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Relationism: Legal Theory for a Relational Society

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Relationism: Legal Theory for a Relational Society

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Any theory of law that by virtue of its emphasis on law courts and on enforceable remedies focuses mainly on the individual, the State, regulation, and the discrete transactions of the marketplace, is woefully incomplete. It fails to address the broad realm of interaction between the colossal institutions and organizations that dominate advanced societies, and it neglects the way in which law functions as law among them. One common theme underlies the intense dissatisfaction with the formal legal ordering of industrial relations, ongoing contracts, and international law: on account of the character of relations between the parties, their conduct is far removed from the demands of the formal legal order. This dissatisfaction can be found, for example, in the work of an English royal commission on industrial relations.[1] It was also reflected in the work of the Uniform Commercial Code Commission that adapted the law of contracts to the practices and needs of commerce,[2] and it is expressed today in the perceived inadequacy of legal remedies for breaches of sovereign loan agreements.[3] Scholars have voiced their dissatisfaction. Clyde Summers, for example, observed that the law of contracts so far as it consists of specific legal rules, has little relevance for collective agreements,[4] and Ian Macneil has criticized the transactional bias of classical contract law.[5] This critique is so persistent and uniform that I have been led to question some familiar and powerful views about legal ordering. It is my position that the much lamented "inadequacies" in the law of industrial relations, in the law of contracts, and in international law

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[1] *See generally* ROYAL COMMISSION ON TRADE UNIONS AND EMPLOYER'S ASSOCIATIONS 1965-1968, REPORT, CMD. 3623 (1968) (Lord Donovan, chairman) [hereinafter cited as DONOVAN REPORT].

[2] *See infra* notes 124-29 and accompanying text.

[3] *See infra* notes 7-14 and accompanying text.

[4] *See* Summers, *Collective Agreements and the Law on Contracts*, 78 YALE L.J. 525 (1969).

[5] *See generally* I. MACNEIL, THE NEW SOCIAL CONTRACT *passim* (1980).

are not so much the result of deficiencies specific to those fields as of a more fundamental and systematic misperception about the nature of legal ordering itself.

In this article I shall advance a number of propositions that are meant to form a related and coherent whole with regard to how law functions as law in important areas of human concern. I shall refer to this perspective as "Relationism."

(1) The idea that a single all encompassing concept of law accounts for all juridical phenomena in modern societies in a wide range of complex settings cannot be sustained. Different kinds of social contexts generate different forms of legal order.

(2) The identification of what is a relevant "social context" is by no means self-evident. This article focuses on "effectiveness" in juridical arrangements between institutions, groups, and other instrumentalities bound together in ongoing long-term relationships. I shall refer to a society under the sway of institutions as a relational society.

(3) In a relational society the "relational aspect" of rules (which refers to how rules function as such in a relational society) must be distinguished from their "external aspect" (which refers to social pressure from strangers to a relationship) and from their "internal aspect" (which refers to how members of a group who accept rules view their own behavior).

(4) The idea that law is necessarily derived from the State through its legislative and judicial organs and that it depends upon the State for its efficacy is warranted neither by a historical perspective nor by the experience of relational societies. The separation between law and State is a feature of relational societies.

(5) The source of juridical norms in a relational order is to be found in agreements, arrangements, and other patterns of interaction between the parties. The pronouncements of the courts of the State and the laws of the other branches of government may purport to govern a relational order formally subject to the State, but they are not sources of law *in* such relationships; they are external to them.

(6) The dominant aspect of juridical activities in relational societies is not of a litigious character. It centers instead on the practices of actors and on their usages, customs, and interpretations that *mediate* between actors' actual patterns of conduct and the formal juridical instruments that are deemed to govern them. It focuses also on the negotiation and renegotiation of juridical instruments accepted as binding. *The* question of jurisprudence is how law functions as law in different societies.

(7) Court-centered legal analysis reflects an ideology that identifies law with the law of the State. Legal analysis that focuses primarily on legal decisions distorts the character of juridical relations in relational societies in which the submission of disputes to courts of law is an infrequent and incidental aspect of ongoing patterns of interaction.

(8) Juridical arrangements developed in relational societies are often analogous to classical contracts, but should not be confused with them. The juridical acts and agreements of institutions and groups engaged in durable relations constitute distinct juridical phenomena.

(9) Relationism views international law as a paradigm for the juridical order of relational societies. Far from constituting a "problem" for legal theory, international law has a profound explanatory power.

(10) A relational approach focuses on time—on the temporal dimension of relationships. Emphasis on discrete transactions abstracted from the ongoing relationships in which they occur distorts the character of the transactions and of the relationships themselves.

(11) The concept of a legal system centered on the State and its officials cannot account for the juridical system of relational societies. The circumstances under which a juridical system can be said to arise in a relational society must be identified in terms other than those of the legal system of the State.

These propositions rest on juridical practices common to a number of fields, for example, on practices of labor and management. These are practices that can be documented and that have already been the object of careful studies. These propositions are designed to offer a better account of the operation of law in a relational society than that provided by State-centered theories about the nature of law.

I. Relational Practices

A. Effectiveness

> You will search the cases in vain for many suits involving institutionalized relationships; when you do find them, they are apt to have arisen in bankruptcy. The cases that are to be found generally involve "one shot" deals—situations where the breaching party did not fear loss of good will and, in addition, the settlement offer was too small to be tolerated or feelings were too aroused to permit settlement on any basis.

> But if businessmen buyers do not rely very much on contract law, what is the purpose of the involved structure of buyer's remedies that we study and teach? Would nonlegal sanctions be enough to police most important performances without contract remedies to back them up? We do not know.[6]

In sustained relationships the effectiveness of agreements rests primarily upon factors other than the intervention of the State. The courts, which are there "to put muscle into agreements," are often precluded from having any role at all. Reliance on the relational aspect as the true basis for the effectiveness of international loan agreements is widespread. This reliance has been characterized by Dr. Wallich of the Federal Reserve Board:

> [I]t is sometimes thought that the usual rules of lending risk do not apply to sovereign borrowers. It has been said that lending to countries is less risky than lending to businesses or individuals because a country, unlike a business or individual, will always be around. Country lending, it is sometimes said, is free of final bankruptcy and definitive loss. All that is needed is occasional rescheduling that gives the lender a breathing space . . . .[7]

Consider the uses of loan agreements with large sovereign borrowers when enforcement is simply out of the question for the banks. The degree of mutual dependence between lenders and borrowers is such that neither side can escape unhurt if the other fails. The relationship between American commercial banks and the Mexican government is of this character. The mutual dependence of the banks and the big borrowers is highlighted by talk of the formation of a coalition of big borrowers (a borrowers' OPEC) that would parallel the coalition of lenders reflected in the cross-default provisions of most loan agreements. A clash between big lenders and big borrowers, if it were to take place, would threaten the banks and the borrowing countries alike. Yet at some time in the future the borrowing countries will need to return to the capital markets and the banks will want to resume business with them. A

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[6] Mueller, *Contract Remedies: Business Fact and Legal Fantasy*, 1967 WIS. L. REV. 832, 836 (footnote omitted).

[7] H. Wallich, International Lending and the Role of Bank Supervisory Cooperation: Remarks at the International Conference of Banking Supervisors 3 (Sept. 24, 1981) (available at Federal Reserve Bank of New York), *quoted in* Reisner, *Default by Foreign Sovereign Debtors: An Introductory Perspective*, 1982 U. ILL. L.F. 1, 5. Dr. Wallich views this reliance as "too complacent an attitude." *Id.* at 3, *quoted in* Reisner, *supra*, at 5.

default, a moratorium, or the classification of a loan as a non-performing asset is reasonably certain to lead to future negotiations once normalization is under way. The cost to the borrower of a failure or violation of covenant under the loan agreements will be exacted in higher interest payments, lower credit ratings, or the provision of collateral to secure loans. In the meantime the threat of the collapse of the international financial system, triggered by the default of a major borrower, might require action by the Federal Reserve and other central banks. Action by these lenders of last resort will have serious consequences for the monetary base, the money supply, inflationary expectations, interest rates, and the economy.

Although a big lender cannot effectively enforce a loan agreement against a defaulting big borrower, there are other advantages in concluding a legal agreement with the borrower. In a hypothetical Mexican default, Mexico might not be able to argue successfully in a non-Mexican forum that changed circumstances (falling oil prices) or Mexican law give it the right unilaterally to end or modify the loan agreement in a manner contrary to the terms of the agreement itself.[8] The intervention of the Federal Reserve may not be possible unless a formal default or other failure under the loan agreements is declared. Cross-default provisions will not take effect in the absence of formal default. The seizure of Mexican assets deposited with the lender may also require a formal prior declaration of default. Most significantly for future negotiations, the lender will be entitled to some form of compensation for its rights under the violated loan agreement. Besides, the lender's desire not to be shut off from a major economy that may prosper in the future is likely to induce avoidance of any formal breach.[9] Future business prospects weigh heavily in decisions regarding responses to breaches of individual transactions.

Bank loans to foreign sovereign borrowers have self-enforcing features. A self-enforcing agreement in economic theory has "an object that is the equivalent to [sic] a deferred payment or bond. This is the expected value of the future gains that can be lost by the party who violates the implicit terms of the self-enforcing

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[8] *See* Texaco Overseas Petroleum Co. v. Libyan Arab Republic, 17 INT'L LEGAL MATERIALS 1 (1978) (Dupuy, Arb.).

[9] Professor Reisner has commented that, with the exception of the Iranian default, "there is an astonishing paucity of litigation involving claims by U.S. banks on foreign sovereign debtors." Reisner, *supra* note 7, at 6.

agreement."[10] The lender is primarily concerned with the help it can obtain from the Federal Reserve in the event of a major default. Milton Friedman explained that the panic about the default on foreign government debt was based on a misunderstanding; governments never pay their debts, they only refinance them.[11]

In practice, a rescheduling of debts means that *short-term loans to foreign governments are not liquid assets* and that interest payments will not necessarily all be received in cash—even if the loan agreement provides to the contrary. Thus, the November 1982 agreement between Poland and its Western creditor banks to reschedule $2.3 billion of commercial debt provides for the payment of $1.2 billion of interest due in 1982 on the understanding that the banks will recycle $550,000,000 as short-term trade credits back to the Government of Poland. The rescheduled principal was to carry an interest rate of 1.75% above the cost of obtaining funds in the London money market.[12] The loan agreements between the Western commercial banks and Poland, and the agreements to reschedule, confirm the mutual dependence and long-term relationship between the two sides. Even the repayment of interest due is tendered on the understanding that the relationship will be deepened and compounded by the new commercial credits. In a long-term inextricable relationship the concept of short-term credit may thus be illusory. The loan agreements to reschedule have given the banks Poland's commitment to pay more on the rescheduled funds than it would have to pay were it not in arrears. The existence of a lender of last resort, either a central bank or an international institution such as the International Monetary Fund, eases the strains of mutual dependence, reduces lenders' risks, and creates even more complex patterns of sustained and inextricable relations.

