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IN THE BLIND SPOT:
The Hybridization of Contracting[1]

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(to appear in: Theoretical Inquiries in Law 7, 2006)

Abstract: What are the consequences of modernity for the institution of contracting? As the unity of the traditional contract is dissolved into a multiplicity of separate contracting worlds (economic transaction, legal promise, productive agreement), the binding force of contracting needs to be reformulated from an interpersonal to an interdiscursive relation. The central thesis of this article is that the unity of contracting is hidden in the blind spot of the distinction between contracting worlds. It needs two diametrically contradictory theories, each, however, resting exactly on the other's blind spot, so that they cannot be integrated into a synthesis. As demonstrated with the example of the expertise contract, the subtle interplay of different contracting worlds depends basically on a fragile symmetry of chances of translation. The normative correlate of contract understood as translation between different worlds of meaning would be an extension of constitutional rights into the context of private governance regimes.

I. THE "CONTRACTUAL GAP" IN LATE MODERNITY

My starting point is the transformation of the contract – the most fundamental institution of private law - in modern times: its hybridization. I want to focus on the consequences of the following argument which I developed at length somewhere else:[2] Today, contract is no longer the consensual exchange relation of two legal subjects to which the judge grants legal force, as long as the *nudum pactum* can at least be endowed with a *causa*.[3]

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[1] I wish to thank *Isabell Hensel* and *Anton Schütz* for critical comments and constructive suggestions.

[2] Gunther Teubner, Contracting Worlds: Invoking Discourse Rights in Private Governance Regimes, 9 Social & Legal Studies 399 (2000). Some consequences for legal doctrine are suggested in *id., Expertise as Social Institution: Internalising Third Parties into the Contract, in* IMPLICIT DIMENSIONS OF CONTRACT: DISCRETE, RELATIONAL AND NETWORK CONTRACTS 333-64 (D. Campbell, H. Collins & J. Wightman eds., Hart 2003).

[3] On the social history of contracting in the continental-law area see ANDREAS ABEGG, DIE ZWINGENDEN INHALTSNORMEN DES SCHULDVERTRAGSRECHTS: EIN BEITRAG ZU GESCHICHTE UND FUNKTION DER VERTRAGSFREIHEIT (Schulthess 2004); DIETER GRIMM, SOZIALE, WIRTSCHAFTLICHE UND POLITISCHE VORAUSSETZUNGEN DER VERTRAGSFREIHEIT: EINE VERGLEICHENDE SKIZZE (Suhrkamp 1987); Franz Wieacker, A HISTORY OF PRIVATE LAW IN EUROPE: WITH PARTICULAR REFERENCE TO GERMANY (Clarendon Press 1996); for the common law PATRICK S. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT CLARENDON (Oxford University Press 1979); LAWRENCE M. FRIEDMAN, CONTRACT LAW IN AMERICA: A SOCIAL AND ECONOMIC CASE

In the dynamics of social fragmentation, in which one and the same contract appears as the simultaneous expression of different and divergent rationalities, the old two-person relation of the contract has metamorphosed into a polycontextural relation, which, though consensual, is impersonal. And the binding force of the contract disappears "in between" the contextures. Now, what are the consequences of this fragmentation?

An individual contract today typically breaks down into several operations within different contexts: (1) an economic transaction which, recursively intermeshed in accordance with the intrinsic logic of the economy, changes the market situation, (2) a productive act which, in accordance with the intrinsic logic of the relevant social context (e.g. medicine, media, science, art, technology, and other social areas where goods and services are produced) changes the productive situation, and (3) a legal act which, recursively intermeshed with other legal acts in accordance with the intrinsic logic of the law, changes the legal situation.[4] The outcome of today's extreme social differentiation is the real (not just analytical) splitting of the one contract into three acts, a legal act, an economic transaction and a productive act, and the enabling of their simultaneity ("*uno actu*"). The single contract is fragmented into a multiplicity of different operations, each of them occurring in different mutually closed discourses. It is at once transaction, production and obligation – but it is at the same time a fourth thing, the "between", the interdiscursive relation of the various performative acts.

An expertise contract may serve as an example and show how important it is to distinguish these three dimensions.[5] There is a whole variety of concrete projects of considerable scale that expertise is contracted for: complex acquisitions of property, large credit operations, construction projects, high risk financial transactions. Usually there is a triangular situation: the *expert* and two partners to a project, one of them the *mandator* contracting with the expert who is supposed to give expert advice on the project, the other the *beneficiary,* the third party who as a rule does not participate in the expertise contract. In several legal orders it is highly controversial whether the expert is contractually liable not only to the mandator, but also to the beneficiary. The explanation for this controversy is that the expertise contract participates in three different contracting worlds – (1) in the contractual interaction of mandator and expert, (2) in the economic context of monetary operations, (3) in the social context of producing the expertise. Each of these contracting worlds imposes on the transaction a

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STUDY (University of Wisconsin Press 1965).

[4] Abegg, supra note 3; *Mark Amstutz, Die Verfassung von Vertragsverbindungen, in* MARK AMSTUTZ, DIE VERNETZTE WIRTSCHAFT: NETZWERKE ALS RECHTSPROBLEM – SYMPOSIEN ZUM SCHWEIZERISCHEN RECHT 45-86 (Schulthess 2004); Hans CASPAR VON DER CRONE, RAHMENVERTRÄGE: VERTRAGSRECHT - SYSTEMTHEORIE – ÖKONOMIE 85 (Schulthess 1993); THOMAS MÜLLER, VERWALTUNGSVERTRÄGE IM SPANNUNGSFELD VON RECHT, POLITIK UND WIRTSCHAFT 144 (Helbing & Lichtenhahn 1997.

