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Transnational Contract Law

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Contract is a leading trope of transnational ordering. In the shadow of the various attempts to harmonize contract law at the transnational level (such as through UNIDROIT), the very institution of contract already forms the backbone of transnational interaction. Yet, as this chapter outlines, contract theory is for the most part ill-prepared to capture the constitutive role of contracts in the regulation and critique of transnational social institutions, such as global value chains or digital platforms. In such scenarios, beyond being geared towards efficiency between parties, contracts embody a plurality of rationalities and interests and form a discursive space. Albeit often in a fragile way, contracts emerge as equivalents of political institutions inasmuch as the state legal order no longer provides substantial background justice. The chapter surveys how realist and critical traditions in contract theory, in both their US and European variants, are presently being recalibrated to properly reconstruct transnational social conflicts.

1. Introduction

Contract has occupied a central role in any concept or inventory of transnational law ever since its inception—not surprisingly, since contract constitutes a versatile, basic institution beyond the confines of private law. It forms part of the transnational social fabric. When *Jessup* coined the term as an umbrella category for law that regulates transboundary social activity, many of his examples were ultimately based on contract, be it between private parties, or involving state agencies or international organizations.[1] This is because contract is at the surface agnostic towards political boundaries and has a fundamentally chameleonic nature, as illustrated by the plurality of contexts governed by contract. Political theory (when using the 'social contract' to justify a particular societal order), private law, welfare state regulation and a vast array of inter-state and international relations each recur to an idea of contract, making it a contested and pluralistic category with discordant connotations that defy uniform theorization. Contract represents a veritable 'law of society'[2]—its contradictions echo the differentiation of society.[3] Due to its centrality for transnational ordering, the institution of 'contract' can serve as prime example of most, if not all, bigger trends and

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[1] Philipp C. Jessup, *Transnational Law* (New Haven: Yale Univ. Press, 1956).

[2] Peer Zumbansen, 'The Law of Society: Governance Through Contract', 14 *Indiana Journal of Global Legal Studies* 191-233 (2007).

[3] Gunther Teubner, 'Contracting Worlds: The Many Autonomies of Private Law', 9 *Social and Legal Studies* 399-417 (2006).

challenges that mark the emergence of transnational law[4], eg an erosion of boundaries both inside (notably public vs. private) and outside the law, notably a refinement of the relation between law and other modes of normative, technological, and algorithmicized governance, a renewed inquiry into legitimacy, and an exposure to new social realities. The story of transnational law could quite extensively be told from the vantage point of contract and its role in the fault lines of globalization. Yet, the different forms of social cooperation realized through contract and their respective social embeddedness remain unaddressed by a (neo-)formalist contract theory. Such approaches posit as archetype of contract a will-based interpersonal agreement between parties presumed as equals.[5] Their ambition is to highlight the unifying, rather than the contradicting, distinguishing, contextualizing elements. In a way, this stands in contrast to the development of national contract laws over the 20th century that have known a diversification and series of adjustments in a move *away* from a unitary, highly abstract theory of contract.[6] A central normative impetus towards this has been the constitutional fundamental rights provisions that reversed the liberal default rule and placed private legal arrangements under a steady burden of justification.[7] What is more, (neo-

[4] For a synopsis Gralf-Peter Calliess and Peer Zumbansen, *Rough Consensus and Running Code. A Theory of Transnational Private Law* (Oxford: Hart, 2010), 27-152; Richard Cotterell, 'Spectres of Transnationalism: Changing Terrains of Sociology of Law', 36 *Journal of Law and Society* 481-500 (2009).

[5] Eg Charles Fried, *Contract as Promise* (Cambridge/MA: Harvard University Press, 1981); more recently Douglas G. Baird, *Reconstructing contracts* (Cambridge/MA: Harvard University Press, 2013); for an overview of recent US scholarship in the field Eyal Zamir, 'Contract law and theory: three views of the cathedral', 81 *University of Chicago Law Review* 2077-2123 (2014).

[6] See Duncan Kennedy, 'Three Globalizations of Law and Legal Thought: 1850-2000', in: David M. Trubek (ed), *The New Law and Economic Development. A Critical Appraisal* (Cambridge: Cambridge University Press, 2006), 19-73; Franz Wieacker, *A History of Private Law in Europe* (Tony Weir trans., Oxford: Clarendon Press, 1995), § 27; Marietta Auer, *Privatrechtsdiskurs der Moderne* (Tübingen: Mohr Siebeck, 2014), 63-73, for a similar narrative already Patrick S. Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford: Clarendon Press, 1979).

[7] See on this conceptual shift from reading 'private law as constitution' to the 'constitutionalization of private law' Dan Wielsch, 'Responsible Contracting. The Requirements of EU Fundamental Rights on Private Law Regimes', in: Hugh Collins (ed), *European Contract Law and the Charter of Fundamental Rights* (Cambridge: Cambridge University Press, 2017), 257-283 and, in a comparative US-German perspective, Felix Maultzsch, 'Die Konstitutionalisierung des Privatrechts als Entwicklungsprozess', 67 *Juristenzeitung* 1040-1050 (2012). While an increasing normative guidance through fundamental rights can be observed across private law jurisdictions, the starting points of the respective national debates remain marked by historically grounded conceptions of 'private law' and its relation to public order. In the US, the early codification of constitutional rights has favoured a more holistic understanding of private law having a per se constitutional dimension, while eg in Germany an antagonistic reading as distinct normative orders (under the primacy of constitutional law) prevails (cf on the intellectual history of this differentiation Dieter Grimm, *Verfassung und Privatrecht im 19. Jahrhundert. Die Formationsphase* (Tübingen, Mohr Siebeck, 2017)), with nowadays however an already 'materialized' understanding of contract law that incorporates a broader spectrum of constitutional values. At the EU level, a similar constitutionalization of contract law has occurred, drawing essentially on the German and Italian conceptual debates and case-law (see eg Stefan Grundmann (ed), *Constitutional Values and European Contract Law* (Alphen: Kluwer International, 2008); Gert Brüggemeier, Aurelia Colombi Ciacchi and Giovanni Comandé (eds), *Fundamental Rights and Private Law in the European Union* (Cambridge: Cambridge University Press, 2010) and Hugh Collins, 'The Constitutionalization of European private law as a path to social justice?', in Hans-W. Micklitz (ed), *The Many Concepts of Social Justice in European Private Law* (Cheltenham: Edward Elgar, 2011), 133-166).