Juridically binding loan agreements can accomplish much more than is apparent from reading their texts. These potential objectives are also far removed from what Macaulay, in his pioneering study on commercial contracts, described as the main dimension of conventional contractual planning: the definition of performance, the effect of contingencies, the effect of defective performance, and the availability of legal sanctions.[13] *In sustained*

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[10] Telser, *A Theory of Self-Enforcing Agreements*, 53 J. Bus. 27, 43 (1980).

[11] Financial Times, Sept. 23, 1982, at 21.

[12] *See* N.Y. Times, Nov. 4, 1982, § 4, at 15, col. 3; *id.*, Nov. 3, 1982, § 4, at 1, col. 1.

[13] Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 Am. Soc. Rev. 55, 60 (1963).

and inextricable relations a principal use of contracts is to provide a basis for renegotiations once a defective performance occurs.

> The objective in specifying events of default in a loan agreement is to describe those circumstances in which the lender . . . should have the right to terminate the lending commitment . . . . The exercise of such a right is drastic and banks rarely exercise it except as a last resort when other measures are not, or cannot be, effective. This right is primarily important to bank lenders for getting the attention of and negotiating with a financially or otherwise troubled borrower . . . in order to effect other measures, like restructuring the credit, or obtaining guarantees or collateral or other credit support, or selling assets.[14]

B. The "External," "Internal," and "Relational" Aspects of Rules

A complete account of what makes agreements effective in sustained relationships cannot be limited to the two aspects of rules that are dear to modern legal theory—their "internal" and "external" dimensions. Thus, for example, Hart's discussion of the concept of rule, for all its indebtedness to Wittgenstein and Winch, fails to account for the effectiveness of legal instruments in ongoing relationships. "The fact that rules of obligation are generally supported by serious social pressure," he writes, "does not entail that to have an obligation under the rules is to experience feelings of compulsion or pressure."[15]

> The internal aspect of rules is often misrepresented as a mere matter of 'feelings' in contrast to externally observable physical behaviour . . . . But such feelings are neither necessary nor sufficient for the existence of 'binding' rules. . . . What is necessary is that there should be a critical reflective attitude to certain patterns of behaviour as a common standard . . . .[16]

The notion of serious social pressure clearly refers to pressure for compliance with an obligation coming from *outside* the relationship, from third parties and the relevant community that has a

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[14] Ryan, *Defaults and Remedies Under International Bank Loan Agreements with Foreign Service Borrowers—A New York Lawyer's Perspective*, 1982 U. ILL. L.F. 89, 90.

[15] H.L.A. HART, THE CONCEPT OF LAW 85-86 (1961).

[16] *Id.* at 56.

stake in the effectiveness of the rules. This point of view is incomplete and fails to explain how the rules function as rules for the entities that are engaged in sustained and durable relationships.

In a relational order there is also an awareness that a breach of certain patterns of behavior may be interpreted by another party as indicating a change in the relationship. This is not solely a matter of how members of a group who accept rules view their own regular behavior.[17] For example, a presidential candidate who was committed to repudiate an international agreement before taking office may find himself in the position of "having to" confirm it after his election. This phenomenon cannot be fully explained in terms of the internal/external dichotomy. Fidelity to established patterns of behavior is dictated by concern for the perception of other parties and the complexity of interactions with those who are more than interested bystanders. This phenomenon can be dubbed "the relational aspect of rules." It is by no means incompatible with the internal/external dichotomy that Winch derived from Wittgenstein and that Hart popularized for legal theory. Explanations of durable and inextricable relations require broadening of Wittgenstein's insights. Actors may be seen as concerned less with their *own* attitude to the rules and practices or with pressure from strangers to the relationship than with the maintenance of a particular mode of relations among themselves.

C. Sanctions

Durable relations are often damaged by attempts to enforce agreements by sanctions. The breach of an agreement casts a shadow over a relationship that is deepened further by efforts to involve the State in the dispute. In the industrial relations of free societies the problem has arisen everywhere even as the legal issues often vary. In Britain, sanctions against collective groups such as unions raise questions about the legal standing of the union with respect to its members.[18] Collective agreements are concluded with unions, but in Britain unions are not regarded as the agents of their members.[19] In any event, "unconstitutional" action by trade unions is not the real issue. The problem is strikes that are both unofficial and unconstitutional.[20] From a purely legal point of view sanctions are not the answer: "[T]hose who would be bound by the

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[17] *Id.* at 87.

[18] DONOVAN REPORT, *supra* note 1, § 470, at 125-26.

[19] *Id.* § 477, at 128-29.

[20] *Id.* § 479, at 129.

agreements do not break them in any event, and those who are in the habit of breaking them would not be bound."[21] But the legal objections to sanctions are the least significant ones. The Donovan Commission noted that employers were reluctant to enforce legal sanctions against their own employees.[22]

Quite apart from the question of the legal status of collective agreements, employers in England can sue the large majority of strikers to obtain damages for breaches of contract. The law can intervene at the option of the employers, but hardly any employer ever resorts to this right. The employers' association, the CBI, told the Commission that the failure to sue for breaches of contract is

> "not so much because the measure of damages against one man might be very small compared with the cost and inconvenience of litigation and because the chance of recovering the damages was doubtful, but because the main interest of the employer is in a resumption of work and preservation of good will."[23]

It is not in the interest of employers to heighten resentment among workers by summoning them before a court, especially at a time when in most cases the strike will have ended.

> Whatever deterrent effect such court proceedings may have will be outweighed by the harm they are liable to do future relations on the shop floor, on the building site, in the office. The same would in our opinion also apply if an employer deducted from wages any amount awarded to him by way of damages . . . .[24]

No proposal for sanctions that involved any measure of employer participation, even under "automatic sanctions" schemes, was endorsed by the Commission.[25] "Automatic sanctions" cannot function without the involvement of employers, at least with regard to notification that the strike action had taken place and of the names of those who had taken part. In the United States, however, legal sanctions do exist for breach of collective agreements.

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[21] *Id.*

[22] *Id.* § 463, at 123.

[23] *Id.* (quoting paragraph 170 of the CBI's "evidence" to the Commission).

[24] *Id.*

[25] The thrust of an "automatic sanction" scheme was that "the strikers should suffer a detriment irrespective of the wish of some person to bring legal proceedings." *Id.* § 489, at 132-33. The Commission concluded that, in reality, "[t]here is no such thing as an automatic sanction" and regarded any form of sanctions as unworkable until such time as "employers may be able and willing to use such rights as the law gives them." *Id.* § 502, at 136.

Most collective agreements are drawn so as to make the full range of legal sanctions available. The cost of poor industrial relations in terms of industrial performance and productivity is notorious. Nevertheless, in the United States "a process of litigation and adjudication [has become] the most marked characteristic of the collective bargaining relationship."[26]

It comes as no surprise that in his study of manufacturers' exchange relations, Macaulay reached, by and large, similar conclusions about the high cost of enforcement.[27] Business exchange differences are usually adjusted without dispute. When disputes do arise, they are often resolved without reference to a contract or to potential or actual legal sanctions. Businessmen are reluctant to speak of legal rights or to threaten to sue.

> Even where the parties have a detailed and carefully planned agreement, which indicates what is to happen if, say, the seller fails to deliver on time, often they will never refer to the agreement but will negotiate a solution when the problem arises apparently as if there had never been any original contract.[28]

In the words of a purchasing agent, " 'You don't read legalistic contract clauses at each other if you ever want to do business again. One doesn't run to lawyers if he wants to stay in business because one must behave decently.' "[29] Just as employers in Britain are loath to sue their employees, so it seems that in the United States corporations were involved in relatively few civil actions regarding private contracts. Contract suits often result in a "divorce" ending the "marriage" between two corporations. Contract actions, moreover, often carry overtones of bad faith. Typically, actions involving private contracts tend to involve the termination of franchises: they are more closely related to ending a relationship than to settling differences that arise within it.[30]

The need to enforce contracts with the remedies of the law of the State is by no means self-evident. We are told that in Japan the legal enforcement of the contractual relationship is quite precarious.[31] In California, in the middle of the last century, the gold

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[26] Summers, *supra* note 4, at 536.

[27] Macaulay, *supra* note 13, *passim*.

[28] *Id.* at 61.

[29] *Id.*

[30] *See id.* at 65-66.

[31] Kawashima, *Dispute Resolution in Contemporary Japan*, in LAW IN JAPAN 41, 47 (A. von Mehren ed. 1963).

rush surged at a time when there was no government or state to assign exclusive ownership rights to gold-bearing lands.[32] All non-privately-owned land was technically the property of the United States, but for almost twenty years after Mexico ceded California, there was no federal or state law governing the acquisition of mining rights in federal lands. Yet, throughout this period, miners who worked the gold fields concluded land allotment contracts and designed for themselves legal regimes that did not involve the State in any fashion.[33] Moreover, it is said that there are eight ways in which damages recovered in contract litigation do not put an injured party in as good a position as if the contract had been performed.[34] "As a result, it is nonlegal sanctions, not 'the law,' that keep contracts from being breached in most standard dealings between parties."[35] Schelling has observed that "tacit negotiation of unenforceable agreements can sometimes be more efficacious than explicit verbal negotiation of agreements that purport to carry some sanction."[36]

Even in circumstances in which no relational considerations arise, coercive sanctions are hemmed in by serious limitations such as the insufficiency of resources, the ambiguous relationship with deterrence, the importance of socialization, the antecedent character of the norms, and the minority character of deviance. Coercive sanctions, which come into play in a statistically small percentage of events that make up social life, depend upon the prior existence of procedural norms that govern their applicability.

Barkun has identified two important consequences that follow from these relational considerations:

> First, coercive sanctions need not be the mainstay of law inasmuch as the vast number of social interactions seems never to invoke them or to be due to their presence. To limit law solely to instances in which sanctions are applied (a not uncommon approach) is to reduce it to social pathology. Second, the procedural consensus upon which sanctions are based is perceived to be ideologically and perhaps temporally prior to the use of force.[37]

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[32] Umbeck, *A Theory of Contract Choice and the California Gold Rush*, 20 J.L. & ECON. 421, 428-30 (1977).

[33] *Id.* at 429-30.

[34] Mueller, *supra* note 6, at 836 (citing 1 J. BONBRIGHT, VALUATION OF PROPERTY 276-88 (1937)).

[35] *Id.* at 836.

[36] T. SCHELLING, ARMS AND INFLUENCE 140 (1966).

[37] M. BARKUN, LAW WITHOUT SANCTIONS 64 (1968).

D. Forms of Agreement

In a relational order, agreements between the parties need not take any particular form. Some agreements may be reduced to writing. Others may be tacit and informal. The parties are always free to assign special modes of interpretation to particular written agreements.