[5] For details, Teubner, supra note 2 (2003).

different “privity”, i.e different boundaries, different rules of membership, different principles of exclusion and inclusion. The worlds involved display variations of bilateral, trilateral and multilateral obligations. While in many types of contract, the implied configurations have more or less identical boundaries, it is the peculiarity of the expertise transaction that is exposed to a collision of different privities which contract law is asked to decide.

What "is" this interdiscursive contractual relationship? How does the dynamics of the conflict work and how are the various contractual acts made compatible with each other? This would seem to be one of the hardest problems flowing from the contemporary disintegration of the unity of the contract.

Can we today still discern some operational, structural or systemic "unity of the contract", able to take the place of the exchange between two people? The different disciplines involved affirm this emphatically: they base the unity of contract on either legal consensual obligation or on economic efficiency or on productive transformation, and then superimpose their specific perspective on the other aspects. Contract is thus either economized, legalized or socialized. But this is false, "imperialistic" interdisciplinarity.[6] In contrast, social theory if it deserves this name should not let itself be taken over by any of these perspectives, but instead elaborate the social multidimensionality of the single contract in transdisciplinary fashion. The sobering consequence is that a unity of the contract can no longer be constructed. A contract is neither a unitary process (of social transactions in the broadest sense grasping the relational essence of contract[7]), nor a unitary structure (usually perceived as an ensemble of norms enacted by private autonomy[8]), nor a unique event/operation/act (such as in legal doctrine the agreement of the contracting parties[9]). The single contract is always already a multiplicity of differing processes, structures, operations.

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[6] Most clearly visible in the economic analysis of law, e.g. *Richard Craswell, Contract Law: General Theories*, *in* 3 ENCYCLOPEDIA OF LAW AND ECONOMICS: THE REGULATION OF CONTRACT 1-24 (B. Bouckaert & G. d. Geest eds., Elgar 2000).

[7] This is, however, the trend in relational contracting theory, which sees the contract as a "socially embedded" legal relation, Ian R. Macneil, *Relational Contract: What We Do Know and Do Not Know*, Wis. L. Rev. 483-525 (1985); Robert Gordon, *Unfreezing Legal Reality: Critical Approaches to Law*, 15 Fla. St. U. L. Rev. 195-220 (1985); *Melvin A. Eisenberg, Relational Contracts, in* GOOD FAITH AND FAULT IN CONTRACT LAW 292-304 (J. Beatson & D. Friedmann eds., Clarendon 1994). See also the critical comments on Teubner, supra note 2 (2000), by Oliver Gerstenberg, *Justification (and Justifiability) of Private Law in a Polycontextural World*, 9 Social & Legal Studies 419-30 (2000), Ian R. Macneil, *Relational Contract Theory: Challenges and Queries*, 94 Nw. U. L. Rev. 877 (2000) and David Campbell*, The Limits of Concept Formation in Legal Science*, 9 Social & Legal Studies 439-47 (2000).

[8] As in legal institutionalism, cf. Neil Maccormickl & Ota Weinberger, AN INSTITUTIONAL THEORY OF LAW (Kluwer 1986).

[9] As in the still dominant legal doctrine, e.g. DIETER MEDICUS, BÜRGERLICHES RECHT 19, para. 24 (Carl Heymanns 2004).

Its unity then consists, if at all, only of the interconnection, in the so-called structural coupling between the economy, the productive context and the law (parallels would be: property, the constitution as institutions linking law to different social worlds).[10] This does mean that the systems involved mutually adapt according to laws of perturbation, it certainly does not mean the separation of the systems is suspended, nor even that the contractual operations of the systems involved partly overlap. The hybrid (ambivalent, polyvalent) nature of the contract finds its basis in the inescapable hermeneutic differences of the different social contexts in which the individual contract is situated.

Correspondingly, no unitary meaning of the one specific contract extending over the hermeneutic boundaries can be discerned. The all-embracing meaning of a contract is always only produced relatively and differentially, only in mutual reconstruction of the diverse (partial) agreements, whether in the language of costs or in the language of legal expectations or in the language of the relevant production standard.[11] It is their mutual observation that enables re-entry of the system/environment distinction into each system. That creates within the legal agreement an imaginary space for the representation of the legally relevant facts of business and production. At the same time an imaginary space of legal obligations and productive processes is created in the economic transaction, but ofcourse only in the language of cost factors, profit expectations, economic property rights and preferences. And thirdly, an imaginary space for the reconstruction of resources and obligations appears within in the productive act. But even such a re-entry of one system into the other still leaves us with the insurmountable hermeneutic difference between the contractual languages of legal norms, production standards and transaction costs. None of them is in a position to rightfully claim interpretive predominance.

Can we, then, at least see the unity of contract in the dynamic interactions among those three autonomous contractual chains? In principle not, since they are not directly accessible to each other which would make interaction possible. What happens is only a mutual irritation of economic transaction, production relationship and relationship in law of obligations, sensitizing each to external noise and an internal readiness for change. Correspondingly, there is no common history of the three concatenations of contractual operations, since they each have a past and a future of their own in their different respective social contexts. In this sense one can speak only of the co-evolution of three autonomous perspectives, which are however each controlled by evolutionary mechanisms of their own, and in principle stay separate. Any unitary narrative of the contract fails because of the differences in the various "path-dependent" evolutionary

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[10] NIKLAS LUHMANN, LAW AS A SOCIAL SYSTEM 395 (Oxford Univercity Press 2004).