)formalist approaches have lamented the contemporary '*depth* of contract' as the '*death* of contract'[8] or developed a '*fear* of contract'[9] that contributed to an ongoing depoliticization of the very category. The State was conceptually indispensable, yet remained tacitly in the background in these theories, making it difficult to account for a changing role of the State in the transnational realm. This correlates with a long-standing conception of contract as a legal institution enabling essentially market activity that can be traced back to *Max Weber's* dictum of contract as the 'legal side of the market society'[10]. Under such a paradigm of contract as vehicle of economic rationality, the increasing contractualization of society under privatization since the late 20th century[11] could not fully be apprehended. This challenge very much resonates in the transnational realm and is propelled by changing concepts of 'Statehood' itself.[12]

The role of contract in the transnational sphere encompasses a wide range of phenomena, from the harmonization of contract laws beyond the state and the emergence of a fully-fledged anational law of commercial contracts ('new lex mercatoria') to, more generally, contracts as a governance mechanism and backbone of transnational social institutions of various types. The latter is illustrated eg by early examples of cross-boundary commercial and investment contracts[13] and the contractual practice of 'conditioning' in World Bank development projects[14] but also the role of contract in transnational ('private') ordering in fields as diversified as financial markets, sports, digital communication, or copyright. Against this heterogeneity, any ideal conception of contract reaches its limits when confronted with radical social pluralism. Here, contracting realities become disembedded from background justice provided for by nation states—an element that is crucial in (neo-)formalist contract theories—thereby shifting attention to the inner-contractual mechanisms of justice. While in the EU, political pluralism can still (hypothetically) be processed by a democratically enacted contract law making[15], such stable political reference becomes fictitious in the transnational realm.

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[8] Grant Gilmore, *The Death of Contract* (Columbus: Ohio State Univ. Press, 2nd ed. 1995); Robert E. Scott, The Death of Contract Law, 54 *University of Toronto Law Journal* 369 (2004).

[9] See critically Roy Kreitner, 'Fear of Contract', *Wisconsin Law Review* 429-475 (2004).

[10] Max Weber, *Wirtschaft und Gesellschaft. Grundriss der verstehenden Soziologie* (1921/22) (5th edn., Tübingen: Mohr Siebeck, 1980), at 401 ('private contract as the juridical side of the market community', trans. KHE); relatedly Niklas Luhmann, *Das Recht der Gesellschaft* (Frankfurt a.M.: Suhrkamp, 1993), 440-451 (contract as 'structural coupling' between law and the economy); see also Nathan B. Oman, 'Contract Law and the Liberalism of Fear', 20 *Theoretical Inquiries in Law* 381-410 (2019), at 401 (contract law as a 'midwife to commerce').

[11] Jody Freeman and Martha Minow (eds), *Government by Contract. Outsourcing and American Democracy* (Cambridge/MA: Harvard University Press, 2009).

[12] Christoph Möllers, *Staat als Argument* (Munich: C.H. Beck, 2nd ed. 2001).

[13] For pioneering work cf Erich Schanze, *Investitionsverträge im internationalen Wirtschaftsrecht* (Munich: Hermann Luchterhand Verlag, 1986).

[14] John W. Head, 'Evolution of the Governing Law for Loan Agreements of the World Bank and Other Multilateral Development Banks', 90 *The American Journal of International Law* 214-234 (1996).

[15] For such a call cf Martijn W. Hesselink, 'Democratic Contract Law', 11 *European Review of Contract Law* 81-126 (2015).

Contract becomes a tool for *social*, not merely *interpersonal* ordering, as powerfully depicted in a burgeoning field of research on 'organizational', long-term or 'network contracts'[16] and, even more radically, in theories of 'societal constitutionalism' beyond the nation state.[17] In other words, contract builds communities and ultimately society at large—a task that is not mastered *en passant* by enabling and restricting individual transactions but requires to take a different lens. Contracts form miniature legal orders in and of themselves, which can no longer be assessed in individualistic terms alone, but in light of their aggregate and broader societal effects. This has deep methodological implications for contract law theories: The 'meeting of minds' as posited by an individualistic concept of freedom of contract[18] is itself not sufficient to guarantee for justice in contracts. At the same time, the selectivity and boundary-drawing nature of contract[19] is not per se to be overcome, since it is what enables social mobilisation and self-determination through contract. But the legal guarantee of 'freedom of contract' is flanked by judicial review at the domestic level; creating a balance that does not as such exist beyond the nation state.[20] A solution is to complement—not replace!—an individualistic lens both in the underlying social imaginary and as a normative guidance by an institutional perspective that combines a concern for the protection of individual autonomy with a sensorium for the well-ordering of social institutions.[21]

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[16] Cf Gunther Teubner, *Networks as Connected Contracts* (Oxford: Hart, 2011), with a preface by Hugh Collins; Marc Amstutz, 'Contract Collisions: An Evolutionary Perspective on Contractual Networks', 76 *Law and Contemporary Problems* 169-189 (2013); Stefan Grundmann, Fabrizio Cafaggi, and Guiseppe Vettori, 'The Contractual Basis of Long-Term Organizations – The Overall Architecture', in: Stefan Grundmann, Fabrizio Cafaggi, and Guiseppe Vettori (eds), *The Organizational Contract. From Exchange to Long-Term Network Cooperation in European Contract Law* (London/New York: Routledge, 2016), 3-38.

[17] Gunther Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (Oxford: Oxford University Press, 2012); Marc Amstutz, Andreas Abegg and Vaios Karavas, 'Civil Society Constitutionalism: The Power of Contract Law', 14 *Indiana Journal of Global Legal Studies* 235-258 (2007).

[18] On the historical emergence and defence of the (rational) individual in contract theory cf Roy Kreitner, *Calculating Promises: The Emergence of Modern American Contract Doctrine* (Stanford: Stanford University Press, 2007). Law's methodological individualism has normative and a socio-theoretical roots; on the latter cf Kenneth J. Arrow, 'Methodological Individualism and Social Knowledge', 84 *The American Economic Review* 1-9 (1994).

[19] Cf Luhmann, *Recht der Gesellschaft* (above Fn 10), at 459 (contracts 'stabilize a specific difference over time, while being indifferent to anything else', 'indifference for the sake of difference', KHE trans.).

[20] See Horatia Muir Watt, '"Party Autonomy" in international contracts', 6 *European Review of Contract Law* 250-283 (2010); Betty Mensch, 'Freedom of Contract as Ideology', 33 *Stanford Law Review* 753, 754 (1981); for a contemporary critique Elizabeth Anderson, *Private Government* (New Jersey: Princeton University Press, 2017).

[21] See for a perceptive account Ludwig Raiser, 'Vertragsfreiheit heute', *Juristenzeitung* 1-8 (1958).

Practical inroads for such an institutionalist perspective are the interpretation[22] of contracts, in particular the different doctrines on third-party effects[23], but also the enforcement stage.[24]

This article will in the first place provide a brief summary of the uses (and abuses) of contract in the transnational sphere and point out the significance of contract as a building-block of transnational institutions, drawing on global value chains and digital platforms as case-studies (II.). In so doing, it will illustrate the limited ability of current contract law theories to identify the stakes in the new and heterogenous emanations of contract. As a remedy, this chapter explores the repository of realist, critical and liberal legal approaches in their potential to be recalibrated for the transnational sphere (III.). Here, the working hypothesis is that instead of revealing the subliminal influence of State power as did the realist and critical tradition, the main challenge shifts to identifying the various channels through which non-curtailed private power is translated into contractual rights.

2. From transnational harmonization of contract laws to radical contractual pluralism

What justifies speaking of contracts or contract law as 'transnational'? Unlike contracts that merely link parties across jurisdictions, conventionally labelled 'international' contracts and governed by the rules of private international and procedural law, 'transnational' contracts and their law abstract from national references to an even greater extent. The search for an applicable national law as 'definite seat of a legal relation' as posited by *Savigny*[25] then becomes epistemologically reductive. As a general tendency, this is echoed in a gradual shift away from efforts to harmonize contract *laws* at an interstate and business sectoral level to an understanding of *contracts* as genuine transnational institutions. While the former concentrated on enabling and facilitating cooperation and realizing efficiency-gains[26], the latter unfolded the enigmatic nature of contractual arrangements beyond the state.