On the matter of the form of agreements the relevance of the findings of the Donovan Commission to other legal contexts is striking. For example, agreements concluded in the United Nations in the course of negotiations between groups of states on the text of resolutions display practically all the features that the Donovan report ascribes to collective agreements in England.[38] The Commission may without knowing it have expounded legal theory, for its findings seem to fit collective negotiations generally, whether they take place in an English factory or in an international arena. Thus, under the Charter of the United Nations, resolutions of the General Assembly that are not binding for member States may nevertheless acquire legal significance inasmuch as they may express an agreed interpretation of the Charter or express an agreed practice under the Charter. Resolution 2625 (XXV) on "Friendly Relations" thus "declared," by the unanimous consent of the General Assembly, an agreed interpretation of provisions of Article 2 of the Charter that has since become part of the peremptory norms of the law of nations from which no derogation is permitted under the Law of Treaties.[39]

In another example, the famous Resolution 242 of the Security Council with regard to the situation in the Middle East, which lays down principles for an agreed settlement between Israel and her neighbors, did not fall within the ambit of Article 25 of the Charter and was therefore not binding.[40] Nonetheless, it acquired legal force for the States which in negotiations with the United States agreed to "accept" that Resolution, which then became incorporated in an international agreement between them and the United States. As in the case of collective agreements, differences existed over what the Resolution required and over the weight of the preparatory work that led to its adoption, for example, as to the question whether "withdrawal from territories" means withdrawal from *all* territories.[41] As in the case of the collective agreements sur-

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[38] DONOVAN REPORT, *supra* note 1, §§ 471-472, at 126.

[39] G.A. Res. 2625, 25 U.N. GAOR Supp. (No. 28) at 121, 124, U.N. Doc. A/8028 (1971).

[40] S.C. Res. 242, 22 U.N. SCOR at 8-9, U.N. Doc. S/INF/22/Rev. 2 (1967).

[41] S.C. Res. 242 (1)(i), 22 U.N. SCOR at 8, U.N. Doc. S/INF/22/Rev. 2 (1967).

veyed by the Donovan Commission,[42] Resolution 242 became part of a continuous process in which differences concerning interpretation could not be separated from claims to modify its effect. In this process it would have been difficult indeed to point to "the bargain" that had been struck. For every accord, such as the Camp David Framework Agreements, has provided another more detailed framework for yet other negotiations on questions that had not yet been resolved.

It is not surprising that the formality or legal character of international agreements and arrangements can itself become the subject of negotiations. Thus, the Final Act of the Conference on Security and Cooperation in Europe signed in Helsinki on August 1, 1975, is neither a "treaty" nor an "executive agreement."[43] A negotiator for the United States commented that

> [f]rom the very earliest discussions in Geneva it became clear that virtually all delegations desired documents that were morally compelling but not legally binding. As the negotiations progressed, however, and as various delegations gained enthusiasm for texts which were to their liking, certain texts took on some of the tone of legally binding instruments. This trend was a cause of concern to the U.S. delegation, which considered that the intent of the participants should be clearly reflected in the language of the documents. Given the predisposition of Congress to question the right of the President to conclude important international agreements without Congressional consent, any ambiguity as to the legal nature of the texts could become the source of an unnecessary dispute with the Congress.[44]

Even though the Declaration as such was clearly not intended to be legally binding, it remained possible, on account of the language used, for the "Document on Confidence-Building Measures and Certain Aspects of Security and Disarmament," which is part of the Final Act,[45] to be regarded as binding. Some doubts were

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[42] *See* DONOVAN REPORT, *supra* note 1, § 471, at 126.

[43] Final Act of The Conference on Security and Cooperation in Europe [hereinafter cited as Final Act], *reprinted in* 14 INT'L LEGAL MATERIALS 1293 (1975).

[44] Russell, *The Helsinki Declaration: Brobdingnag or Lilliput?*, 70 AM. J. INT'L L. 242, 246 (1976). Russell's article is discussed in Gottlieb, *Global Bargaining: The Legal and Diplomatic Framework*, in LAW-MAKING IN THE GLOBAL COMMUNITY 109, 121 & n.28 (N. Onuf ed. 1982). This section reworks arguments made in Gottlieb, *supra*, at 121-26, and is printed with the permission of the Carolina Academic Press, Durham, North Carolina.

[45] *See* Final Act, *supra* note 43, *reprinted in* 14 INT'L LEGAL MATERIALS at 1298-99.

dispelled by tabling interpretive statements during the course of the negotiations. Despite the lack of intent to create legal obligations, the United States, the Soviet Union, France, and the United Kingdom faced the problem of how best to protect their existing special rights in Germany under the German Instrument of Surrender at the end of World War II.[46] An express disclaimer of modification of Four-Power rights in Germany was thus included by the three Western powers in the text of their acceptance of the invitation to the second stage of the Conference and in a statement in the opening week in Geneva. The Powers eventually felt, despite the nonbinding character of the Final Act, that some form of disclaimer should be included in the Final Act itself.[47]

To have regarded the Final Act as legally binding would have had a number of significant consequences even in the absence of "sanctions" for violations. The Department of State was concerned that "euphoria over this event might lead to increased pressure for withdrawal of U.S. forces from Europe and for other forms of unilateral disarmament."[48] It played down the Conference as an exercise that "was primarily of interest to the allies of the United States and which in any case had not produced documents of a legally binding character."[49] The United States was also reluctant to concede that the Conference had finalized the status quo in Europe and recognized the frontiers in Europe, confirming Soviet hegemony in Eastern Europe and in the Baltic States. According to the same participants, it was the view of "all" the Western negotiators that the Declaration does not depart materially from previous international arrangements on frontiers and "does nothing to recognize existing frontiers in Europe."[50] To this end, Western representatives sought to avoid legal obligations of any kind and treated the question of frontiers merely as a facet of the principle of the nonuse of force that had been developed in the United Nations Declaration on Principles of Friendly Relations and Cooperation among States. Recognition of the existing frontiers was also resisted because of the interest of the Federal Republic of Germany in an eventual reunification with the German Democratic Republic and because of insistence by States in the European Economic Community that no statement be made in the Final Act that might

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[46] *See* Russell, *supra* note 44, at 257.

[47] *Id.* at 257-59.

[48] *Id.* at 242.

[49] *Id.*

[50] *Id.* at 249.

frustrate an eventual political union of the Community.[51]

Particularly useful materials on the formality and legal effect of international engagements can be found in the Senate Hearings on an Early Warning System in Sinai. In seeking the Senate's approval for the American proposal to send technicians to Sinai, the Secretary of State distinguished among several types of documents submitted to Congress.[52] He referred to documents that include assurances, undertakings, and commitments that are considered to be legally binding upon the United States and that were initialed or signed by the United States and one of the parties. He warned that not all the provisions of documents that also contain legally binding[53] commitments are considered to be legally binding. Some are and some are not so binding; some provisions reflect assurances by the United States of political intentions: "These are often statements typical of diplomatic exchange; in some instances they are merely formal reaffirmations of existing American policy. Other provisions refer to contingencies which may never arise and are related—sometimes explicitly—to present circumstances subject to rapid change."[54] Dr. Kissinger stated that the documents submitted to Congress contain all assurances and undertakings that are binding on the United States and assured the Committee that the Administration will make no contrary claim in the future, nor will it accept any contrary claim by any other government.[55] The Secretary of State pointed out that

> [t]he fact that many provisions are not by any standard international commitments does not mean, of course, that the United States is morally or politically free to act as if they did not exist. On the contrary, they are important statements of diplomatic policy and engage the good faith of the United States so long as the circumstances that give rise to them continue. But they are not binding commitments of the United States.[56]

He submitted to the Committee extracts from documents in the negotiating record that, "although not regarded by the Admin-

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[51] *See id.* at 250-52.

[52] *See* 73 DEP'T ST. BULL. 609 (statement of Secretary of State Henry Kissinger before the Senate Committee on Foreign Relations) (Oct. 7, 1975) [hereinafter cited as Kissinger Statement].

[53] *Id.* at 611.

[54] *Id.* at 612.

[55] *See id.* at 611.

[56] *Id.* at 613.

istration as binding, might be so regarded by others."[57] The Committee was also supplied with documents that are explicitly described as a part of the Agreement between Egypt and Israel, without the United States being a party to the instrument. Other kinds of documents might also be in existence: minutes, notes, and other documents in the negotiating record containing assurances, undertakings, and commitments of a nonbinding character only.

The statement of the Secretary of State highlights the delicate distinctions between types of assurances, undertakings, commitments, and political intentions of the United States. These distinctions suggest several categories of material and give meaning to the concept of binding obligations:

—Legally binding provisions in an agreement that are recognized to be binding in the sense that the United States recognizes it is not free to disregard them and that are governed by the rules of international law regarding legal agreements.

—Provisions that one party to an agreement but not another party may regard to be legally binding.

—Assurances, undertakings, commitments, and statements of political intentions that declare or reaffirm existing American policy and that are not intended to be legally binding.

—Assurances, undertakings, commitments, and statements of political intentions that refer to contingencies that may never arise or that relate to present circumstances subject to rapid change.

—Undertakings or assurances that are conditioned on existing or prior legislative authority and approval.

Statements and provisions of documents that are not legally binding engage States politically and morally, in the sense that they are not free to act as if they did not exist. The undertakings engage the nations' good faith so long as the circumstances that gave rise to them continue. Provisions and instruments are not binding without the intent to give them a legal character. Treaties and executive agreements are legally binding instruments by virtue of their formal character. Other nonbinding memoranda of agreement, however, can contain legally binding provisions. The publicity inherent in the Senate's consent power involves the Congress in the process of agreement, reducing the possibility that it may not wish to honor the commitments of the Administration. In the case of the Sinai Agreements, the Administration made it clear that the Congress was only invited to approve the American proposal re-

[57] *Id.* at 611.

garding the limited role of the United States in the Early Warning System in Sinai. Dr. Kissinger emphasized that a vote in favor of that proposal would not commit the Congress to a position on any one of the elaborate United States commitments to Israel made as part of the package deal.[58] Congress was not asked to approve the undertakings and assurances to the parties. In the complex relationships between the United States, Egypt, and Israel that were compounded by domestic constitutional constraints, the parties distinguished among many types of commitments without reference to their enforceability. These distinctions were important to them and constituted part and parcel of the diplomatic and juridical regime that was to govern their relationship.

E. Relational Norms and Legal Norms

In sustained relationships, particularly those of an inextricable nature, agreement is thus not necessarily given a "legal" character. Whether parties to such a relationship are States, corporations tied by a longstanding supply agreement, or labor and management, the advantages attached to the legal character of bargains are neither trivial nor evident. The decisions to make an agreement for sale legally binding rather than regard it as a simple business "order," or to characterize an international declaration as a "political" text rather than as an executive agreement, have major implications. The reasons for giving an agreement juridical status are by no means confined to the desire for an enforceable instrument:

—A legally binding agreement will prevent a party to the agreement from asserting in good faith that it is at liberty to terminate it or to modify it unilaterally.

