than the economic discourse. To be sure this happens today - to a limited degree, to be sure - whenever contract law uses the famous general clauses of "public policy" to invalidate an economically viable contract due to non-economic criteria, or of "good faith" to balance economic criteria against other social criteria of performance. But these are merely marginal corrections of the dominant economic worldview which is imported to the law by myriads of economic transactions. They need to be replaced by the condition of symmetry within the triangle of discourses in contract.

## V. DISCOURSE RIGHTS IN THE PRIVATE SPHERE

Contract as translation raises the issue of authenticity, of integrity of the text, of its survival in the free play of translation (Walter Benjamin). Freedom of translation within the triangle of contractual projects requires that each text has a right to its autonomy. Violations of this right have occurred by the diverse totalitarianisms of the 20th century, Lyssenkow's political biology as well as Silicon valley's instrumentalisation of science, not to speak of the worst. Totalizing regimes control the meta-rules of translation between discourses. They monopolise the right of the ultimate translation which they then impose upon other discourses as binding.

These "rights" are social phenomena, incipient and inchoate normative constructs that emerge from social practices as compelling claims of right so important to an institutionalised practice as to make legal recognition plausible.<sup>32</sup> But this presupposes a conceptual readiness of the law to respond to the pressures of social development. The conceptualisation of contract as interdiscursivity raises for the law the issue of constitutional rights, fundamental rights for discourses. But these rights can no longer be

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<sup>32</sup> For incipient and inchoate law as result of social practices that press for legal institutionalisation, Selznick, 1969: 32 ff. In a less normative language, a similar argument for the emergence of constitutional rights as social institution has been developed by Luhmann, 1965: 186ff..

seen as protecting only the individual actor against the repressive power of the state, but would need to be reconstructed as "discourse rights" in the situation of today's polycontextuality. The normative correlate of contract as translation would be an extension of constitutional rights into the context of private governance regimes. This, however, requires a fundamental transformation of the classical model of constitutional rights in all its four elements: individual - state - power - right.<sup>33</sup>

(1) Constitutional rights can no longer be limited to the protection of an individual sphere of action. They need to be extended to guarantees of freedom of discourses. Under threat is not only the individual sphere of freedom of the artist, the researcher and the journalist, but also the integrity of the discourses themselves, the freedom of art, education, research, media communication. This extension from individual to discourse which was the revolutionary message of systems theory to public law has fundamentally altered public law in its understanding of constitutional rights.<sup>34</sup> The individualistic rhetoric is covering the actual role of constitutional rights to protect the fragile multiplicity of discourses against the monopolising tendencies of the political discourse. And it should be realised that the sphere of the self-realising individual is but only one among many spheres of action that are guaranteed by constitutional rights. Constitutional rights need to be understood as a historical complement to social differentiation. To the degree that the expansionist tendencies of the modern state threatens the fragile multiplicity of social discourses, the emergence of constitutional rights as social institutions prevents a totalising politicisation of them, not always successfully as we know now.

(2) However, this protection of the fragile conditions for a multiplicity of discourses is in need of another extension today. It can no longer be seen as only directed against the expansionist tendencies of the repressive state. The new experience of the 19th and 20th

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<sup>33</sup> An attempt to spell out what the implications of such an approach are for the freedom of art in private contexts, see Graber & Teubner, 1997. For the debate of constitutional rights in private contexts, see Clapham, 1996; Collins, 1992; Raz, 1986; Nelson, 1981.

<sup>34</sup> Prepared by an "institutionalist" understanding of constitutional rights in the German constitutional doctrine, the breakthrough was Luhmann, 1965. For an elaboration, Willke, 1975; Grimm, 1987; Ladeur, 1992; Graber, 1994. For similar developments in the Anglo-saxon debate, see Raz, 1986.

century is that totalising tendencies have their origin not only in politics, but as well in other fields of action, today especially in technology, science and the economy. Thus, a discursive concept of constitutional rights should be expanded and directed against any social system with totalising tendencies. In this sense, constitutional rights understood as discourse rights can be seen as corner stones for a reconstruction of private law. Contemporary private law must see one of its main tasks in the protection of the many private autonomies, not only against the repressive state but also against the expansionist tendencies of technology, science and the market. Spheres of individual freedom and dignity, the realm of self-realisation of the individual, the discourses of research, art, education, media communication, even the sphere of politics itself need to be protected against the monopolisation of translation by the expansionist economic and technological discourses.

(3) For this purpose it is not enough to focus on centres of economic power. The contemporary discussion of human rights in the private sphere is still too narrow if it chooses the criterion of private power in order to delineate a space within the private sector where constitutional rights should be applicable as opposed to a space of genuine private autonomy where they are not. The analogy from political power to economic power may be fruitful for a transitory period. But it overlooks the specific dangers for a free discourse translation that come from the economic system whose medium of action and motivation is not power but money. The criterion for applying constitutional rights in the private sphere should not be just power, but the specific communicative medium of the expansionist social system involved. Freedom of research, education and art are not only endangered by the overwhelming power-structure of mega-corporations against which disempowered individuals protest in vain. Rather it is the more subtle seduction, corruption by the profit motive, monetary incentives that represent the new dangers for discursive freedom. Business art sponsoring, private financing of education, the exposure of research to market incentives, these are the new seductive situations which need not to be demonised as such, but need a firm institutionalisation of constitutional rights that play a similar role as their historically immensely successful predecessors in the political sphere.

(4) But this new focus on medium excludes the direct analogy of a "right" as a quasi-spatial exclusion zone. Arguably, this concept was adequate as a protective device against intrusion of political power into a field of action. However, the subtle seduction of economic incentives cannot be counteracted by the law guaranteeing a space of autonomy to the victim of seduction. This is a challenge for institutional imagination. "Proceduralisation" of constitutional rights in the direction of legal procedures could become effective guarantees of discursive autonomy. One possibility is pluralisation of the sources of dependency which will create a new independence. A constitutional duty for the state to guarantee a multiplicity of financial resources for research, for art, for education could have some effects on the autonomy of social discourses equivalent to the traditional rights construction.<sup>35</sup> What is asked for is a new proceduralisation of constitutional rights in the so-called private sphere.

Driving motive behind such an extension of constitutional rights in the private sphere is the more general normative argument to constitutionalise private law. This is not only to argue for the infusion of the law of contract, tort and property with the values of the political constitution which is important enough, rather for transforming private law itself into a new constitutional law. If it is true that today's private governance regimes are producing vast amounts of law that govern, regulate and adjudicate wide areas of social activities then the

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<sup>35</sup> For freedom of science, see Kealey, 1997; for freedom of art Graber & Teubner, 1997.



question of a "constitution" for these private regimes is as pressing as the constitutional question was for the monarchical political regimes in recent European history. Traditional private law could be fundamentally transformed to play this role of a private constitution protecting the many autonomies of civil society. It is not the Concordia of Ambrogio Lorenzetti's Buon governo that is in sight, what is envisaged is more sober and modest than revitalised communitarian aspirations in law - externally imposed legal-political restrictions on the self-destructive tendencies of expansive social systems.

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