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[22] Cf for an 'institution-preserving interpretation' Dan Wielsch, 'Contract Interpretation Regimes', 81 *Modern Law Review* 958-988 (2018); for an opposing welfare-based approach Richard A. Posner, 'The Law and Economics of Contract Interpretation', 83 *Texas Law Review* 1581 (2005); Steven Shavell, 'On the Writing and the Interpretation of Contracts', 22 *Journal of Law, Economics and Organization* 289-314 (2006).

[23] Cf Stefan Grundmann and Moritz Renner, 'Vertrag und Dritter – zwischen Privatrecht und Regulierung', 68 *Juristenzeitung* 379-390 (2013) and Aditi Bagchi, 'Other People's Contracts', 32 *Yale Journal on Regulation* 211-256 (2015).

[24] For an example from certification schemes in global value chains whose function as social practice needs to be reflected legally cf Klaas Hendrik Eller, *Rechtsverfassung globaler Produktion. Zur sozialen Aufgabe des Rechts der Globalisierung* (PhD thesis, Cologne 2019), ch. 3.

[25] Friedrich Carl von Savigny, *System des heutigen Römischen Rechts* [System of Modern Roman Law] (Berlin: Veit & Comp., vol VIII, 1840), 108 (in German).

[26] For the underlying idea of regulatory competition cf Hugh Collins, 'Regulatory Competition in International Trade: Transnational Regulation through Standard Form Contracts', in: Horst Eidenmüller (ed), *Regulatory Competition in Contract Law and Dispute Resolution* (Munich et al.: Beck et al., 2013), 134-154; Alan Schwartz and Robert E. Scott, 'Contract Theory and the Limit of Contract Law', 113 *Yale Law Journal* 541 (2003) (for a normative theory of contract in which contract should serve nothing but efficiency).

Against this background, a preliminary typology of a 'transnational' dimension of contract and contract law could distinguish between three types: *First*, a transnational dimension can stem from a project of harmonization of contract law that is coordinated in inter-state forums and intended for transboundary use.[27] This was the case of the first wave of a concentrated private and contract law harmonization in the beginning of the 20th century. Such initiatives like the uniform international sales law of the Vienna Convention[28] and other codifications under the auspices of the International Institute for the Unification of Private Law (UNIDROIT)[29] stand in line with the practical needs of international commerce and complement instruments of international private law. Next to these initiatives of global reach, the European Union has entered the scene by harmonizing inter alia consumer contract law as part of its 'integration through law'. In the field of general sales law, attempts of harmonization faced more scrutiny on behalf of the Member States and have until today not been implemented comprehensively.[30] One argument was a perceived technocratic genesis of such rules, lending them to the stigma of 'Juristenrecht'[31].

While the aforementioned rules were adopted within a state-oriented, public international law framework, a *second type* of transnational model contracts is drafted and curated immediately by business associations, sometimes through procedures that piggyback on models of democratic rule-making.[32] Here, private ordering largely substitutes for public contract law that not only fails to provide the *type* of contract required by the parties' economic or other project.[33] More drastically, parties seek to depart deliberately from the procedural, institutional and democratic framework of a national contract law by creating project-, market- or institution-specific legal orders themselves. Paradoxically, the more national legal orders subscribe to a unitary system of norm production, the

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[27] For a recent survey and account of such initiatives cf Jürgen Basedow, 'Internationales Einheitsprivatrecht im Zeitalter der Globalisierung', 81 *Rabels Journal of Comparative and International Private Law* (RabelsZ) 1-31 (2017).

[28] UN Convention on Contracts for the International Sale of Goods (CISG).

[29] Cf Ralf Michaels, 'Rethinking the UNIDROIT Principles: From a law to be chosen by the parties towards a general part of transnational contract law', 73 *Rabels Zeitschrift für ausländisches und internationals Privatrecht* 866-888 (2009); Stefan Vogenauer (ed), *Commentary on the Unidroit Principles of International Commercial Law (PICC)* (2nd ed., Oxford: Oxford University Press, 2015).

[30] A 'European Civil Code' today seems illusionary and of little substantive value. The EU Draft Regulation on a Common European Sales Law (COM/2011/0635 final – 2011/0284 (COD)), withdrawn in 2014, seems to have been the peak of such initiatives. It had been preceded by the 'Principles of European Contract Law' (PECL) and the 'Draft Common Frame of Reference' (DCFR) as expert-driven norms that continue to serve as reference in the field. Cf for an analysis of the political stakes of this harmonization Reinhard Zimmermann and Nils Jansen, 'General Introduction: European Contract Laws – Foundations, Commentaries, Synthesis', in: Nils Jansen and Reinhard Zimmermann (eds.), *Commentaries on European Contract Laws* (Oxford: Oxford University Press, 2018), 1-18 and Horst Eidenmüller et al., 'The Common Frame of Reference for European Private Law—Policy Choices and Codification Problems', 28 *Oxford Journal of Legal Studies* 659-708 (2008).

[31] As in Eugen Ehrlich, *Principles of the Sociology of Law* (Cambridge/MA: Harvard University Press, 1936).

[32] Cf Dan Wielsch, 'Global Law's Toolbox: Private Regulation by Standards', 60 *The American Journal of Comparative Law* 1075-1104 (2012).

[33] For such a perspective, towards the legislator, Hanoch Dagan and Michael Heller, *The Choice Theory of Contracts* (Cambridge: Cambridge University Press, 2017).

more manifold and societally pluralistic norm production would become.[34] This second type is eg represented by the FIDIC rules for construction work[35], the 'Incoterms' as formulated by the International Chamber of Commerce (ICC) or the numerous private rules that govern transnational transportation, on the ground and at sea.[36] In the absence of legislative endorsement, such rules follow gradual codification and experimental learning.[37]

A *third type*—which again highlights commonalities, yet at a different level[38]—consists of transnational principles of contract (such as good faith or proportionality) that assert themselves incrementally through a 'creeping codification' of a lex mercatoria.[39] As these principles grow closer to a robust body of law—representing a move back from plural realities of contracts to a fragmented contract law—, they take the role of gap-fillers and can guide the interpretation of contracts. The term suggests that this development finds its forerunner in the medieval lex mercatoria.[40] It is important to note already at this stage that the sphere of commercial practice may be the most ancient and established[41], yet not the sole domain of contracts at the transnational level. Commonly associated with examples of regulating markets[42], contracts are equally central in the design of organisations, communities or movements beyond the economic sphere. Furthermore, the transnationalization of contract is not restricted to substantive law, but likewise mirrored in its procedural and enforcement dimension. An institutionalized system of international arbitration routinely interprets transnational contracts in an enforceable manner.[43]

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[34] Gralf-Peter Calliess, 'The Making of Transnational Contract Law', 14 *Indiana Journal of Global Legal Studies* 469-483 (2007), at 473.