—A legally binding agreement will have the effect of modifying conflicting preexisting rights and obligations in that relationship.

—In negotiations and renegotiations, it makes a difference that one is demanding what is conceded to be a legal right already established by agreement rather than a new claim. Implementation of prior legal obligations does not call for a quid pro quo in ordinary circumstances.

—In the event of a breach of a legal agreement the aggrieved party may be entitled to proceed against the interests and the assets of the other in arenas where it is able to do so, either directly or pursuant to judicial and administrative proceedings.

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[58] *See id.* at 611-12.

—The intervention of third parties (allies as well as adversaries) may depend on there being a violation of a legal obligation or another contingency characterized in legal terms.

—A legal agreement may require the approval or ratification of persons and organs that may not be involved in other forms of agreement. There may also be special registration and reporting requirements.

—A legal agreement will bind the parties (not only the persons who concluded them) and will remain in effect in the face of objections and opposition within the internal organs and constitutional structures of the parties (provided that the conclusion of the agreement was not ultra vires).

—Legal agreements can recognize or transfer title, recognize legal status, authorize, license, appoint, exclude, preclude, grant powers, and contain other provisions about which the parties can make no contrary claim.

Parties to a relationship thus wish to distinguish between agreements they regard as legally binding and other agreements, though in neither case do they expect the terms of the agreements to be enforceable.

In complex relationships no one should be astonished to find complex types of agreement that elude analysis in the simple terms of classical international law or the law of contract. The distinctions between ordinary agreements and those regarded as legally binding reflect the practice of States and are not the fruits of doctrinal writings. They lead and point us to the nature of legal relations in complex interaction. Those distinctions also account for the determination by those who take part in deeply entangling relationships to regard some transactions as endowed with a legal character.

This feature of social relations has also been investigated with care in Britain in the Report of the Royal Commission on Trade Unions and Employer's Associations.[59] It is a peculiar feature of British law that collective bargaining agreements have not been subjected to the operation of the legal order. They were not intended to create legal relations of any kind.[60] Britain stood almost alone in the presumption that collective agreements are not contracts. The reasons for the abstention of the legal order were in part historical and went back to a time when the judiciary shared in the general hostility to the emergence of labor unions. But there

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[59] *See* DONOVAN REPORT, *supra* note 1.

[60] *See id.* §§ 470-471, at 125-26.

were other reasons for the policy that collective bargaining and collective agreements remain outside the law.

> [C]ollective bargaining is not [in England] a series of easily distinguishable transactions comparable to the making of a number of contracts by two commercial firms. It is in fact a continuous process in which differences concerning the interpretation of an agreement merge imperceptibly into differences concerning claims to change its effect.[61]

Moreover, bargaining takes place at several levels and in more than one place at a time. On occasion, an agreement is given the form of a "resolution" or a "decision" of the particular council or negotiating board.[62] The agreement will also be variable at the will of such a body and in light of difficulties of interpretation that may arise. Much of the bargaining that takes place simultaneously at a number of levels is fragmented and informal. From a legal point of view it may not be possible to identify the "party" who made the agreement. There would also be doubts as to contents and evidence about the agreement's meaning. In addition, such agreements may sometimes be found void for uncertainty if they were ever submitted to a court of law. Other difficulties arise under the law of agency. The system is "a patchwork of formal agreements, informal agreements and 'custom and practice'."[63] Such bargains and agreements do not fit easily into the categories of the law of contracts.

F. Contract

The impact of sustained relationships on the law of contract has been studied in Europe for more than half a century. In this country, research in this subject, though comparatively recent, is well known.[64] I wish to refer to a less familiar body of foreign scholarship of a highly doctrinal character. In the 1920's, Hauriou and Renard developed in France the "Theory of the Institution," which focused on societal and economic arrangements stretched out over time and involving complex relations. These were the special phenomena of juridical life linked to groups and foundations. In contrasting "contract" with the "institution," Renard asserted that "contract is only the tête-à-tête of creditor and debtor, of

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[61] *Id.* § 471, at 126.
[62] *Id.* § 472, at 126.
[63] *Id.*
[64] *See, e.g.*, I. MACNEIL, *supra* note 5; Macaulay, *supra* note 13; Mueller, *supra* note 6.

seller and buyer."[65] The Institution on the contrary is the organization of an idea: it is an idea detached and emancipated from the person or persons who have conceived it and integrated it into an arrangement of ways and means capable of continuing its realizations and eventually perpetuating its development.[66] In this theory, the contractual and the institutional are sharply distinguished. Indeed, in his view there are three fundamental juridical acts, of which all others are merely satellites: legislation, contract, and foundation (or institution). Unfortunately the heavy use of Bergsonian and theological terminology in Renard's major work, *La Théorie de l'Institution,* did not invite a wide audience in the Anglo-American world.[67]

In the 1950's, Savatier traced the strains generated by the social and economic changes of modernity on classical Civil Code contract doctrines.[68] These are the changes that came with the needs of modern corporations for heavy capital investment, large labor forces, and long-term planning. In the vein of Hauriou, he asserted that the traditional formal system of contract was shattered and replaced by a new law of "Institution." He developed the contrast between contract and institution in terms of four main features.

First, whereas classical contracts are instantaneous, the institution is lasting. "There can no doubt be continuous or successive contracts, but they then tend toward the institution."[69] All institutions are lasting, whether they be families, foundations, or private firms. An institution, according to Savatier, is settled, so to speak, in a time continuum. The Civil Code had conceived of the firm as a contract or a bundle of contracts. Article 1787 of the Code on the contract for "*louage d'ouvrage,*" ungainly translated as an "engagement to do a work," was the main text for this purpose: "When a person is engaged to do a work, it may be agreed that he will furnish only his work or his skill, or that he will also furnish the materials."[70] This provision originated at a time when artisanal production was the dominant nonagricultural enterprise, but capi-

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[65] G. RENARD, LA THÉORIE DE L'INSTITUTION 107 (1930).

[66] Delos, *The Theory of the Institution: The Realist Solution to the Problem of Moral Personality and Law with an Objective Foundation,* in THE THEORY OF THE INSTITUTION 222, 249 (1970) (citing G. RENARD, *supra* note 65, at 107).

[67] *See generally* THE FRENCH INSTITUTIONALISTS (A. Broderick ed. 1970).

[68] R. SAVATIER, LES METAMORPHOSES ECONOMIQUES ET SOCIALES DU DROIT CIVIL D'AUJOURD'HUI (2d ed. 1952).

[69] *Id.* § 103, at 86.

[70] CODE CIVILE [C. CIV.] art. 1787 (1981). *See* R. SAVATIER, *supra* note 68, § 97, at 82-83.

talism brought new equipment and means of production, and firms were needed in order to plan and accumulate capital. The firm "ceased being an isolated contract in order to become a whole series of contracts, increasingly dependent on the equipment and on the team of the firm."[71] The basis of an article 1787 contract was a single person. The firm belonged to him. A single owner could raise the needed funds. The advent of "*sociétés anonymes*" marked the emergence of a new type of firm able to secure the considerable capital needed for industrial enterprise.[72] The firm became increasingly "depersonalized," and when the firm provided public service the State intervened and nationalized it. In this schematic account of the evolution of the firm, Savatier emphasized the continual shrinkage of the scope of article 1787 contracts. "It is progressively absorbed by the institution [of the firm] . . . . [T]his contract, and the contracting parties, become mere cogs. The will of the parties loses its control over the contract."[73] Their continuing consent is not required. And contracts of employment (*louage de services*) contemplated in article 1779 of the Code were also conceived in an artisanal context.[74] Industrial needs for teams of wage earners and the growth of labor unions led to fundamental changes in labor law far removed from the provisions of article 1779 of the Code Civile. The transformation of the contract into a durable relationship can also take place with the intervention of the State, for example, as a result of the protection of tenants by rent control legislation. Many leases have acquired an unlimited time frame, and the same holds true of a variety of other relationships that had a contractual origin.

Second, it is not the time component alone that contrasts institutions and contracts. Sustained relations involve third parties, for "institutions have made the contract burst also in the spatial dimension."[75] The principle of article 1165 of the Civil Code that limited the effect of contracts to the parties thereto no longer governs the working of institutions.[76] The simplistic concept of the Code that anyone's business is his private affair does not account for the ties that hold together members of a civilized society and its growing complexity. The socialization of contracts is widespread

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[71] R. SAVATIER, *supra* note 68, § 98, at 83.
[72] *Id.* § 99, at 83-84.
[73] *Id.*
[74] *See* C. CIV. art. 1779 (1981).
[75] R. SAVATIER, *supra* note 68, § 104, at 87.
[76] C. CIV. art. 1165 (1981); R. SAVATIER, *supra* note 68, § 104, at 87.

in France: as the contract is "metamorphosed" into an institution, socialization is even more pronounced. On account of institutions, the effects of contracts are rarely limited to the parties, so that "these effects like echoes, are bounced back again and again inside a universe in which all institutions are solidary."[77]

The third characteristic of institutions, and of sustained relations, is their flexibility. This contrasts with contracts that "had something rigid" about them.[78] Change could come only with the full agreement of all the parties to a contract. Legislation has made many types of agreement more flexible (for example, employment contracts) so as to meet ever-changing economic needs and public purposes.[79]

According to Savatier, the fourth characteristic of institutions lies in their internal organization and hierarchical structure.[80] Complex enterprises have organs and internal relationships that import within the institution numerous constitutional problems affecting the individual liberty of its members. This feature of institutions arises whenever sustained internal relations lead to the adoption of procedures and structures designed for the management of those internal relations. Every institution thus develops an "internal personality" expressed in organs, rules, and procedures.

The final metamorphosis of institutions takes place when the State intervenes. Institutions then become subject to the State through government planning and nationalization.[81] Savatier's *Metamorphoses* and the *Proceedings of the Association Henri Capitant* on the nature of the firm[82] anticipate in some respects the research on contract by Macaulay, Friedman, and Macneil.[83] Working in a different legal environment and using different methods of analysis, French scholars reached conclusions similar to those reached in America with respect to the impact of long-term relations on the informal practices of corporate enterprises.

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[77] R. SAVATIER, *supra* note 68, § 104, at 88.

[78] *Id.* § 105, at 88.

[79] *Id.*

[80] *Id.* § 106, at 88-89.

[81] *Id.* § 108, at 90-91.

[82] R. SAVATIER, *supra* note 68; 3 TRAVAUX DE L'ASSOCIATION HENRY CAPITANT POUR LA CULTURE JURIDIQUE FRANCAISE 39-233 (1948).

[83] *See* L. FRIEDMAN, CONTRACT LAW IN AMERICA (1965); Macaulay, *supra* note 13. I.R. Macneil's contribution to an understanding of relational aspects of the law of contracts in the United States is capital. Prominent among his many works are I. MACNEIL, *supra* note 5; Macneil, *The Many Futures of Contracts*, 47 S. CAL. L. REV. 691 (1974).