[11] On this reciprocal reconstruction of the contract in the different contracting worlds as productive misunderstanding see Teubner, supra note 2 (2003); *id.*, supra note 2 (2000); *id.*, *The Two Faces of Janus: Rethinking Legal Pluralism*, 13 Cardozo L. Rev. 1443-62 (1992).

dynamics.

Our first interim finding is: social differentiation splits the formerly unitary contract into three autonomous concatenations of events in the respective legal, economic and production contexts. This difference is - despite (or even because of) mutual observation, structural coupling, re-entry and co-evolution - always reproduced anew as a unsurmountable hermeneutic dissonance. The "between" continually dissolves again into phenomena that must forcibly be assigned to one system or the other. The gaps between law, production and the economy - it might have been the proper role of the modern contract to fill - remain empty. If that is so, the question arises whether elsewhere in modern society, as it were outside the operationally closed systems, there may not exist social mechanisms that are located "between" them and materialize the binding force of the contract. What we are looking for is the social site where the "transformation of a distinction into a Möbius strip", which is what the contract actually accomplishes, comes about.[12]

Does such binding force attach to some pan-socially institutionalized communication "between" the systems of the economy, production and the law? Can we identify some emergent discourse consisting of "interdiscursive" operations of a new kind. And this locus of pan-social identity-finding is just what several authors have often sought.[13] A vain search! Empirically, communication bridging the economy, law and production does indeed happen, but definitely not in the sense of an independent communication system emerging among collective actors.[14] All there is is "diffuse" communicative linkage of legal acts and productive acts to acts of payment, and conversely. The reason for this absence is the difference institutionalized in modernity between society as a whole and functional subsystems. While this difference supplements the one among subsystems, it in turn creates a new unbridgeable "gap".

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[12] DIRK BAECKER, DIE FORM DES UNTERNEHMENS 207 (Suhrkamp 1993), describes the binding force of the contract as a replacement of difference (firm/environment) by identity (transaction). In the light of our discussion, this should be amended to: differences.

[13] Particularly significantly by Klaus Bendel, *Funktionale Differenzierung und gesellschaftliche Rationalität*, 22 *Zeitschrift für Soziologie* 261-78 (1993), with his concept of "intersystemic discourse"; similar advances are to be found in *Ulrich K. Preuss, Rationality Potentials of Law: Allocative, Distributive and Communicative Rationality*, *in* CRITICAL LEGEL THOUGHT: AN AMERICAN-GERMAN DEBATE *525-55* (C. Joerges & D. Trubek eds., Nomos 1989); *Bob Jessop, The Economy, the State and the Law: Theories of Relative Autonomy and Autopoietic Closure, in STATE, LAW, AND ECONOMY AS AUTOPOIETIC SYSTEMS: REGULATION AND AUTOMOMY IN A NEW PERSPECTIVE* 187-263 (A. Febbrajo & G. Teubner eds., Giuffrè 1992).

[14] In this connection see *Helmut Willke, Societal Guidance Through Law, in* STATE, LAW, AND ECONOMY AS AUTOPOIETIC SYSTEMS: REGULATION AND AUTONOMY IN A NEW PERSPECTIVE 353-87 (A. Febbrajo & G. Teubner eds., Giuffrè 1992). Nor is there any socially institutionalized communication system that might be able to restore the unity of the contract through the medium of values; see NIKLAS LUHMANN, DIE GESELLSCHAFT DER GESELLSCHAFT 340 (Suhrkamp 1997).

Might not, then, "life-world" communication in Habermas' sense restore the unity of the contract? In fact, the contract is not only a transactional, productional and juridical relation, but at the same time exchange in the life-world, indeed a "relational contract". Yet looked at more closely, this is either its reconstruction into intimate relations (family, friendship etc.), i.e. in yet another functional subsystem, so that it is again merely a new inter-system relation that is created thereby; or else the contract is reconstructed in diffuse communication "outside" the functional subsystems, which then raises the question whether the contractual unity is restored at quite different levels, those of interaction or of organization.

Can, then, the "integration" of legal, productional and economic aspects be restored in the living social relation called "contract"? If we change the perspective from functional subsystems to interaction and organization,[15] then, indeed, the contract can be seen as a unitary, self-reproducing social process. And in fact, the concrete interaction of the contracting parties and the formal organization of the contract do "integrate" legal, economic and productional aspects, the co-ordination of which they effect with every successful operation as a "contractual act" (negotiations, conclusion of the contract, performance, amendment, breach of contract etc.). But once again they do this only as autonomous discourses, which in turn, each under the laws of its own internal perspectives, maintaining its own autopoiesis, reconstruct legal, productional and economic aspects. Instead of transcending the hermeneutic differences of the three contractual chains coming about in different social contexts, they only add yet another difference to the set: the one between different social levels (society, organization, interaction). They thus only exacerbate the initial question of how mediation among the various autonomous processes in the unitary contractual constellation is possible.

In an act of ultimate despair, we may still try out the "humanization" of the contract. After all, integration of the various social aspects of contract happens in the consensus of real flesh-and-blood-people. But even this only adds yet another internal perspective to the already multiply fractured contractual *Gestalt*, tending to further disintegrate rather than integrate it. For now on top of the multiple social reconstructions of the one contract comes a further twofold reconstruction of the communicative *consensus* (or better, of several communicative *consensūs*) in the consciousness of the individuals involved. The set of differences within society is further enriched by the difference between society and mind, without any unity thereby being created.