[35] Released for the first time in 1957 by the Federation International des Ingenieurs-Conseils; for their transnational adoption cf Charles Molineaux, 'Moving Toward a Lex Mercatoria – A Lex Constructionis', 14 *Journal of International Arbitration* 55 (1997).

[36] Cf Andreas Maurer, *Lex Maritima. Grundzüge eines transnationalen Seehandelsrechts* (Tübingen: Mohr Siebeck, 2012).

[37] Calliess and Zumbansen, *Rough Consensus* (above Fn 4), 248-277; Amitai Aviram, 'A Paradox of Spontaneous Formation: The Evolution of Private Legal Systems', 22 *Yale Law and Policy Review* 1-68 (2004).

[38] Cf Stefan Grundmann, 'The Future of Contract Law', 7 *European Review of Contract Law* 490-527 (2011) (deciphering a trend of 're-codification').

[39] Klaus Peter Berger, *The Creeping Codification of the New Lex Mercatoria* (2nd ed., Aalphen aan den Rijn: Wolters Kluwer, 2010).

[40] A. Claire Cutler, *Private Power and Global Authority. Transnational Merchant Law in the Global Political Economy* (Cambridge: Cambridge University Press, 2003), 108-140; Ralf Michaels, 'The True Lex Mercatoria: Law Beyond the State', 14 *Indiana Journal of Global Legal Studies* 447-468 (2007).

[41] Berthold Goldman, 'Frontières du droit et "lex mercatoria"', 9 Archives de Philosophie du Droit, 177-192 (1964).

[42] Cf John P. Esser, 'Institutionalizing Industry: The Changing Forms of Contract', 21 *Law and Social Inquiry* 593-629 (1996); Robert J. Gilson, Charles F. Sabel, and Robert E. Scott, 'Contract and Innovation: The Limited Role of Generalist Courts in the Evolution of Novel Contractual Forms', 88 *New York University Law Review* 170-215 (2013); Thomas Dietz, *Global Order Beyond Law* (Oxford: Hart, 2010).

[43] On the cultural driving forces of the profession cf Yves Dezalay and Bryant Garth, 'Merchants of Law as Moral Entrepreneurs: Constructing International Justice from the Competition for Transnational Business Disputes', 29 *Law and Society Review* 27-64 (1995); Robert Wai, 'Enforcement in the Shadows of Transnational Economic Law', in: Hans-

a) *Contrat sans loi* revisited

While a project of international or European harmonization of contract laws only rescaled the locus of the political, the second strand of examples literally broke a taboo of the intrinsic relation between law and state. In a landmark contribution, Gunther Teubner—alluding to Eugen Ehrlich—famously depicted this new global legal pluralism as 'Global Bukowina', referring to Ehrlich's homeland in the far east of the Austrian Empire, marked by an overlap of local norms and those enacted at the central level in Vienna far off.[44] Against the traditionalist suspicion which a lex mercatoria beyond the analytical grid of modern law faces, Teubner overtly lay bare the blind spots of theoretical assumptions of the nation state model of law production—and their implications for the 'politics of definition of law'[45]. The old riddle of the normative status of contract as a derived or genuine source of legal obligation can no longer be circumvented as easily as in the positivistic framing of the nation state.[46] Ignoring the normative status of a lex mercatoria would mean to lose out of sight of legal analysis the central mode of governance of commercial practice and the social conflicts in which this practice is implicated. As a consequence, the role of law and normativity broadly speaking in organizing the global economy would be (and is indeed until today[47]) largely overlooked; and at the same time, legal analysis would relinquish a constructive role in framing and influencing normative innovation. The necessary realism and openness to the complexity of social life is gained through theoretical inquiry[48]: Teubner finds remedy in a pluralistic theory of norm production that places political, legal and social law production on equal footing. This is facilitated by leaving behind a hierarchical, deductive model for a self-referential theory of legal validity that observes how law autonomously defines its own boundaries. With the binary code of the law (lawful vs. unlawful) as 'rule of recognition', self-validation allows for the paradox of a 'contrat sans loi'. In this perspective, recognition and enforceability in state forums is no longer an a priori characteristic of law. An illustrative challenge to the conventional wisdom of treating 'enforcement' as the sole domain of the state is provided by the dispute body of ICANN (UDRP) that can merely delete a domain by means of (technical) enforcement.[49] This is pushed even further

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W. Micklitz and Andreas Wechsler (eds), *The Transformation of Enforcement: European Economic Law in Global Perspective* (Oxford: Hart Publishing, 2016), 15-46.

[44] Gunther Teubner, 'Global Bukowina: Legal Pluralism in the World Society', in: Gunther Teubner (ed), *Global Law Without a State* (Dartmouth: Aldershot, 1997) 3-28.

[45] Boaventura de Sousa Santos, *Toward a New Common Sense. Law, Sciences and Politics in the Paradigmatic Transition* (New York: Routledge, 1995), at 115; see on the post-modern condition undergirding transnational law Matej Avbelj, 'Transnational Law Between Modernity and Post-Modernity', 7 *Transnational Legal Theory* 406-428 (2016).

[46] For a recognition of contract as 'legal norm' Hans Kelsen, *Reine Rechtslehre* (2nd ed., Wien: Deuticke, 1960).

[47] IGLP Law and Global Production Working Group, 'The role of law in global value chains: A research manifesto', 4 *London Review of International Law* 57-79 (2016).

[48] See for such an understanding of theoretical work in law Roy Kreitner, 'On the New Pluralism in Contract Theory', 45 *Suffolk University Law Review* 915-933 (2012), at 927.

[49] https://www.icann.org. 'Enforcement' is no longer a unitary act but becomes a versatile, fragmented process, cf Hans-W. Micklitz and Andrea Wechsler (eds), *The Transformation of Enforcement* (Oxford: Hart, 2016).

by automated contracting such as through blockchains where personal interaction is literally supplanted by technology.[50]

In an important twist, Teubner's intervention is by no means restricted to the sphere of economic activity: The locus of norm production shifts to the intersection between law and various social spheres, communities, and sub-systems. Even though lex mercatoria had become the most sophisticated exponent of this development, other regimes soon stepped up, including the melodious lex sportiva[51], lex digitalis[52], and lex financiaria[53]. Not only corporations and their law firms, but also social movements, expert groups, circles of bureaucrats, online communities and professional associations serve as authors of norm production. In each of these cases, contract became a central trope of governance, placing it at the centre of conceptual debates and making it akin to a repoliticization from the inside. A central obstacle here was that the originality of transnational regimes is not always manifest: From a traditional point of view, one might argue that this is 'much ado about nothing'—bilateral contracts between, yes, powerful agents that structure social spheres of cooperation, but ultimately contracts that a national judge might decide upon.

b) Contracts between economy and society: The case of value chain capitalism

A telling example of what such a perspective misses is provided by the role of contract in novel forms of economic organization under a 'supply chain capitalism'[54] for physical production and services. Both the dispersion across production stages in physical production and the value creation in digital platforms (or 'ecosystems') is achieved through a particular intertwinement of contracts. In the field of manufacturing, such 'global value chains'[55] (GVCs) often bring together hundreds, if not thousands of suppliers in decentralized networks administered through contract governance. The semiconductor chip manufacturer Intel eg uses no less than 19,000 suppliers in over 100 countries to provide direct material but also tools, machines, logistics and packaging.[56] While advances in the field of communication and transportation as well as a supportive mentality among

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[50] Most recently termed an 'uncontract' by Shoshana Zuboff, *The Age of Surveillance Capitalism* (New York: PublicAffairs, 2019), 208 et seqq.