G. Relationism and the Constitution

There is a relational dimension to constitutional interpretation, and this is perhaps nowhere as apparent as in regard to the separation of powers doctrine. What is at stake in this area, after all, is not merely a system of checks and balances, but also the relationships that must develop between the branches for there to be a workable government. The Supreme Court has affirmed that "in the performance of assigned constitutional duties, each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others."[84] The separation of powers doctrine, joined with the political questions doctrine, "requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch."[85] The judiciary may have to intervene in determining where authority lies as between the other two branches of the government. In so doing it is enjoined by Justice Frankfurter to be "wary and humble."[86]

But as the ultimate interpreter of the Constitution, the Supreme Court has been cautious to give weight to "[d]eeply embedded traditional ways of conducting government," which cannot supplant the Constitution but "give meaning to the words of a text or supply them."[87] In the *Youngstown* case Justice Frankfurter developed a position that has not met universal approval:

> It is an inadmissibly narrow conception of American Constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them. In short, a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on "executive Powers" vested in the President by § 1 of Art. II.[88]

The long continued acquiescence of Congress may indeed give decisive weight to the executive construction of its powers. In the same vein Mr. Justice Jackson said, "[w]hile an interval of de-

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[84] United States v. Nixon, 418 U.S. 683, 703 (1974).

[85] Powell v. McCormack, 395 U.S. 486, 549 (1969).

[86] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 597 (1952) (Frankfurter, J., concurring).

[87] *Id.* at 610 (Frankfurter, J., concurring).

[88] *Id.*

tached reflection may temper teachings of . . . experience, they probably are a more realistic influence on my views than the conventional materials of judicial decision which seem unduly to accentuate doctrine and legal fiction."[89] He added,

> the actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context. While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity. Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress.[90]

Indeed, in cases in which the distribution of authority between the executive and legislative branches is uncertain, such as in the area of foreign relations, "any actual test of power is likely to depend on the imperative of events and contemporary imponderables rather than on abstract theories of law."[91]

A practice that is deeply embedded and has provoked no protest from other branches of the government cannot replace the text of the Constitution. But such a practice will not be set aside by judicial fiat as a violation of the Constitution except in very unusual cases. There may indeed be something frivolous, a little presumptuous, and slightly absurd in courts of law or scholars decreeing that a time-honored pattern of practices shall overnight be regarded as unconstitutional. Patterns of government that are deeply entrenched should not be at the mercy of sudden shifts of judicial attitudes or of newly held convictions of judicial officeholders that these patterns undermine the Constitution. The same gradual process that establishes such a practice may be required to modify it. Any other attitude would merely encourage judicial "coups" and further judicial involvement in political controversies. For even though the Constitution is not a contract between the different branches, agreed practices under the Constitution are evidence of what the Constitution was understood to require and should not unilaterally be set aside by any of the three branches as part of a novel reading of the text of the Constitution itself. In this

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[89] *Id.* at 634 (Jackson, J., concurring).
[90] *Id.* at 635 (Jackson, J., concurring).
[91] *Id.* at 637 (Jackson, J., concurring).

respect, constitutional interpretation is analogous to the interpretation of any accord intended by parties to design a framework for their relationship. But the analogy is limited. The significance of "past practice" under the Constitution cannot be equated with that of "practice" under the Uniform Commercial Code.[92] It may be closer to that of "past practice" as a criterion for interpreting collective labor agreements, owing to their character as a framework for coexistence between groups.

A fundamental distinction between contracts and other instruments that regulate the relations of different groups was originally suggested by Gierke[93] and later developed by Leon Duguit.[94] This distinction, which anticipated the "Theory of the Institution," could shed some doctrinal light on the character of the Constitution as it governs the separation of powers. According to Duguit a "collective juridical act" is neither a unilateral act nor a contractual act. It is known in German as a *Vereinbarung,* a term that has been translated as "union."[95] The interpretation of such collective juridical acts involves considerations that are primarily relational, thus permitting the groups regulated by the instrument to develop their relationship with a view to their shared purposes. A constitution clearly belongs to the species of juridical acts contemplated by Duguit. Practice under a constitution acquires a salience that cannot be compared with that of practice in classical contract law, hence the importance of the many episodes, pronouncements, and other texts that express constitutional practice and to which respect and deference are due. The respect and deference that Mr. Justice Frankfurter insisted upon are due not for reasons of courtesy, but on account of the relational character of the Constitution itself. A constitution cannot be read like an ordinary statute that expresses the will of the legislator. It belongs to a different species of juridical instruments. It is neither legislation nor contract, but a collective juridical act. In Renard's terminology it is a "foundation" of an "institution."

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[92] One of the underlying purposes of the Uniform Commercial Code is "to permit the continued expansion of commercial practices through custom, usages and agreement of the parties." U.C.C. § 1-102(2)(b) (1972).

[93] O. GIERKE, DIE GENOSSENSCHAFTSTHEORIE UND DIE DEUTSCHE RECHTSPRECHUNG 133 (1887).

[94] Duguit, *Collective Acts as Distinguished from Contracts,* 27 YALE L.J. 753 (1918).

[95] *See id.* at 761, 763.

H. Relational Juridical Acts

One need not accept institutional theory as a whole, with its elaborate doctrinal trappings, in order to recognize the distinction between classical contracts and other types of juridical acts that do not have a transactional focus. This distinction, which lies at the heart of the relational approach, separates juridical instruments that contemplate an isolated bargain, a transaction, or a short-lived episode from those that contemplate a framework for an ongoing relationship or venture. This distinction, which the French institutionalists developed with characteristic conceptual complexity, is echoed in the work of American scholars of the law of contracts and industrial relations, where they lament the heavy transactional bent of classical contract law and its inadequacy in relational settings. Macneil, for instance, makes a herculean effort to reveal the common grounds between the classical law of contracts and a more relational viewpoint.[96] The question arises, however, how far the transactional and relational viewpoints in the law of contracts are compatible and whether the tension between the two is not such that a conceptual separation of the transactional and the relational must be acknowledged. For once the full measure of the distinction between the two is revealed, relational acts appear as a distinct category of juridical acts: they are acts intended to have a juridical effect that rest on a continuing express or tacit understanding between the parties and acts that are intended to govern the relationship in a durable manner. These relational acts make possible a unified treatment of questions of interpretation in fields as distinct as the law of treaties, relational contract law, constitutional law, and the law of collective labor agreements. Indeed, as this article suggests, a whole range of other issues would appear to unite these fields: in all of them the bases for the effectiveness of juridical instruments—their form, their derivation, and the role of the State—are broadly analogous. This analogy strongly invites a recasting of legal theory so as to make room between the three traditionally recognized categories of juridical acts—legislation, contract, and judicial decision—for relational acts as a fourth and fully separate category.

Relational juridical acts take many forms. Some are required as a framework for a protracted relationship that is designed to traverse the unknown regions of time in the same way that an army in column advances into an enemy country; the encounters

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[96] *See generally* I. MACNEIL, *supra* note 5; Macneil, *supra* note 83.

with unexpected events in uncharted future regions preclude either the precise planning or the deference to textual authority associated with ordinary discrete contracts. Other relational juridical acts in the course of a relationship take the form of arrangements, practices, and the other interactions required by the relentless advance through time and circumstance. Some of these acts are built in the stable materials of binding instruments, while others represent ephemeral arrangements and understandings.

Relational juridical acts as conceived in this article are not to be confused with institutions or any other concept of legal personality. Relational acts can endow relationships with legal personality, by incorporation for example, but they need not do so. Thus joint ventures and long-term supply agreements fall short of the creation of an "institution" with legal personality. Yet the logic of all these acts is inscribed in the common interests and purposes that have to be ferried forward through time.

II. The Social Context of Relational Orders

The view that law and its social environment stand in a relation of reciprocal influence is certainly not a novel one.[97] But this view provides singularly little insight for the scholar who wishes to discern and understand the forces that give law its efficacy in human affairs. The notion of the "social context" within which law functions has proven to be of such indeterminacy that a baker's dozen such notions can be found in the literature of sociology and of anthropology. The search for "social context" has, for example, led Lon Fuller to focus on a spectrum of relationships that run from intimacy to hostility.[98] With a similar objective in mind, Roberto Unger has traced the emergence of bureaucratic law and the disintegration of community and law in postliberal society.[99] Some fifty years before, Hauriou and Renard in France and Santi Romano in Italy had investigated the nature of the "Institution" and its interplay with the creation of law.[100] In his massive compendium *Social Dimensions of Law and Justice,* Julius Stone surveyed the vast panorama of efforts to account for the variety and depth of interactions between law and society.[101] The scale and

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[97] It is shared by many schools of jurisprudence; a notable exception is Kelsen's doctrine of the "Pure Theory of Law." H. Kelsen, Pure Theory of Law (2d ed. 1967).

[98] Fuller, *Human Interaction and the Law,* 14 Am. J. Juris. 1, 27 (1969).

[99] R. Unger, Law in Modern Society 58-66 (1976).

[100] *See supra* notes 65-67 and accompanying text.

[101] J. Stone, Social Dimensions of Law and Justice (1966).

breadth of existing scholarship should deter any casual intrusion into the formidable thicket of sociological jurisprudence. It is here enough to identify the relational social context as one in which the juridical order derives its efficacy primarily from factors other than court-centered enforcement.

The predominance of relational orders in modern society is apparent when the effect of relations between leading actors is borne in mind and when the State is no longer viewed as a monolith but a conglomerate of many agencies and institutions. Following Daniel Bell,[102] we can say that the United States is dominated not by electoral politics alone but by a "Club of X-Hundreds." The range and diversity of the participants in this "Club of X-Hundreds" is impressive: The Fortune 500, major banks, labor unions, political action committees and organized lobbies, the news media, congressional committees, the several executive departments and agencies, leading universities, professional organizations, organized religions, political parties, state and local governments, associations speaking for ethnic and racial groups, and so on. The State is no longer the "nightwatchman," the arbiter between rival interests, but an active participant in the struggle for influence.

This by now familiar image of interacting instrumentalities—including agencies of the State that are themselves under the influence of special interests—is the image of a "new feudalism" in which neither the general laws nor the general interest are certain to prevail. The emergence of "feudal" tendencies in advanced societies is accompanied by relational phenomena. The measures adopted to bail out the City of New York and to save the Chrysler Corporation from failure confirm that these institutions serve the interests of other leading actors. In like manner, Brazil will not be allowed to default on its loans because big banks and the international financial system will not allow it.

Evidently the members of the "Club" and their interactions must be studied if one is to learn how law functions as law in the affairs of modern society. These entities have developed in large measure with the economy, in response to the structure of representative government, and as "countervailing forces" to other powerful organizations. These modern instrumentalities are the successors to the corporations or associations (*gemeinde*) prominent in the works of Montesquieu, de Tocqueville, and Gierke—the "intermediate groups" that stood between the State and the individual.