At the centre of the contractual phenomenon, then, is a void, the central absence in the modern contract. Altogether, the contract "as such" remains a mere configuration with no operative substrate of its own, an invisible dance of mutual adaptation, a secret coordination of consent, a grandiose relation of structural coupling of a multiplicity of

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[15] *Niklas Luhmann, Interaktion, Organisation, Gesellschaft, in* NIKLAS LUHMANN, SOZIOLOGISCHE AUFKLÄRUNG 2, 9-20 (1975) (3rd ed., Westdeutscher Verlag 1986).

meaning-processing systems. The contract's unity (of meaning), however couched, disappears in the black hole of compatibilities, synchronizations, resonances, co-evolutionary processes. Its content, its dynamics, its decisions, its binding energies are scattered over the closed systems involved. The contract itself only momentarily "bridges" differences of the most varied nature: differences between society, functional systems, organizations, interactions, consciousnesses. "As such," however, the contract is a nothingness in the dark space between the systems. It always lies at the blind spot of the distinction between system and environment.[16] Is this a failing of modern society or a failing of its theory? Is it the reality of functional differentiation or its self-description that is at fault here? Can under conditions of functional differentiation the contractual differences no longer be bridged? Or is it only that its theory no longer has anything to say about bridging, about harmonization, about binding force? Perhaps here the logic of the blind spots and their various compensations can help us along.

II. IN THE BLIND SPOT

Every distinction creates a *tertium non datur*. The excluded *tertium* which is nevertheless present must, however, remain latent for the distinction itself, since otherwise the distinction would itself be called into question. Every social system – not only the contract -, as a recursive concatenation of distinctions, is based on a flaw: on the violence of the initial distinction that constitutes its unity. The flaw is accordingly not one at all, but an advantage; without it, no construction is possible. That implies renouncing perfection. The eye that sees everything is no longer able to see anything.[17]

Even this sketch of the logic of the blind spot assists with an initial insight, namely that the interdiscursive gap is ineluctable in the genesis of the contract. What seems in the vain search for the binding force of the modern contract to be a flaw in its practice or an error in the theory is actually a latency that is simply necessary for constructional reasons. Then, however, the consequence for the modern contract "as such" is: the contract's inter-discursive binding effect must remain invisible to contemporary society as a whole and its self-description. It can be observed only in its effects on the economy, law and production, but not itself as relationality between them. In the dance of mutual adaptations of the diverse contractual projects, while the movements of the individual

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[16] More exactly, in the blind spots of the re-entries, i.e. the contractually relevant system/environment distinctions, which are each repeated within the system as system/system distinctions: from the viewpoint of a contracting party as one party versus another, from the viewpoint of law as legal contract versus transaction, etc.

[17] On the metaphor of the "blind spot " in the context of constructivism see *Niklas Luhmann, Wie lassen sich latente Strukturen beobachten?*, *in* DAS AUGE DES BETRACHTERS - BEITRÄGE ZUM KONSTRUKTIVISMUS, FESTSCHRIFT FÜR HEINZ VON FOERSTER 61-74 (P. Watzlawick & P. Krieg eds., Carl-Auer-Systeme 1991); *Heinz von Foerster, Das Gleichnis vom blinden Fleck: Über das Sehen im allgemeinen, in* DER ENTFESSELTE BLICK: SYMPOSION, WORKSHOPS, AUSSTELLUNG (G. J. Lischka ed., Benteli 1993).

bodies can be seen, the dance itself remains invisible.

The latency is not only necessary, but needs to be secured against its actualization. Both the (constructed) object and the latency itself need to remain invisible in the blind spot, to avoid the collapse of the construction. This may be bound up with corresponding intentions. In contractual thought it was no doubt the humanistic concept of the legal contract that safeguarded the latency. As agreement between people, as harmony of two declarations of will, as binding promise between persons, as common source of binding norms, it carefully avoids sight of the multiplicity of hermeneutic differences described above. The full consent of two people overcomes all distinctions, and the person-to-person giving of word alone is seen as able to keep the divergent projects together. In this role of covering the blind spots of differential genesis of contracts, the otherwise rather obsolete legal concept of the contract, which celebrates individual private autonomy, has managed to make itself indispensable even in modernity. Or putting it in a different conceptual tradition: "The unknownness of the abstraction of exchange is thus a constitutive component of the exchange action itself."[18]

Yet even when latency is safeguarded, it does not set the unruly question of the bindingness of contract at rest. For the very attraction of the gap lies in the constant effort to conceal it, but also in the effort to "fill" it. There is a continual suspicion that the real point lies in the gap. In the contractual context the suspicion keeps on arising that the agreement of the contracting parties is not capable of binding the diversifying projects.[19] And it is not just suspicion but the actual difference of the various types of consent continually breaking through that lies concealed here. If contractual consent means something different for the contracting parties involved, for the contractual relationship, for law, the economy and production respectively,[20] how are these various *consensūs* brought into harmony? Here lies the reason for the persistent unrest in the imperfect order of the interdiscursive contractual complex.

Hence the ongoing efforts to ensure the "unity" of the contract in operational practice and reformulate it in various self-descriptions. New compensatory manoeuvres are continually thought up, to re-integrate the contract's lost unity: imperialist interpretation by one specialized discipline (law, economics, sociology), re-entry of the initial distinction, the repeated making of further new ones, the incorporation of other perspectives. What happens is a grandiose complexification of operations and of observations of the contract around the blind spot. This becomes particularly clear in a theory perspective that discloses the polycontextural dimensions of the contract in their radicality, while at the

[18] SLAVOJ ZIZEK, ENJOY YOUR SYMPTOM! 16 (Routledge 1992).

[19] This is one of the motives for interdisciplinary attempts to find the contractual binding outside the law, e.g. in the "relational contract" or in economic (!) structures.