[51] Antoine Duval, 'Lex Sportiva: A Playground for Transnational Law', 19 *European Law Journal* 822-842 (2013).

[52] Lars Viellechner, 'Responsive Legal Pluralism: The Emergence of Transnational Conflicts Law', 6 *Transnational Legal Theory* 312-332 (2015) (studying the ICANN dispute resolution body).

[53] Johan Horst, *Transnationale Rechtserzeugung. Elemente einer normativen Theorie der Lex Financiaria* (Tübingen: Mohr Siebeck, 2019).

[54] Anna Tsing, 'Supply Chain and the Human Condition', 21 *Rethinking Marxism* 148-176 (2009).

[55] See for a recent compilation of articles on the leading model and classification Gary Gereffi (ed), *Global Value Chains and Development. Redefining the Contours of 21st Century Capitalism* (Cambridge: Cambridge University Press, 2018); on the genealogy and interdisciplinary connections of global production analysis cf Jennifer Bair, 'Global Commodity Chains. Genealogy and Review', in: Jennifer Bair (ed), *Frontiers of Commodity Chain Research* (Stanford: Stanford University Press, 2009), 1-34.

[56] Cf Kate Crawford and Vladan Joler, 'Anatomy of an AI System' (2018), available at anatomyof.ai/img/ai-anatomy-map.pdf.

entrepreneurs and consumers[57] have played an important role in the emergence of such chains[58], GVCs are ultimately spurred by an 'organizational' or 'economic' revolution[59] facilitated by (contract) law. Production chains form the precondition of the exercise of labour and environmental rights and can often even de facto set conditions for governmental action. The ethics of human interdependency become largely toothless vis-à-vis closed-circuited systemic processes that are increasingly difficult to regulate from the outset.[60]

While 'private governance' is usually referred to as a tool of regulating GVCs[61], the even more quintessential inquiry goes into the private governance of *enabling* and *constituting* GVCs—and other institutions[62]—and thereby generating the systemicity in the first place. In this perspective, GVCs are in and of themselves a regulatory landscape[63] or a legal order.[64] As a mode of production, GVCs rely heavily on a legal implementation and the interests and ideals represented therein—contract, in other words, becomes a vehicle of the production rationality. This is no less true in the digital sphere where the business model of digital platforms hinges on terms and conditions both towards customers and businesses. One of the reasons why the centrality of contract has been overlooked by legal scholars for long[65] is that contract is used in original variants. Value chain contracting

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[57] Benedicte Brøgger, 'The Rise and Demise of a Supply Chain', 2 *Journal of Business Anthropology* 232-253(2013), at 239.

[58] Cf for a comparison with previous industrial revolutions Richard Baldwin, 'Trade and Industrialization after Globalization's 2nd Unbundling: How Building and Joining a Supply Chain are Different and Why It Matters', in Robert C. Feenstra and Alan M. Taylor (eds), *Globalization in an Age of Crisis: Multilateral Economic Cooperation in the Twenty-First Century* (Chicago: University of Chicago Press, 2014), 164-212.

[59] Cf on organizational innovation behind the First Industrial Revolution Jürgen Osterhammel, *The Transformation of the World. A Global History of the Nineteenth Century* (Princeton: Princeton University Press, 2015), at 724-729.

[60] Likewise with emphasis on 'systemicity' Kevin Sobel-Read, 'Global Value Chains: A Framework for Analysis', 5 *Transnational Legal Theory* 364-407 (2015); Dan Danielsen, 'Beyond corporate governance. Why a new approach to the study of corporate law is needed to address global inequality and economic development', in: Ugo Mattei and John Haskell (eds), *Research Handbook on Political Economy and Law* (Cheltenham: Edward Elgar, 2015), 195, 198; on the spread of networks as form of social organization Manuel Castells, *The Rise of the Network Society* (2nd ed., London: Wiley, 2010), 1996; David Singh Grewall, *Network Power. The Social Dynamics of Globalization* (New Haven: Yale University Press, 2008).

[61] Frederick Mayer and Gary Gereffi, 'Regulation and Economic Globalization. Prospects and Limits of Private Governance', 12 *Business and Politics* 1-25 (2010); Richard M. Locke, *The Promise and Limits of Private Power* (Cambridge: Cambridge University Press, 2013).

[62] As pointed out by research on 'legal institutionalism', cf Simon Deakin et al., 'Legal institutionalism: Capitalism and the constitutive role of law', 45 *Journal of Comparative Economics* 188-200 (2017); Geoffrey Hodgson, 'Conceptualizing capitalism: A summary', 20 *Competition & Change* 37-52 (2015); and most recently Katharina Pistor, *The Code of Capital. How the Law Creates Wealth and Inequality* (Princeton, Princeton University Press, 2019).

[63] Benedikt Reinke and Peer Zumbansen, 'Transnational Liability Regimes in Contract Tort and Corporate Law: Comparative Observations on "Global Supply Chain Liability"', *Kings' College London, TLI Think! Paper* 4/2019, at 25.

[64] Larry Catá Backer, 'Are Supply Chains Transnational Legal Orders? What We Can Learn from the Rana Plaza Factory Building Collapse', 1 UC *Irvine Journal of International, Transnational, and Comparative Law* 11-66 (2016).

[65] For a similar observation A. Claire Cutler, 'Private transnational governance in global value chains. Contract as a neglected dimension', in: A. Claire Cutler and Thomas Dietz (eds), *The Politics of Transnational Governance by Contract* (London: Routledge, 2017), 78-97.

simultaneously challenges boundaries of bindingness, privity, 'privateness' and between contract and organization.

In the eyes of the lead firm and those actors trying to exert governance along the chain, contract becomes a means of coordination and safeguarding, rather than of sanctioning in case of breach. This corresponds to a generally observed dominance of ex ante contract governance over ex post liability.[66] Functionally, private governance regimes combine elements of legislative, administrative and adjudicative power.[67] Substantively, they set standards of cooperation, stipulate information rights, allow for on-site visits and reporting duties, transfer IP and other assets and generally allocate risks related to incidents along the chain. This corroborates findings of scholarship on network contracts in economic sociology, law and institutional economics.[68] Here, sunk costs and the value of trust and reputation will let companies favour 'voice' or 'loyalty' over 'exit'.[69] From the perspective of (neo-)classical contract law and the social functions ascribed to contract under this paradigm, value chain contracting presents vehemently uncharted characteristics.