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[102] D. Bell, The Cultural Contradictions of Capitalism (1976); D. Bell, The Coming of Post-Industrial Society (1973).

They were the guilds, foundations, and other associations that had retained the right to live according to their own laws and privileges that the French Revolution and the Napoleonic Codes had done so much to sweep away.

A. Relational Concepts

What then are the features of some of the recurrent concepts in this analysis? These include the ideas of a relational order, the formal system, the mediating system, the regime of a relationship, and a relational society. Let me try a brief sketch, albeit with some repetition.

1. *Relational Order.* A relational order is a pattern of steady relationships between institutions that are tied to one another by a variety of expectations, interests, activities, enterprises, or vulnerabilities in an ongoing and durable way. In a relational order the parties are unable to end their relationship without serious adverse consequences or disruption. In a relational order relations are mutual, deeply impacting, and even inextricable. It is an order in which relations are codified by the development of a special regime between the participants. Parties may be tempted to terminate a relationship when collaboration breaks down or when their interests are no longer served by its continuation. But where the cost of termination is too high they may prefer to put up with its persistence.

Five dimensions of relations between major actors in advanced societies stand out: they are *durable, mutual, deeply impacting, specialized* (with their own history and their own regime), and *horizontal.* These dimensions mark the contours of the social context in which legal relations display common features. The interactions between law and the social milieu in which the law functions impose constraints on the nature of legal ordering from which no departure is possible without a change in the social context itself.

Not all five dimensions require elaboration. Although I believe that many types of personal relations display features of a relational order, I shall restrict my discussion of the concept of relational order to collective or institutional relationships, so as to avoid the controversies that accompany theories of human behavior and motivation. The relations of institutions, organizations, and States cannot be understood as a composite of personal relations. There is no need to overload legal theory with the baggage of disputes from other fields. In a sense the behavior of States and other institutions activated by the concept of interest is more transparent than the fathomless range of human actions and emotions.

An account of relational orders should distinguish between the following:

(i) *Horizontal and vertical relations.* In horizontal relations none of the actors has the power to coerce the others or the power to coerce is quite balanced, while in vertical relations a hierarchical structure truly reflects one-sided domination and power. Horizontal relations involve situations in which the law is unenforced and unenforceable. This familiar situation was well put by Quincy Wright. "History discloses many instances of the difficulty of law enforcement in a state, within which are powerful feudal barons, ecclesiastical organizations, chartered municipalities, cultural minorities, historic estates which were once sovereign, monopolistic corporations, or wealthy trade unions."[103]

(ii) *Personal and institutional relations.* These are relations between persons, institutions, and different combinations of both.

(iii) *Inextricable and terminable relations.* These terms distinguish those relations that cannot be brought to a conclusion without eliminating an adversary from relations that can be ended, even if at some substantial cost.

The durability and the seriousness of the stake in the relationship is a facet of all relational orders, as is the mutuality of the relation. Mere durability will not prevent the treatment of a weak party in a vertical relationship as if it were engaged in a set of discrete transactions or isolated bargains. Mutual dependence keeps the weaker party from being treated as a disposable commodity.

Relational orders are characteristic of the relationships between economic actors, whose failure will not be tolerated in advanced societies, and of the relationships between other public bodies and associations. Relational orders are also typical of the *internal* relationships of major corporate actors and other institutions.

A relational order stands at the opposite pole from the order of episodic bargains characteristic of free market theory in which buyers and sellers come together casually and for a limited purpose that can be achieved without entering into any relationship apart from the exchange transaction itself. In the exchanges of the marketplace relations are circumscribed, limited to a specific act of exchange, and "fungible." The particular act of exchange does not depend upon the character of the actors or their identity.

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[103] Wright, *Law and Politics in the World Community*, in LAW AND POLITICS IN THE WORLD COMMUNITY 6 & n.10 (G. Lipsky ed. 1953).

The concepts of a relational order and its opposite, the order of the marketplace, are useful for an analysis of actual relationships that, needless to say, do not fall neatly into either category. Thus the *internal* structure of a firm can be perceived relationally as a form of economic interaction between capital, workers, and managers, while the functioning of the price mechanism in the free market at the other extreme is an instance of the order of episodic bargains. Intermediate forms of interaction such as the franchise contract belong somewhere in the middle. A recurring question is why some economic structures appear in a relational mode while others are governed by the marketplace. Factors affecting a relational order are often not monetizable or reducible to a simple cost/benefit analysis. They include trust, good faith, collaboration, the quality of life of the parties, and other intangible factors that largely escape the science of economics.[104]

2. *Formal System.* The formal system of a relational order consists of the formal rules, institutions, and instruments that govern a relationship. *The informal system of a relational order* consists of the pattern of practices of the parties that may or may not conform to the formal system. The patterns of interaction between legislative rules, the formally agreed instruments of the parties, and their ultimate behavior resist simplistic classification. The line between compliance and violation, especially in the absence of adjudication, remains hazy. For agreed interpretations, custom, practice, and renegotiated instruments tend to blur the line between violations and permitted conduct. It is apparent that when the demands of a relationship are paramount neither the law of the State nor the rules of decision (judicial law) may function as rules of conduct. The living law, to use the term coined by Eugen Ehrlich, "[i]s not the part of the content of the document that the courts recognize as binding when they decide a legal controversy, but only that part which the parties actually observe in life."[105] It corresponds closely to the action of the informal system. The distinction between the "living law" and "valid law," the law enforced by the courts, was also drawn by the Donovan Commission, when it chose to speak in terms of the "informal" system of industrial relations.[106] Just as Ehrlich pointed out that no use was ever made of

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[104] This matter was considered in some detail in Macneil, *Economic Analysis of Contractual Relations: Its Shortfalls and the Need for a "Rich Classificatory Apparatus,"* 75 Nw. U.L. Rev. 1018 (1981).

[105] E. Ehrlich, Fundamental Principles of the Sociology of Law 497 (1936).

[106] *See* Donovan Report, *supra* note 1, §§ 46-52, at 12-13.

all the contractual penalties in usufructuary leases so long as it was possible to get on with the lessee at all,[107] so it appears that much of the legislation on labor relations in England has never been invoked and has remained a *lettre morte.*

The Donovan Commission stressed the contrast between the formal system of industrial relations in Britain and the informal one. The formal system is embodied in the official institutions. The informal system is created by the actual behavior of major industrial actors.[108] The informal system is grounded in reality. In Britain the informal system was found by the Commission to be at odds with the formal one. The Commission found that "[a]ny suggestion that conflict between the two systems can be resolved by forcing the informal system to comply with the assumptions of the formal system should be set aside. Reality cannot be forced to comply with pretences."[109]

Much about the operation of a legal system cannot be derived from a study of case law or legislation. The development of commercial relations has seen the rise of new forms of property and novel credit instruments that do not trace their descent from legislative or judicial sources but from innovations of the financial community. Some of the developments in this century of new forms of property and markets, such as certificates of deposit, bankers acceptances, currency futures, share options, Repo's, NOW accounts, and the CBOE, are a result of financial practice, not legislation. Ehrlich's "living law" method for the investigation of emerging institutions is empirical and direct.

> There is no other means but this, to open one's eyes, to inform oneself by observing life attentively, to ask people, and note their replies. To be sure, to ask a jurist to learn from actual observation and not from sections of a code or from bundles of legal papers is to make an exacting demand upon him, but it is unavoidable, and marvelous results can be achieved in this manner.[110]

The efforts of the Donovan Commission fit the mode of enquiry extolled by Ehrlich.

3. *Mediating System.* A mediating system consists of the techniques used to reconcile the informal system, the actual patterns of

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[107] E. EHRLICH, *supra* note 105, at 490.

[108] DONOVAN REPORT, *supra* note 1, § 46, at 12.

[109] *Id.* § 150, at 36.

[110] E. EHRLICH, *supra* note 105, at 498.

conduct of the parties, with the requirements of the formal system of rules and institutions. The mediating system adopted in the law of industrial relations, in commercial law, and in international law gives formal legal weight to the practices of parties. It emphasizes notions like "course of performance," "acquiescence," "waivers," "course of dealing," "usage," and "custom." It provides for "agreed interpretation," "renegotiation," and other modes for changing obligations acquiesced in by the parties. It lends weight to informal, tacit agreements that may be expressed in a wide variety of forms and instruments. A mediating system is concerned with interactions over time. It discourages the assignment of exclusive weight to the formal legal documents and to the original intention of the parties.

The role of a mediating system is evident in contracts and in treaties between parties locked in a complex ongoing relationship. When contracts or treaties form part of a relational order, resort to a mediating system for the adjustment of the relationship of the parties becomes necessary. Emphasis in the law of contracts and in treaty law to the *text* of instruments is most appropriate in the context of episodic bargains or when parties to an ongoing relationship wish to have a particular transaction between them treated *as if* it were an isolated transaction. The performance of obligations under a particular agreement is then not linked with the performance of obligations under other agreements between the same parties.

4. *Regime.* Every relationship in a relational order is characterized by its own rules, procedures, precedents, and practices that constitute the "regime" of the relationship.

The regime of every relationship tends to be unique. It is a combination of the formal, informal, and mediating systems—that is, of the agreements, course of practice, interpretations, course of performance, usages, and customs. The regime of a relationship includes the practices of the parties that have been unopposed. The regime of a relational order tends therefore to have "feudal" features: the chief characteristic of the feudal order is that it has few general laws and consists mostly of agreements. In order to give an account of the feudal State it is necessary to look at the contents of the particular grants, charters, agreements, and contracts between the king, lords, vassals, and villeins. There is no "Feudal Constitution."

5. *Relational Society.* A relational society is one in which the relational orders of the State and the powerful associations, firms, and institutions of which it is constituted predominate.

In a relational society the regimes that govern the major social and economic actors form a substantial part of the "living law" of the land. A theory of law that considers the municipal ordinances of a small town as "law" for the purposes of publication and legal scholarship, but that relegates to the category of private contract law the formal legal documents and practices that govern the relationship, let us say, of General Motors and the UAW, conceals rather than illuminates the way in which law functions as law in modern society.

The analysis of relational orders is not designed as a blueprint for how law ought to function, but suggests only how law must necessarily function under the shadow of the informal system. There are necessary contraints on the operation of relational orders. There is no way in which key features of such orders can be modified.