[20] One spectacular case of the divergence of consensus between law (or legal doctrine) and economics (theory) is "efficient breach of contract".

same time complexifying the binding aspects which have been discussed above: contract as inter-system structural coupling, contract as pan-social integration, contract as organization or as interaction (see I). The result is a never-ending process of creating differences and compensating for their blind spots by inventing a false unity.

Is there an alternative? Perhaps. We may imagine a way of enhancing the compensation of blind spots in a different direction. The inspiration might be: two diametrically contradictory theories, each, however, resting exactly on the other's blind spot, so that they cannot be integrated into a synthesis. The inspiration is taken from the "particle-wave" theoretical dispute in quantum physics which has shocked our ideas about the one right theory.[21] Neither theory is “right”; it is the conflict between them that makes both “right”. Constant "switching" from one to the other gives an almost simultaneous observation from two contradictory but complementary perspectives. But there is a strict condition for complementarity: that each be able to illuminate the other's blind spot.

Can this yield a generalizable model for polycontextural observation which could work in our contractual context? The trick would be not simply to postulate theoretical pluralism, postmodern arbitrariness, dependence on the observer's viewpoint, anything goes whenever a theory seems to have reached its limits.[22] Theoretical multiplicity as such in principle contributes nothing at all towards throwing light on blind spots of competing theories. Nor is it enough for one theory to focus on aspects that the other neglects. Instead, we need strict complementarity of two theories precisely fitting in with each other in their contradiction relating to the relevant blind spot. The procedure would have three steps: (1) choose an ambitiously constructed theory, (2) identify the blind spot in its initial distinction, (3) choose a second, strictly complementary non-congruent theory, with a leading distinction "orthogonal" to the first's and accordingly focusing on its blind spot, and conversely. Systems theory versus deconstruction, systems theory versus discourse theory – would these be possible candidates for this sort of negative symbiosis of theories? And does the focus on the other's latencies establish their mutual attraction? Or would systems theory first have to invent its own complement anew? At any rate, this sort of switching between orthogonal perspectives might supply more interesting insights than the otherwise usual technique of mutual incorporation of theories, which then only continue to cultivate their blind spots, even if at a different place. In the relation of the competing theories to each other, the switching would be neither a one-sided incorporation nor an overlapping integration, nor a disconnected pluralist coexistence either. It would be more of a case of dialectic without synthesis. The complement is the "negation" of the difference; both are necessarily dependent on each other. But no

[21] For a discussion of particle-wave dualism as incompatibility or complementarity of theories in an observer-dependent perspective see Michel Bitbol, *En quoi consiste la "revolution quantique",* 11 *Revue internationale de systémique* 2125, 2225 (1997).

[22] PAUL FEYERABEND, WIDER DEN METHODENZWANG*:* SKIZZE EINER ANARCHISTISCHEN ERKENNTNISTHEORIE (Suhrkamp 1976).

integration of complement and difference is possible, since each buries the other in its difference technique.

III. CONTRACT AS "WAVE AND PARTICLE"?

Where does the metaphor of the contract as particle and wave lead us? "Particles" – those would be the various contractual projects as discrete units: transaction in the economy, contract conclusion in law, productive act in the various other worlds of meaning, exchange in the organized social relations and pursuits of interests of the individuals involved. "Wave" would denote the dynamic relation among law, the economy and the productive social context, between various levels of social formation – interaction, organization, society – between states of mind and socially constructed *consensūs*. And the trick would then be not to resolve the dynamic contractual complex into either a theory of social particles or a theory of social waves, but to leave it in its contradictoriness and seek surplus value in that very contradictoriness. What on one view of the contract disappears as a multiplicity of discrete operational chains between the systems becomes visible in the complementary vision as binding dynamics. And what in this view in turn appears only as undifferentiated unitary occurrence is in the other focused on in its multiplicity of meanings.

This leads directly to the (latent) dispute between Luhmann and Latour about the non-modernity of modernity, or about the relationship between differentiation and hybridization.[23] Both, systems theory and actor-network theory agree that hybridization and differentiation are neither mutually exclusive nor reciprocally restrictive, but the relation between them is one of mutual enhancement. Hybrids are not simply compromises, mediations, that weaken the differentiations of modernity through integration, but arise only once the differentiation has produced and stabilized differences; indeed, they base their very existence on the stable persistence of the difference.[24] It is only the combination of both sides of the difference that brings out the special nature of the hybrid: neither mediation nor syntheses, but extremely ambivalent (or polyvalent) unity.

What is however disputed is the relation between differentiation and hybridization. Latour starts by insisting on the mutual enhancing of modernity and non-modernity, but ultimately, as it were in the last instance, decides in favour of non-modernity. In the parliament of things it is the politics of the hybrid that wins. Latour ultimately gives hybridization primacy over differentiation.[25] The contract would then be a hybrid that

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[23] BRUNO LATOUR, WE HAVE NEVER BEEN MODERN (Harvester Wheatsheaf 1993); *id.*, POLITICS OF NATURE. HOW TO BRING THE SCIENCES INTO DEMOCRACY (Harvard University Press 2004); NIKLAS LUHMANN, SOCIAL SYSTEMS (Stanford University Press 1995).

[24] Michael Hutter & Gunther Teubner, *The Parasitic Role of Hybrids*, 149 Journal of Institutional and Theoretical Economics 706-15 (1993).

[25] Latour, supra 23 (2004); *id.*, supra note 23 (1993).

combines economic, productional and legal aspects. Luhmann by contrast plumps for late modernity. In the refined conceptual manoeuvring of operational closure and structural coupling, production of difference and re-entry, the differences ultimately always prevail. The outcome is the dissolution of the unity of the hybrid in the difference of the systems involved. The contract then has a legal, a productional and an economic side facing each other in structural coupling.