The reasons are twofold and pertain to contractual complexity and the diversity of socio-political backgrounds which a contractual regime cuts through. Complexity establishes the supply-chain as an emergent social entity or system, where social meaning is no longer located at the level of individual contracts, but at the level of their symbiosis. What, then, are the aggregate dynamics arising out of the interplay between numerous contracts and the underlying mechanisms of coordination and disruption? Likewise, the boundary-drawing nature of contract law shifts from the individual contract to the relation between chain and environment. While the prospering field of 'contract governance'[70] has primarily focused on the 'internal' side of governance between chain actors, the additional task now is to ensure the *public* accountability of ever more complex webs of contract at the transnational level. The qualification as 'private' becomes overly reductive, not only because value chains have real-life ('public') repercussions but because contract serves as a forum of competing values and discourses beyond efficiency. In contractual practice, a multitude of instruments such as sustainability clauses, certification schemes and a broad spectrum of implementations of Corporate Social Responsibility (CSR) seek to establish a meta-level reflexivity

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[66] Jan M. Smits, 'Private Law in a Post-national Society. From Ex Post to Ex Ante Governance', in: Miguel Maduro, Kaarlo Tuori and Suvi Sankari (eds), *Transnational Law. Rethinking European Law and Legal Thinking* (Cambridge: Cambridge University Press, 2014), 307-320.

[67] Cf Lisa Bernstein, 'Opting out of the Legal System: Extralegal Contractual Relations in the Diamond Industry', 21 *Journal of Legal Studies* 115-157 (1992).

[68] Cf seminally Stewart Macaulay, 'Non-Contractual Relations in Business – a Preliminary Study', 28 *American Sociological Review* 55-67 (1963); Oliver Williamson, 'Transaction-Cost Economics: The Governance of Contractual Relations', 22 *Journal of Law & Economics* 233-261 (1979) and Walter W. Powell, 'Neither Market nor Hierarchy – Network Forms of Organization', 12 *Research in Organizational Behaviour* 295-336 (1990). For a reconstruction of this 'interdisciplinary dialogue' cf Stefan Grundmann, 'Towards' a Private Law Embedded in Social Theory – eine Skizze', 24 *European Review of Private Law* 409-424 (2016).

[69] As in Albert Hirschman, *Exit, Voice, and Loyalty* (Cambridge/MA, Harv. University Press, 1970).

[70] For a state-of-the-art overview cf Stefan Grundmann, Florian Möslein and Karl Riesenhuber (eds), *Contract Governance. Dimensions in Law and Interdisciplinary Research* (Oxford: Oxford University Press, 2015).

for operational ('first-level') supply chain contracts.[71] When reading supply chains as an evolutionary stage of capitalism, contract becomes the grammar for transnational struggles of distribution, participation and social justice. Yet, non-market concerns are uneasy to accommodate within a (neo-)formalist contract theory.[72] Towards this, the social imaginary of contract law as conveyed in case-law but also metaphors and public imagery[73] needs to be adjusted accordingly in several respects. The national compartmentalization of GVCs through the lens of international private law appears arbitrary and dominated by national preconceptions; on the other hand, commercial arbitration is conceptually inapt to account for the *public pervasiveness* of production regimes. Contract here is neither individualistic nor a unitary social convention (as the two antipodes presuppose)[74], but constitutive of an emerging and dynamic communicative relation that is the value chain.

3. Re-contextualizing transnational contract law

Transnational contracts are of precarious normativity: They are unimpressive by conventional legal standards, yet form a 'critical infrastructure' in the transnational sphere—a sphere that is by no means detached from local, tangible realities. Transnational contract law raises rare epistemological questions that require to critically re-examine the semantics and connotations of modern legal thinking and the path-dependencies and ruptures between the nationally conditioned legal mind and the way contract is stretched and projected towards global phenomena. However, such a 'thinking in transitions'[75] is at odds with most of current theoretical approaches in the field that subscribe to a stability and timelessness of legal institutions anchored in the nation state. To be

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[71] See eg Michael P. Vandenbergh, 'The New Wal-Mart Effect: The Role of Private Contracting in Global Governance', 54 *UCLA Law Review* 913-970 (2007); Bertram Lomfeld, 'Sustainable contracting: How standard terms could govern markets', in: Bertram Lomfeld, Alessandro Somma and Peer Zumbansen (eds), *Reshaping Markets. Economic Governance, the Global Financial Crisis and Liberal Utopia* (Cambridge: Cambridge University Press, 2016), 257-282; Jaakko Salminen, 'Contract-Boundary-Spanning Governance Mechanisms: Conceptualizing Fragmented and Globalized Production as Collectively Governed Entities', 23 Indiana Journal of Global Legal Studies 709-742 (2016); Philipp Paiement, *Transnational Sustainability Laws* (Cambridge: Cambridge University Press, 2017); Katja Kreutz, 'Law Versus Code of Conduct: Between Convergence and Conflict', in Jan Klabbers and Touko Piiparinen (eds), *Normative Pluralism and International Law* (Cambridge: Cambridge University Press, 2013), 166-200; Jan Smits, 'Enforcing Corporate Social Responsibility Codes Under Private Law', 24 *Indiana Journal of Global Legal Studies* 99-113 (2017); Paul Verbruggen, 'Private regulatory standards in commercial contracts: questions of compliance', in: Roger Brownsword, Rob van Gestel and Hans.-W. Micklitz (eds), *Contract and Regulation* (Cheltenham: Edward Elgar, 2017), 284-322; generally on the concept of meta-regulation cf Jacco Bomhoff and Anne Meuwese, 'The Meta-Regulation of Transnational Private Regulation', 38 *Journal of Law and Society* 138-162 (2011).

[72] Roy Kreitner, 'Voicing the market: Extending the ambition of contract theory', 69 *University of Toronto Law Journal* 295-336 (2019).

[73] Cf eg Daniel Damler, *Konzern und Moderne. Die verbundene juristische Person in der visuellen Kultur 1880–1980* (Berlin: Duncker & Humblot, 2016).

[74] Cf Bertram Lomfeld, *Die Gründe des Vertrages. Eine Diskurstheorie der Vertragsrechte* (Tübingen: Mohr Siebeck, 2015), 288-290.

[75] For an example from legal history cf Harold J. Berman, *Law and Revolution. The Formation of the Western Legal Tradition* (Cambridge/MA: Harvard University Press, 1983).

sure, a new pluralism of contexts, functions and uses of contract is not exclusively linked to the transnational sphere, but has been witnessed with the advent of the welfare state.[76] Indeed, both the liberalization of the welfare state and the transnational realm draw heavily on 'governance by and of contracts' and can be seen in a certain lineage. The new transnational paradigm is however distinctive in the sense that socio-economic change is not exclusively conveyed by political means, but—in the absence of central political institutions—needs to be observed by the law (of contract) itself. Within the current spectrum of liberal, egalitarian, economic, systemic, deliberative or critical approaches, this task is translated in different terminology and with varying vehemence.[77] Systems theory captures perhaps most accurately that the vacant spot of (institutionalized) politics now is (to be) occupied by law and its interfaces with other social sub-systems.[78] This is only purportedly a highly abstract claim which in reality calls for a close-view, empirical approach of the socio-political context in its spatial, normative and power-related dimensions.[79] Even helpful and topical heuristics such as the 'global value chain' have to be employed in light of the irreducible polymorphism that exists in reality, bearing in mind and inquiring into the local and concrete effects of social pervasiveness of such chains. Contract theorists, however, instead of taking a constructive stance on the new reality of social contexts that are governed by contract and pluralizing the normative sensorium of contract, have for the most part taken the opposite perspective, namely turned to (neo-)formalist approaches that reduce rather than multiply contract's social points of reference. In what follows, two diametrical theoretical lines of thought—realist and critical legal studies on the one hand and a universalist, autonomy-based private law on the other—shall be discussed with regard to their framing and normative guidance for transnational contracts.

a) Redirecting the realist heritage: *Liaisons dangéreuses* between law and state in the national constellation

Realist and critical heritage have without doubt left a strong mark on theories of transnational law. It has enabled a critical view on the blind spots of neoliberal legality[80] that arises from the ever accelerated collapse of the public/private law dichotomy.[81] Yet, their conceptual core and lines of

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[76] Peer Zumbansen, *Ordnungsmuster im modernen Wohlfahrtsstaat. Lernerfahrungen zwischen Staat, Gesellschaft und Vertrag* (Baden-Baden: Nomos, 2000).