Relationism does not outline an ideal form of legal relations but rather a necessary one. Thus, for example, when common institutions are set up in a relational order with the participation of *all* the parties to the relationship, formal limitations on the authority and power of such institutions will remain subject to adjustments made by the mediating system. Such institutions cannot be deprived of their authority to permit, license, legitimize, and condemn in a manner that will affect all the members—unless compulsory judicial review is provided for. For example, the General Assembly of the United Nations, in which all member States are represented, cannot be prevented by the Charter from adopting resolutions like the Uniting for Peace resolution,[111] which may juridically license actions by States, even though the Charter of the United Nations contemplates that binding decisions shall be restricted to those adopted by the Security Council under Article 25 of the Charter.[112] The Framers of the Charter neglected to account for the legitimizing power of the Assembly. The Framers were mistaken in attaching too much weight to the distinction between legally binding resolutions and other resolutions adopted by United Nations organs. Little can prevent States from lending weight to resolutions that were adopted with their support, even if these are not binding. The relational order that prevails in the United Nations has transformed the Charter framework through a set of practices, interpretations, and procedures that often depart from the intent of the Framers at the San Francisco Conference. The

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[111] G.A. Res. 377, 5 U.N. GAOR Supp. (No. 20) at 10-12, U.N. Doc. A/1775 (1950).

[112] U.N. CHARTER art. 25.

formal order of the United Nations Charter could not be expected to control the informal system in effect in its principal organs. On the contrary, the mediating system of the international order tends to reflect the informal system in the organization. This much should have been expected, for the voting majority in control of the Assembly could not have been prevented from imprinting its own reading of the Charter in the absence of compulsory judicial review by the International Court of Justice.

The concepts of a relational order and of formal, informal, and mediating systems lay the groundwork for a unified theory of law for all relational orders. Such a theory provides a framework for investigating how interest groups and other major actors can be expected to interact and how the public interest can be preserved in a relational society dominated by "private" agreements between large institutional actors. Such a theory considers international law as a paradigm for legal ordering in relational orders. Far from being a "problem" for legal theory, international law has a profound explanatory power.

B. Law and State

In a horizontal relational order the law of the State ordinarily functions as the law of a third party. It governs a relationship to the extent that the parties are willing to adopt the law of the State as a rule of conduct or to the extent that the State is able and willing to enforce its law.

The distinction between the idea of law and the law of the State has been drawn by historians who investigated the forms of legal ordering in the era that preceded the emergence of the modern centralized State. The identification of the idea of law with the law of the State is the corollary of the idea of law as a coercive order. Investigation of relational orders, relational societies, and the legal orders of such societies (in brief, Relationism) points to the separation between the idea of State and the concept of law.

There was and there remains in effect a plurality of legal orders separate from the State. In a relational order the sources of law are distinct from those of the law of the State. In a relational order law is not a coercive system but an interactive one.

The separation of the concept of law from the idea of State is reflected in the informal system's emphasis on the adjustment of relationships away from courts. It points to the autonomous law-creating capability of relational orders. In a relational order the role, significance, and authority of the judiciary are much reduced. In a relational society jurisprudence cannot define its task in terms

of the law of the State or of the decisions of the judges of the State's courts.

The identification of the idea of law with the State is the reflection of a political rather than of a legal ideology that continues to have a powerful hold on the legal mind. The emphasis on judicial remedies in professional literature has folded within it the identification of law and State, of law with enforceable decisions. This emphasis is firmly set in theories that assign to the State political supremacy in society. Such theories view the State as the source of all laws. Hence reform, welfare, and justice are all said to stem from the State. In this identification of the idea of law with the State, liberal and Marxist doctrines share a common ground.

The separation of the idea of law from the concept of State is not a novel one. It is a feature of medieval legal theories, legal pluralism, the sociological school of jurisprudence, and institutionalism. It can be found in German corporatist doctrines as well as in theories of international law, canon law, and natural law. It is a theme that runs through the works of Althusius, Gierke, Ehrlich, Hauriou, Gurvitch, Renard, Santi Romano, del Vecchio, Harold Laski, and Lon Fuller.[113]

The separation of the idea of law from the concept of State has been used to support a variety of contradictory political causes such as Social Catholicism, Fabianism, and Fascism. It has suffered a setback on account of the exploitation of corporatist doctrines by the Fascist regimes of Petain in France and of Salazar in Portugal. But none of the propositions advanced in this article owe the slightest debt to doctrines with which it shares only the rejection of the thesis that there can be no legal system other than the legal system of the State.

In a relational order the juridical system does not depend upon State agencies that make, interpret, or apply the law. In a horizontal relational order the institutions of a legislature, a judiciary, and an executive function only with the continuing consent of those that are to be governed by them.

In classical adjudication, every case concerns a discrete transaction. Common law adjudication typically involves disputes, not the adjustment of relationships. Adjudication is to an ongoing relation what surgery is to a patient. It is a traumatic intervention that attempts to give life to a right but that in the process may sometimes kill the patient, the relationship in which it arises.

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[113] The fullest treatment of this subject is found in S. ROMANO, L'ORDINAMENTO GIURIDICO *passim* (2d ed. 1946).

The modern focus of jurisprudential inquiry on courts is epitomized by the famous aphorism of Holmes that "the prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."[114] This identification has persisted into more recent times. In the words of Ronald Dworkin, *the* question of jurisprudence is "[w]hat, in general, is a good reason for decision by a court of law?"[115] This view contrasts with Ehrlich's perspective:

> To a person, however, whose conception of law is that of a rule of conduct, compulsion by threat of penalty as well as of compulsory execution becomes a secondary matter. To him the scene of all human life is not the court room. It is quite obvious that a man lives in innumerable legal relations, and that, with few exceptions, he quite voluntarily performs the duties incumbent on him because of these relations.[116]

In ongoing relations, Holmes's "Bad Man" theory of law is quite removed from the realities of human conduct.[117]

The "thesis of judicial decline" is not new.[118]

> Of the "team" involved in the making and enforcement of promises, courts now play an insignificant role. This is evidenced by the decreasing opportunity and power of courts to decide important economic questions, by the tendency to seek fair results in particular cases, by the inability to obtain adequate data or to influence contract behavior, and by the fact that the important questions decided by courts are quickly legislated or drafted out of existence. Since courts have less and less to do with economically significant contract behavior, it follows that contract research and teaching must drastically change its traditional emphasis.[119]

C. Sources of Law in Relational Orders

The separation of law and State calls for a theory of sources of law independent of the State. In a relational order, in which dis-

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[114] O.W. HOLMES, *The Path of Law*, in COLLECTED LEGAL PAPERS 173 (1920).

[115] Dworkin, *Does Law Have a Function? A Comment on the Two-Level Theory of Decision*, 74 YALE L.J. 640, 640 (1965).

[116] E. EHRLICH, *supra* note 105, at 21.

[117] *See* O.W. HOLMES, *supra* note 114, at 174-79.

[118] Speidel, *Contract Law: Some Reflections Upon Commercial Context and the Judicial Process*, 1967 WIS. L. REV. 822, 823, 825 (discussing L. FRIEDMAN, *supra* note 83; Macaulay, *supra* note 13).

[119] *Id.* at 825.

putes are not usually settled by adjudication, there is little need for rules of recognition to identify the rules that the parties to a relationship regard as legally binding.

A sharp demarcation between existing rules and new claims is not a feature of relational orders. Moreover, even when the parties do not regard rules and commitments as legally binding, it may be difficult for one of the parties to disregard or modify them unilaterally. Fidelity to agreed rules and commitments, whether legally binding or not, is a requirement of a healthy relationship.

Violations of nonbinding commitments can be as destructive of trust and good will as violations of juridical obligations. Mutually agreed forms of interaction in a relationship acquire a stability and an inertial weight of their own and generate expectations about the future. A sharp demarcation between the rules of a system and those that do not belong to it is a requirement of all bureaucracies and institutions whose task is to apply the rules of their system only. It is therefore a feature of the legal order of the State. In a relational order the need for such demarcation arises only when institutions are set up to apply and administer an identifiable body of rules, principles, and policies.

A theory of sources in a relational order must identify the formal documents, agreements, and rules which parties intend to characterize or recognize as legal. It must identify the formal system of a relational order. But it should, in addition, identify the *mediating system* as a source of legal obligations. Tacit agreements, as well as past practice, course of performance, and other ingredients of the mediating system, such as acquiescence, function as sources of law. *The formal system, the mediating system, and the regime of a relational order are all sources of juridical obligations.*

In a relational order the norms that govern the parties are primarily of their own making.[120] They are the law of their agreements and contracts. In Roman law the term "lex" originally referred to a contract. This notion is still found in the French Civil Code, which is derived from the Roman law: article 1134 provides that "[t]he agreements legally made take the place of law for those who made them."[121]

The sharp distinction between accepted rules and new claims, between *lege lata* and *lege ferenda,* that legal positivism insists upon, is a facet of State and bureaucratic ordering, not of all jurid-

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[120] Fuller, *supra* note 98, at 14.

[121] C. Civ. art. 1134 (1981). *See* Fuller, *supra* note 98, at 14.

ical systems. The line between the interpretation and the modification of agreements is a hazy one.

III. The Legal System of the State and the Juridical System of Relational Societies

The question is frequently posed what purpose can be served by attempts to characterize as "legal" arrangements in which neither the courts of law nor the other branches of the government have a significant role to play. Is the relational approach a mere definitional exercise? The fact remains that States insist on legal terminology in relational situations and draw serious inferences from distinctions between instruments they regard as legally binding and others they do not. Surely, some new terminology could be contrived *for instruments that are intended to be binding but for which enforcement in the law courts is not contemplated.* By including such instruments in the realm of legal discourse deference is shown to the usage of the very States in whose name we are invited by positivists not to regard these instruments as juridical. The difficulty, however, is more fundamental.

In a relational order the emergence of a juridical system does not depend upon the two minimum conditions that Hart posited as "necessary and sufficient for the existence of a legal system."[122]

> On the one hand those rules of behaviour which are valid according to the system's ultimate criteria of validity must be generally obeyed, and, on the other hand, its rules of recognition specifying the criteria of legal validity and its rules of change and adjudication must be effectively accepted as common public standards of official behaviour by its officials. . . . The assertion that a legal system exists is therefore a Janus-faced statement looking both towards obedience by ordinary citizens and to the acceptance by officials of secondary rules as critical common standards of official behaviour.[123]

In the complex patterns of interaction between institutional actors in modern societies, the officials of the State do not play the preeminent role ascribed to them under the Hartian concept of legal system. Indeed the legal system of the State, which Hart promulgates as the only kind of legal system, functions side by side with the juridical systems of the relational orders that have achieved

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[122] H.L.A. Hart, *supra* note 15, at 113.

[123] *Id.*

prominence in modern states. The juridical system of relational societies must not be confused with the simpler decentralized prelegal form of social structure that British administrators encountered in the Empire and in which there were no officials. The juridical systems of industrial relations, international relations, and international banking cannot be dismissed as primitive or simple on account of the secondary role played by the officials to which Hart's analysis attaches such significance.

The legal system of the State may or may not best be described in Hart's terms. But the operation of relational juridical systems side by side with it cannot be understood in terms of a model explicitly centered on the State's apparatus and officials.

In a relational order a juridical system can be said to arise when a number of circumstances emerge:

(1) Actors accept or recognize sets of rules, practices, and policies as binding and legitimate—in the sense that they admit that they are not at liberty to disregard them—and as proper standards for assessing the legality of their own actions.