The "third" position would be to accept the dispute itself as the solution, without deciding it. The productive condition is, however, for the dispute to be capable of making the blind spots of both positions visible. In fact, hybridization à la Latour is located exactly in the blind spot of systems theory, since its initial distinction between system and environment blinds it to everything that might come about "between" system and environment. That is why Luhmann has to dissolve the hybrid completely and without remainder in the difference of the systems. From his viewpoint nothing else is "thinkable". Latour by contrast decides in favour of the unity of the hybrid, or for a "mediation" between the contraries, and correspondingly blinds himself to the system/environment differentiations. The fruitful complementarity of the two positions is retained, however, if two prohibitions are kept to: avoid the decision between differentiation and hybridization! But also avoid any mediation, far less synthesis! The alternative would be continual switching between "wave and particle", between difference and hybrid, between closed systems and integrating networks. Can this sort of double vision be kept up? Can we, using two mutually contradictory, equally entitled theories, neither reducible to the other, see the contract as a multiplicity of systems and simultaneously as a unitary network?

However, where can a theory of the contract complementary to systems theory and illuminating the blind spot of functional differentiation be found? Its focus would be on the "binding" force of the contract, invisible to systems theory, which not only acts between the contracting parties but also holds together the individual aspects in law, the economy and the productive system, society, organization and interaction, social and mental systems, in the dynamic of the contractual complex. It would be naïve to assume that such a complement to systems theory already exists in the available range of theories. Neither Habermas nor Derrida nor Foucault developed their constructs to be strictly complementary to Luhmann. A complementary theory does not simply exist, but must be sought precisely in the blind spot of functional differentiation, if not indeed invented anew. Systems theory – like any other well-constructed theory – is entitled to its very own complement. Its self-confirming self-rejection is, moreover, only the autological consequence of the polycontexturality it so highly favours, from which it will not even except itself.[26] For the complement to systems theory there are admittedly only fragments available in today's theoretical spectrum. We shall attempt an initial survey of them below.

Contract as "différance" (Derrida)? On Derrida's view the contract would definitely not seem to be a multiplicity of separate and parallel system recursions or discourse

[26] Luhmann, supra note 14, at 1132.

narrations.[27] Instead, the contractual dynamic would be a differential, paradoxically constituted complex chain of distinctions, changing according to context and constantly deferring its meaning, but nonetheless cohesive (and not discursively/systemically nor mentally/socially split), and embracing in its relationality the legal, economic, political, interactional and organizational, but also social and mental, aspects of the contract and holding them together. My guess is that this concept of the contract, not compatible with systems-theory conceptualization but complementary to it, can articulate the open dance of the heterogeneous operations themselves, the net of relations, the coordination, the interplay of the various aspects, without in turn converting it into a closed system of interlinked operations of similar type.

Contract as "actant" (Latour)? The contract would appear as a binding force, as energy between the systems, which is however not, as in systems theory, converted into system events and expectations, but floats freely between the systems. These energies may even arise out of the differentiation itself, as tectonic tensions between the "continents" separated by institutionalized differentiation. Is this incontinence of the systems? My guess here is that the contract as it were lets the tectonic forces of continental drift work for it, by noting, coordinating and thus mutually strengthening and accelerating randomly arising opportunities for coordination between the continents. Energy, force, drive, desire, power, are concepts of only very limited use in systems theory. Expectation (vs. action), medium (vs. form), complexity difference (vs. evolution) are the few "energy-containing" phenomena; the rest of the forces "holds sway" outside the systems, as a blind spot.

Contract would then appear as a hybrid, an activating relation of tension between the various poles, developing its own force of attraction, its sucking and thrusting forces. The focus is directed at the "unconscious" of functional differentiation which brings about the mediation of the separated aspects. On this view the contract would appear as "integrator", though in sharp contrast to usual notions of integration of a functionally differentiated society not as compromise or mix, nor as de-differentiation, nor superdiscourse or metadiscourse, but as a tangential, ad-hoc agreement flaring up momentarily between divergent dynamics.

And finally, contract as "the task of the translator" (Benjamin)? The contract must convert legal, economic, political and life-world aspects into each other is such a way as to "succeed", to create the room for compatibility that must exist between the various aspects if the contract is to come into being and be fulfilled. The symbol of unity is the "object of the contract", meaning not one of the system aspects in isolation, but the compatibility complex responsible for its success. Benjamin’s "pure language" appears in the translation process not as possible reality or even only desirable goal, but as an unattainable "regulatory idea" of a permanent, but at the same time impossible,

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[27] An implicit concept of the contract can be found in Jaques Derrida, *Force of Law: The Mystical Foundation of Authority*, 11 Cardozo L. Rev. 919-1046 (1990), on law in general *id.*, GIVEN TIME (University of Chicago Press 1992).

translation process: "... bringing the seeds of pure language to maturity in translation seems never achievable".[28] The obligation to restore the "break", the fragmentation, the social estrangement exists despite the impossibility of fulfilment.[29] The contract is then to be read as a single text written in three languages (law, economy, production) – an extremely improbable translation accomplishment. At the same time, however, this is where the surplus value of contractual practice as added value of translation is to be found: insofar as the contract “translates” social discourses for each other momentarily and *ad hoc*, they can derive added value that would never have been accessible to them individually out of their own intrinsic dynamics.[30]