[77] See the special issue introduced by Bertram Lomfeld and Dan Wielsch, 'Foreword: The Public Dimension of Contract: Contractual Pluralism Beyond Privity', 76 *Law and Contemporary Problems* i-xii (2014), iii et seqq.

[78] Gunther Teubner, 'In the Blind Spot: The Hybridization of Contracting', 8 *Theoretical Inquiries in Law* 51-71 (2007).

[79] See with particular emphasis on the legal and material 'code' of global supply chains Klaas Hendrik Eller, 'Is "Global Value Chain" a Legal Concept? Situating Contract Law in Discourses Around Global Production', European Review of Contract Law (2020, forthcoming); also Peer Zumbansen, 'Politicizing the Law of Global Value Chain Capitalism', 1 Journal of Law and Political Economy (2020, forthcoming).

[80] As pointed out by recent scholarship on 'law & political economy', see David Singh Grewal and Jedediah Purdy, 'Introduction: Law and Neoliberalism', 77 Law and Contemporary Problems 1-23 (2014) and Honor Brabazon (ed), Neoliberal Legality. Understanding the Role of Law in the Neoliberal Project (Abingdon: Routledge, 2017).

[81] For a lucid plea of preservation cf Matthias Goldmann, 'A matter of perspective: Global governance and the distinction between public and private authority (and not law)', 5 *Global Constitutionalism* 48-84 (2016).

attack need to be recalibrated from the socio-economic constellation of a state-centred contract law to the transnational sphere that requires a 'more reflexive set of instruments of legal critique'.[82] The realist and critical (CLS) perspective had cast light on the inherent link between contract and sovereignty. The central demonstration was to unmask the rhetoric of contract as a hermetically closed inter-party relation and decipher the politics of freedom of contract as a principle of social ordering. In a representative and ground-laying work on the 'Basis of contract', Morris Cohen[83] pointed out the that contract cases always implied a public judgement by bestowing the victorious party with sovereign power of enforcement. Rather than primarily arbitrating inter-party contractual disputes, contract law channels the exercise of sovereign power and 'may be viewed as a subsidiary branch of public law'[84]. It allows the victorious party to translate private into public power—a translation by which the normative underpinnings of a formal vision of freedom of contract materialize *in society*, beyond the contractually bound parties.[85] The example of Cohen illustrates the turn to the office of a judge and the context of judicial decision-making in responding to social change. Brought about by the realists' candidness towards empirical social sciences, they took a sceptical, yet still faithful position towards the legal system and considered the judge to be its Archimedean point.[86]

This faith dwindled with the indeterminacy thesis and critique of rights of CLS that posited as inescapable the normalising, violent dimension of the law.[87] Despite its acumen, such critical perspectives could not easily find resonance in the judicial process in the nation state. The dedifferentiation thesis—'it is all politics!'[88]—ultimately negates the autonomy and thereby normativity of law without formulating a clear alternative. The total equation of law with power relations lets any demand of learning adaptation of law itself seem futile. A law that becomes conceptually inseparable from politics already fails to fulfil its role in liberal democracies.[89] Below the surface, the spirit of resignation that shines through in much CLS work results from a critique of statism that treats state law as ultimate reference. Spurred by the particular socio-political condition in the nation state, a *liaison fatale* of law and state became a recurrent theme in critical

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[82] Cf Zumbansen, 'The Law of Society' (above Fn 2), at 193.

[83] Morris R. Cohen, The Basis of Contract, 56 *Harvard Law Review* 553-592 (1933).

[84] Cohen, The Basis of Contract (above Fn 83), at 586.

[85] See also the seminal Robert L. Hale, 'Coercion and Distribution in a Supposedly Non-Coercive State', 38 *Political Science* Quarterly 470-494 (1923).

[86] On a recent shift in German legal scholarship cf Oliver Lepsius, 'Kontextualisierung als Aufgabe der Rechtswissenschaft', 74 *Juristenzeitung* 793-802 (2019).

[87] While there is no consistent scholarly canon of CLS, for illustrations of this particular point cf Robert M. Cover, 'Violence and the Word', 95 *The Yale Law Journal* 1601-1629 (1986) and Duncan Kennedy, 'The Political Stakes in 'Merely Technical' Issues of Contract Law', 1 *European Review of Private Law* 7-28 (2001).

[88] David Kairys, 'Law and Politics', 52 *George Washington Law Review* 243-262 (1984), at 248.

[89] As eg formulated by Jürgen Habermas, *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy* (Cambridge/MA: MIT Press, 1996).

works over the course of the 20th century.[90] In this perspective, CLS dubs a basic insight of the free law movement[91] and parts of the realist strand[92] which had insisted on a plurality of socially-backed normative orders that may, at times, emerge as alternatives to state legal orders.[93]

With regard to transnational contract law, the CLS demonstration of a political impregnation of contract does not reach far enough. It needs to be expanded to capture the manifold contractual social orders with their power dynamics, discourses and elusive social conflicts that otherwise remain behind the scenes of contract law. Here, transnational law can draw on an 'entangled history of critique' by putting emphasis on the more continental tradition of (critical) sociological jurisprudence.[94] By replacing the amorphous concept of power by a view on self-regulation as oscillating between authority and emancipation, this post-material scholarship unfolds the ambiguities and fragilities of law in the transnational sphere and allows for a tailored critique of specific legal decisions. This entails two consequences: First, a sensitivity towards the multiple instantiations of contract beyond the 'archetype' of a contract law textbook[95], and second, a non-instrumentalist understanding of law. (Contract) Law becomes a medium itself into which social conflicts need to be 'translated'. This translation process—too often rendered invisible by 'legal methodology'—is as such highly political and addressee of claims of justice.

Coming back to our case-study of global value chain capitalism, this shifts the focus slightly away from a search for inroads for lead firm liability based on the black-letter of supply contracts to an inquiry of how these contracts relate to additional and competing normative driving forces of the chain, such as algorithmic, IT-driven or logistical governance. Both analytically and for the purposes of advocacy, the close ties between such types of governance—which together form the 'code' of GVCs—need to be stressed. The operational routines triggered by algorithmic evaluation

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[90] Prominently in Walter Benjamin, 'Critique of Violence', in: *Selected Writings I* (Marcus Bullock and Michael W. Jennings eds, Cambridge/MA: Harvard University Press, 2003), 236-252.