(2) Actors accept that they are not at liberty unilaterally to modify, terminate, or suspend the operation of such binding rules, practices, and policies or unilaterally to adopt measures which have the effect of violating rules, practices, and policies already accepted as binding.

(3) The rules, practices, and policies that are accepted by actors as binding can take a variety of forms. They can be negotiated or adopted unilaterally. They can be found in formal and informal instruments or tacit agreements. They can be expressed in texts adopted by institutional or representative bodies and in any other manner that expresses an *intent to create a legal effect.*

(4) Binding rules, practices, and policies (except for peremptory norms from which no derogation is allowed) are susceptible to formal modification, termination, or suspension by agreement only. In this they differ from moral rules and principles that cannot be modified, terminated, or suspended even by the agreement of the parties.

(5) Accepted rules, principles, and policies are interpreted by reference to the language of juridical instruments as elaborated by the practices of the actors, their agreed interpretations, their course of performance to the extent that no objections are raised, and other usages and customs.

(6) Actors may make demands, claims, and proposals to each other on the basis of such binding rules, practices, and policies and may seek to settle their differences by reference to them.

(7) Actors attempt to secure compliance with such rules, practices, and policies, and there is a measure of congruence between their actions and accepted law.

(8) There is a measure of consensus between the actors about the contents of the rules, practices, and policies accepted as binding and about the criteria for identifying them as such.

(9) Actors are committed to accept the guidance of these binding rules, practices, and policies in good faith and to apply them evenhandedly in all situations, in a neutral, uniform, and consistent manner.

(10) The effectiveness of the rules, practices, and policies accepted as binding rests primarily on the concern of the actors to maintain a particular mode of relationship and on other arrangements of their own choosing for escrows, collaterals, guarantees, and the like.

These ten "circumstances" lack the neatness of the union of primary and secondary rules upon which Hart built his concept of a legal system. They are descriptive of juridical relational systems. (The more obvious practical reasons for endowing a relational order with a juridical dimension have already been mentioned above.)

IV. Problems of Relational Orders

The operation of law in a relational order raises serious problems that are inherent in all relational orders:

—Emphasis on the informal system and on the practice of the parties may lead the parties to condone violations of binding obligations.

—The rights and interests of third parties may be adversely affected by a course of dealing between parties to an ongoing relationship.

—The informal system, the actual conduct of the parties, may be such that it ceases to bear any relevance to the underlying juridical order.

—There may be considerable uncertainty and ambiguity as to the extent of the binding obligations of the parties.

—When the relationship between the parties deteriorates and becomes one of adversity there is little in a horizontal system of power relations that can be done by any third party. These are problems of relational orders. The juridical system is powerless to solve them.

—Conflicts may occur between the juridical systems of different relational orders and the State. Resolution of such conflicts

poses serious problems.

The "living law" and the "informal system" approaches strain the notions of legality and legitimacy in a manner that can be deeply offensive to the jurist with a judgmental disposition. This is compounded by the frequent avoidance of adjudication in the setting of ongoing relations. In international law it is frequently difficult to distinguish State practice in violation of law from State practice that sets a precedent. In commercial law, in the absence of adjudication, the difference between the breach of an agreement and a course of performance accepted or acquiesced in is also far from clear,[124] as is the difference between a violation and a modification of an agreement when a waiver of any term inconsistent with the course of performance can be shown.[125] Agreements that modify a contract need no consideration under the U.C.C.[126]

The U.C.C. distinguishes between "contracts" and "agreements."[127] The concept of "agreement" under the Code is close to the concept of agreement in the Donovan Report. The word "agreement" in the Code is intended to include full recognition of a usage of trade, course of dealing, course of performance, and the surrounding circumstances as effective parts of the agreement. It also bears strong affinities with the concept of "treaty" under Article 2 of the Vienna Convention on the Law of Treaties.[128] The contrast in the U.C.C. between "contracts"—the total legal obligations that result from the parties' agreement as affected by the U.C.C. and other applicable rules of law—and between "agreements," which make reference to the surrounding circumstances, expresses the tension between the stability of expectations reduced to writing and flexibility derived from practice. Flexibility can shade imperceptibly into modification or even breach. Where auto-interpretation is the rule, the line between the two cannot be established. In sustained relations the dominant policy of legal ordering is to permit the continued maintenance of agreed relations and their expansion through "custom, usage and the agreement of the parties,"

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[124] *See* U.C.C. § 2-208 (1972).

[125] *See id.* § 2-208(3).

[126] *Id.* § 2-209(1).

[127] *Compare id.* § 1-201(3) (" 'Agreement' means the bargain of the parties in fact as found in their language or implication from other circumstances including course of dealing or usage of trade or course of performance . . . .") *with id.* § 1-201(11) (" 'Contract' means the total legal obligation which results from the parties' agreement as affected by this Act and any other applicable rules of law.").

[128] Vienna Convention on the Law of Treaties art. 2, U.N. Doc. A/CONF. 39/27 (May 23, 1969).

to use the formulation of the U.C.C.[129] It is unproductive for anyone to focus on violations, breaches, and other phenomena destructive of the friendly relations that the legal order is designed to promote unless the norms violated are fundamental to the legal order.

The practices of parties in a relationship can be injurious to the interests of bystanders. Especially in a decentralized system with limited coercive powers, problems arise about the defense of the public interest. Thus Mr. Andrew Shonfield, in a note of reservation to the Report of the Donovan Commission, felt that the Report placed the welfare of the ordinary citizen at risk and tended to diminish his liberty by endorsing the deliberate abstention of the law from the activities of labor and management, the mighty protagonists in industrial relations.[130] His call for criminal law penalties for actions known to be likely to endanger life, limb, or valuable property reflects a traditional response to the problem of the public interest.[131] In international law, the Vienna Convention on the Law of Treaties provided in article 53 that there are rules of international law out of which states cannot of their own free will contract.[132] The International Law Commission pointed out that the law of the Charter of the United Nations concerning the prohibition of the use of force constitutes a conspicuous example of a rule of international law having the character of a *jus cogens*.[133] In all forms of legal ordering by agreement the problem of the protection of the public interest or of the interests of third parties arises. Solutions predicated upon doctrines of public policy, *jus cogens*, or upon the intervention of the State are all designed to set limits to what can be done by agreement. The problem of containing the hegemonial influence of superpowers has been solved neither in the law of industrial relations nor in international relations.

Third-party intervention can destabilize agreements that states have concluded in arduous negotiations. For example, groups of states hostile to a peace treaty, such as the one concluded between Israel and Egypt, can weaken its legitimacy by declaring it contrary to international law.

The question remains what is to be made of rules that are entirely disregarded in practice so that, in Lon Fuller's words, there

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[129] U.C.C. § 1-102(b) (1972).

[130] DONOVAN REPORT, *supra* note 1, at 288, 291 (Note of Reservation by Mr. Andrew Shonfield).

[131] *Id.* at 291-92.

[132] Vienna Convention on the Law of Treaties art. 53, U.N. Doc. A/CONF. 39/27 (May 23, 1969).

[133] *Id.*

is no "congruence between official action and declared rule."[134] He argues that a total failure of congruence involves a failure to make law. The official norms cease to have relevance to actual conduct. His point is well taken, for a total failure of congruence may result in something that is not legal ordering at all, if by legal ordering we mean the enterprise of subjecting human conduct to the governance of rules.[135] The problem of congruence arises whenever the formal system and the informal one are fully divorced from one another. Practice that entirely disregards legal instruments and governing rules hardly qualifies as living law in Ehrlich's sense. Some connection must remain between the practice and the normative framework; some interaction must take place between agreed rules and actual conduct.

The relational approach is not without normative implications. But it is here presented on its merits rather than as a rationale for normative inferences. Michel Foucault's eloquent comments about the nature of "discourse" have their application to legal theory.[136] They tell us much about the tie between discourse in any field and the total context in which it is held. The character of professional legal discourse at any point in time is deeply fashioned by the "historical circumstances" then prevailing. These include the institutions, modes of behavior, accepted moral norms, the reigning epistemology, and the state of other disciplines. These constitute an often unnoticed element in the context of discourse. Contemporary legal discourse has been powerfully inflected by the formal institutions of the State and the concomitant concern for decisions and measures designed to regulate, compel, or induce obedience. Prevailing legal discourse fashions the legal culture which defines what it is to say something meaningful. The invitation of Relationism is to attempt a break from the prevailing mind-set of legal discourse.

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[134] L. Fuller, The Morality of Law 81 (1964).

[135] *Id.* at 39.

[136] M. Foucault, L'Archéologie du Savoir 55 (1969).

POSITIVISM AND RELATIONISM:
SOME CONTRASTING FEATURES OF TWO TYPES OF LEGAL SYSTEM*

	Postivist Legal System**	Relational Juridical System**
1.	The identification of law with the law of the State.	Every relational order and institution is a source of norms.
2.	Law as norms emanating from State organs for the State's subjects.	Law as norms that are accepted as binding in a relationship in the sense that they may not legitimately be disregarded.
3.	Court-centered enforcement and sanctions are the basis for the effectiveness of norms.	The maintenance of a particular mode of relations is the primary basis for the effectiveness of the norms and obligations of the relationship. Other relational arrangements, such as the provision of collaterals, escrows, and guarantees, are common.
4.	There are two aspects of rules, "external" and "internal," that account for their binding force.	The "relational" aspect of rules must be added to their "external" and "internal" aspects to account for their binding force.
5.	Disputes are settled on a case-by-case basis by references to governing law. There is no linkage to unrelated issues.	Disputes are settled by the adjustment of relations between parties unless the parties themselves prefer a case-by-case disposition. The linkage of unrelated issues is a feature of the adjustment of relations.
6.	A sharp division is asserted between existing law and desired law, between *lege leta* and *lege ferenda.*	The distinction between claims of right and new claims is not a sharp one. The line of demarcation between *lege leta* and *lege ferenda* is fuzzy.

7.	Courts of law are the preferred forum for the settlement of disputes.	Negotiation, bargaining, arbitration, and other techniques for the settlement of disputes over which the parties retain control are preferred.
8.	A sharp distinction is asserted between the lawful and the illegal.	The concern is with legitimacy. The line of demarcation between the informal practices of parties and the violation of norms is not a sharp one.
9.	Emphasis on prohibited and obligatory behavior.	Emphasis on authorized or condemned behavior.
10.	Emphasis on the adversary advocacy of rights.	Emphasis on the management of agreed relationships.
11.	Law making by the legislative and the judicial processes.	Agreement making by negotiated procedures, concurrence, and acquiescence.
12.	The legal system of a hierarchical, vertical social order.	The juridical system of a horizontal, consensual social order.

*These abbreviated formulations are less accurate than those in text.

**The term "legal system" is reserved here for the legal system of the State. The term "juridical system" is reserved for the legal system of relational orders.