It would be the "task of the translator" to seek between the systems the binding force of the contract that keeps the centrifugal dynamics of the functional systems together within temporally, socially and substantively highly specified limits: the flaring up of a momentary, narrowly circumscribed agreement affecting a few actors. This binding effect can no longer be supported on the classical theories of binding by contract: neither on factual prior performance by one party, nor on the word given in a promise, nor on the consent of the contracting parties. For that would presuppose an integration of the various aspects of the contract that today no longer exists. Instead, binding is produced by mutual connecting the contractual performances in each social context independently: as a price-performance relation on the market, as synallagmatic linkage of contractual rights and obligations in law and as reciprocal dovetailing of perceived needs in the productive context. These separate performances of various realms of meaning are accessible to a system/environment perspective; indeed, only a fully worked out systems theory can make them visible at all. But what remains invisible to this sort of perspective is the dynamic of the conflictual harmonization of these binding mechanisms: the dance of reciprocities that is precisely what binds these reciprocities to each other.[31]

Here an analysis orthogonal to the system/environment perspective must step in, taking the mutual interaction, between the systems, of the binding forces of the contract, the contractual "transformation of a distinction into a Möbius strip"[32], as its focus. The focus is then on the ongoing translation process between various reciprocities in the contractual complex, their conflicts, their rapprochements. The interesting thing about this translation process – and this is my third guess – seems to be its highly particularistic nature: the

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[28] WALTER BENJAMIN, GESAMMELTE SCHRIFTEN 2, 15 (Suhrkamp 1977).

[29] For a deconstructive perspective on translation see ALFRED HIRSCH, ÜBERSETZUNG UND DEKONSTRUKTION (Suhrkamp 1997).

[30] For more on this see Teubner, supra note 2 (2000).

[31] This refers to Wiethölter’s concept of reciprocity, see *Rudolf Wiethölter, Just-ifications of a Law of Society, in PARADOXES* AND INCONSISTENCIES IN THE LAW 65-75 (O. Perez & G. Teubner eds., Hart 2006).

[32] Baecker, supra note 12, at 207.

very renunciation of a general transformational grammar in the relation between the discourses involved, the very non-generalizable idiosyncratic nature of any contractual agreement, makes the analysis of the dynamic of the transformation process itself (and not only its outcomes) so important. This process has to clarify whether and how it can be possible to render economic exchange equivalence, legal synallagma and productive reciprocity compatible, in an ongoing translation process.

IV. CONTRACT AS CONSTITUTION

This subtle interplay of different worlds of meaning, the fractured dissemination and distortion of meaning in the contractual ultracycle, however, depends basically on a fragile symmetry of chances of translation.[33] It is constructed upon the non-translatable multiplicity of the language games, on their separation, their autonomy, their actual freedom and on their ability to overcome the translation paradox by their own and specific way of a productive misunderstanding. This opens new normative perspectives. Freedom of contracting individuals is being transformed into freedom of translating discourses. It is no longer just the freedom of economic actors to choose their partners on the market and to strike a voluntary agreement of their choosing under market conditions. This would be only a partial aspect, which reduces freedom of contract to the freedom of the economic discourse to translate other discursive projects into the economic language but not *vice versa*. Freedom of contract today means the freedom of all three discourses involved to translate, to transfer, to reconstruct operations of other discourses into their context, freedom of their productive misunderstanding according to their internal logic. To cite Derrida who developed his ideas on interdiscursivity and translation in a discussion of Kant and Schelling on academic freedom in relation to the state this freedom

> "presupposes separation, heterogeneity of codes and the multiplicity of languages, the non-trespassing of boundaries, the non-transparence."[34]

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

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[33] More details on the following normative argument in Teubner, supra note 2 (2000).

[34] *Jacques Derrida, Des tours de Babel, in* JAQUES DERRIDA, LIMITED INC. (Galilée 1987).

project of an economic rationalisation of the world and introduce the obligation of a necessary and simultaneously impossible translation between the different languages of the social world.

A fundamental change in private law would amount to the following. Of course, private law today is not living in splendid isolation from its environing society, rather it lives in close structural coupling, via the mechanisms of contract, with the economic subsystem of society.[35] But here is where the problem lies. Private law receives thus information about the rest of society quasi automatically and almost exclusively through the cost-benefit calculations of the economic discourse. Any other discourses in society, whether research, education, technology, art, or medicine are first translated into the world of economic calculation, allocative efficiency, transaction costs and then in this translation presented to the law for conflict resolution. This means a serious distortion of social relations. This distortion of social relation by their economic contractualisation has four dimensions: 1. Bilateralisation: complex social relations are translated into a multitude of closed bilateral relations; 2. Selective performance criteria; 3. externalisation of negative effects; 4. Power relations.[36]

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

What does this mean concretely? Coming back to our initial example of an expertise contract, the consequences of such an approach become visible more clearly.[37] In the expertise contract a fundamental conflict, the direct collision between the principles of contractual loyalty and expertise impartiality, comes to the fore.[38]

Expertise, if it is supposed to work properly, needs to guide its orientation firmly

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[35] Luhmann, supra note 10, at 395.

[36] *Hugh Collins, The Sanctimony of Contract, in* EUROPEAN LAW JOURNAL 76 (R. Rawlings ed., Clarendon 1997).

[37] For more details, see Teubner supra note 2 (2003).

[38] For theorising the larger historical and social background of these conflicts, see DAVID SCIULLI, THEORY OF SOCIETAL CONSTITUTIONALISM 40 (Cambridge University Press 1992).

toward principles of scientific inquiry. Application of rigorous methodical standards, orientation toward a comprehensive body of concepts and theories, reliance on inter-subjective consensus in the community of experts, strict insulation against interference of outside political or economic interests, neutrality and impartiality in relation to the interests of the clients involved, are primary among them.[39]

Bilateral contracting on the other side creates for the expert the legitimate obligation of co-operation, trust, interdependence and loyalty toward the economic interests of the mandator. The expert is under the contractual obligation to further the interests of his client, to use his scientific-methodical instruments to advance the position of his partner to the contract, who after all finances the expertise.

Thus, private law faces a sharp collision between two legitimate self-regulatory institutions – contract and expertise. In the private expertise, the ethos of contract - privity, particularism, interest orientation, utility, and loyalty - clash directly with the ethos of scientific inquiry - public knowledge, universalism, disinterestedness, originality and scepticism.

Judicial intervention is needed, if the integrity of independent expertise is to be maintained within the private sector. More abstractly, it is needed to facilitate an internal reflective balancing of institutional contributions to social actors (the mandator, beneficiary, others) against its social function (advancement of knowledge in non-scientific sectors of society). This is the reason why it is an important matter of public policy to declare that expertise comprise a legally "protected sphere" within civil society. Thus,

> "the state in essence buffers these enterprises 'artificially' from all other spheres' more 'natural' condition, that of immediate competition within economic and political market places"[40]

The task at hand is to search for spaces of compatibility between contract and expertise, to search for a legal regime of expertise that furthers an internal reflection on the balance of function and contributions. Here, third party liability comes in. It appears as an adequate means to create a space of compatibility. It provides a solution for a typical collision of contracting worlds. It does so by redefining "privities", i.e. the external boundaries of the interpersonal relations. While the concrete project, whether in the technological, social, scientific or medical sector, requires one comprehensive multilateral relation, which formalises the agreed upon co-operation of several actors,

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[39] For a recent comprehensive reformulation of the fundamental social norms in the scientific community, JOHN ZIMAN, REAL SCIENCE: WHAT IT IS, AND WHAT IT MEANS 28 (Cambridge University Press 2000).

[40] Sciulli, supra note 38, at 207.

the concrete contract and the economic market relation is fragmenting the multilateral complex into various strictly bilateral relations. The “privity” of the relation is defined differently by the contract and by the project. Third party liability dissolves this conflict of different privities in favour of the multilateralism inherent in the expertise. Via liability law, the social institution of expertise forces the bilateral contract to transform itself into a multilateral obligation. The conflict between multilateral social networks and the bilateral economic transactions forces the law to account for third party effects of contracting, even if this contradicts the sacred privity of contract, reduces allocative efficiency and increases transaction costs.

If then as a matter of law, responsibility for third parties is included into the contract, the one-sided contractual duty of loyalty is counter-balanced by a liability supplement toward the other participant in the project. Thus, despite its contractual loyalty, private expertise can regain its requisite neutral and impartial orientation. Independent expertise as an institution, as a complex of social expectations, thus represents one of the non-contractual elements of contract which – as a matter of law - the private autonomy of the parties has to respect. Whenever expertise is organised under a private law regime, the requirement that it is complemented by third party liability is a necessary implicit dimension of this regime.

To express the result in one formula: *third party liability symbolises the transformation of interest-bound expertise into project-bound expertise.* The existence of this liability is a highly visible threshold that separates two institutions. It draws a limit between partisan expertise where knowledge is (legitimately) used for the pursuit of onr-sided private interests and independent expertise where knowledge is applied in an disinterested way with in-built controls of reliability and where it is independent from personal loyalty and reciprocity considerations. Expert liability to third party marks the boundary between the fields of economic and scientific rationality.

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

These "rights" are social phenomena, incipient and inchoate normative constructs that emerge from social practices as compelling claims of right so important to an institutionalised practice as to make legal recognition plausible.[41] But this presupposes

[41] For incipient and inchoate law as result of social practices that press for legal institutionalisation, PHILIP SELZNICK, LAW, SOCIETY AND INDUSTRIAL JUSTICE 32 (Russell Sage 1969). In a less normative language, a similar argument for the emergence of constitutional rights as social institution has been

a conceptual readiness of the law to respond to the pressures of social development. The conceptualisation of contract as interdiscursivity raises for the law the issue of constitutional rights, fundamental rights for discourses. But these rights can no longer be seen as protecting only the individual actor against the repressive power of the state, but would need to be reconstructed as "discourse rights" in the situation of today's polycontexturality. The normative correlate of contract as translation would be an extension of constitutional rights into the context of private governance regimes. This, however, requires a fundamental re-thinking of the horizontal effect of constitutional rights.[42]

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developed by NIKLAS LUHMANN, GRUNDRECHTE ALS INSTITUTION: EIN BEITRAG ZUR POLITISCHEN SOZIOLOGIE 186 (Duncker & Humblot 1965).

[42] An attempt to spell out what the implications of such an approach are for the freedom of art in private contexts, see Christoph Graber & Gunther Teubner, *Art and Money: Constitutional Rights in the Private Sphere,* 18 Oxford Journal of Legal Studies 61-74 (1998); CHRISTOPH GRABER, ZWISCHEN GEIST UND GELD (Nomos 1994). For the debate of constitutional rights in private contexts, see Gunther Teubner, *The Anonymous Matrix: Human Rights Violations by "Private" Transnational Actors*, Modern Law Review (forthcoming 2006); Gavin W. Anderson, *Social Democracy and the Limits of Rights Constitutionalism*, 17 The Canadian Journal of Law & Jurisprudence 31-59 (2004); Aharon Barak, *Constitutional Human Rights and Private Law*, 3 Review on Constitutional Studies 218-81 (1996); ANDREW CLAPHAM, HUMAN RIGHTS IN THE PRIVATE SPHERE (Oxford University Press 1996); HUGH COLLINS, JUSTICE IN DISMISSAL: THE LAW OF TERMINATION OF EMPLOYMENT (Oxford University Press 1992).