[91] See on the transatlantic influence of the movement, initiated in Germany around authors like Eugen Ehrlich, Hermann Kantorowicz and Hugo Sinzheimer, Katharina I. Schmidt, 'Law, Modernity, Crisis: German Free Lawyers, American Legal Realists and the Transatlantic Turn to "Life", 1903-1933', 39 *German Studies Review* 121-140 (2016).

[92] For the 'first generation' cf Karl N. Llewellyn and E. Adamson Hoebel, *The Cheyenne Way. Conflict and Case Law in Primitive Jurisprudence* (Norman: University of Oklahoma Press, 1941); Felix S. Cohen, 'Indian Rights and the Federal Courts', 24 *Minnesota Law Review* 145-200 (1940) as well as, more recently Marc Galanter, 'Justice in Many Rooms: Courts, Private ordering, and Indigenous Law', 19 *Journal of Legal Pluralism* 1-48 (1981).

[93] A noteworthy exception is the work of Robert Cover in whose conception law becomes the forum of colliding claims of validity, cf Robert M. Cover, 'The Supreme Court 1982 Term. Foreword: Nomos and Narrative', 97 *Harvard Law Review* 4-68 (1983). For a good recent overview of engagements with legal pluralism cf Brian Z. Tamanaha, 'The Promise and Conundrums of Pluralist Jurisprudence', 82 *Modern Law Review* 159-179 (2019).

[94] See eg Rudolf Wiethölter, 'Social Science Models in Economic Law', in: Terence Daintith and Gunther Teubner (eds), *Contract and Organisation. Legal Analysis in the Light of Economic and Social Theory* (Berlin/New York: de Gruyter, 1986), 52-67; Gunther Teubner, 'Altera Pars Audiatur: Law in the Collision of Discourses', in: Richard Rawlings (ed), *Law, Society and Economy* (Oxford: Oxford University Press, 1997), 149-176.

[95] See eg Gralf-Peter Calliess and Moritz Renner, 'Between Law and Social Norms: The Evolution of Global Governance', 22 *Ratio Juris* 260-280 (2009).

of supplier performance, IT-based design of contract management devices and the logistical infrastructure which oftentimes dictates the timing of production processes all feature a normative gist that may well result in a more powerful governance regime than the written contracts. This radicalizes findings of 'relational contract' scholarship[96] by showcasing that the ordering effects sparked by written contracts may not only be secondary to business practices and customs, but also to technological, numerical and material types of governance.

b) Reinvigorating the liberal tradition: Toward a global *ius gentium privatum*?

Next to the aforementioned efforts in a realist or critical tradition, also liberal contract theorists have recently exposed their framework to the transnational realm, or more specifically: to transnational corporate wrongs. Most pronouncedly, Hanoch Dagan and Avihay Dorfman have argued that an autonomy-based theory of contract which they, individually and jointly with co-authors, have spelled out in a masterful series of contributions[97] provides a thick answer to such challenges. [98] In what seems at first sight a similar intellectual move to the inward of private law, the proposed strategy in response to a decreasing conceptual role of the state is to be found in 'private law's normative DNA (that) is premised on a profound commitment to reciprocal respect to self-determination and substantive equality'[99]. Dagan and Dorfman explore a 'transplantation of public rights onto private law' not by reference to external constitutional or human rights, but by advocating that such rights form part of the essence of private law discourse and the nature of the legal institution of contract in any event. By incorporating human rights, they forfeit their productive tension in the interaction with private law.[100] Just like in Teubner's 'societal constitutionalism', private law and contract law more specifically, here too, embody a constitutional order. To be sure, this order is less dynamic, procedural and incremental than in Teubner's work, but rather adheres to stable, universal coordinates. The state legal order evanesces in light of the inner moral configuration of private law itself that is seen as well-placed to address unmediated,

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[96] See Stewart Macaulay, 'Non-contractual Relations in Business: A Preliminary Study', 28 *American Sociological Review* 28 55–67 (1963) and, self-reflecting on his prior intervention, Stewart Macaulay, 'An Empirical View of Contract', *Wisconsin Law Review* 465–482 (1985); furthermore Ian MacNeil, 'Contracts: Adjustment of Long-Term Economic Relations under Classical Neoclassical and Relational Contract Law', 72 *Northwestern University Law Review* 854–905 (1978); for a recent application cf Thomas Dietz, 'Contract Law, Relational Contracts, and Reputational Networks in International Trade: An Empirical Investigation into Cross-Border Contracts in the Software Industry', 37 *Law & Social Inquiry* 25-57 (2012).

[97] Hanoch Dagan and Michael Heller, *Choice Theory* (above Fn 33); Hanoch Dagan and Michael Heller, Autonomy for Contract, Refined, 38 *Law & Philosophy* (forthcoming 2019); Hanoch Dagan and Michael Heller, Why Autonomy Must Be Contract's Ultimate Value, 18 *Jerusalem Review of Legal Studies* (forthcoming 2019); Hanoch Dagan and Avihay Dorfman, 'Justice for Contracts' (August 11, 2019), available on SSRN (https://ssrn.com/abstract=3435781.

[98] Cf Hanoch Dagan and Avihay Dorfman, 'Interpersonal Human Rights', 51 *Cornell International Law Journal* 361-390 (2018).

[99] Dagan and Dorfman, 'Interpersonal Human Rights' (above Fn 98), at 361.

[100] Hugh Collins, 'Private Law, Fundamental Rights, and the Rule of Law', 121 *West Virginia Law Review* 1-25 (2018); Wielsch, 'Responsible Contracting' (above Fn 7).

interpersonal conflicts. Appealingly, private law discourse then appears as genuinely transnational and continuous. In the view of Dagan and Dorfman, a contract law that endorses autonomy with conceptual rigor does not require external, eg constitutional orientation or refinement to address sweatshops and labour exploitation in the Global South. Instead, the decisive step towards social receptiveness lies in a pluralistic conception of contract that is deployed to allow for the self-authorship of individual life stories, all the more where such autonomy seems mythical in light of profound structural constraints. As a normative theory, this approach allows for a powerful and erudite contestation of contracting practices upstream in supply chains.[101] Yet, the vantage point of individual autonomy makes it uneasy to pinpoint the impersonal dynamics that ultimately put autonomy in peril and that the critical tradition has on its radar. The approach rests firmly within an individualistic framing of attributing ex post liability. A central practical concern is therefore the identification of duty-bearers that are to compensate for peculiar wrongs. This leaves (possibly too) little room for the acute structural, institutional implications of human rights in the transnational realm.[102] Such an additional macro-level perspective is required however to allow for a connection with social theory of an interconnected world.[103]

4. Conclusion: Moving beyond 'fear of contract' by politicizing transnational contractual pluralism

Transnational contracts have many faces and follow many laws. The temptation of uniform theorization and codification needs to be resisted—there is not and realistically will never be a uniform code of transnational contract law. The practical importance and accomplishments of harmonization projects in specific fields of contract is unquestioned. But the implications of 'transnationality' for contract are way broader and notably include the surge of contract as principal infrastructure of social ordering. The stakes lie at odds with (neo-)formalist contract theory whose rational, will-based underpinnings causes fierce opposition to any objective, regulatory understanding of contract. In a troubling coincidence, the challenge of 'transnationality' arises right at a time in which broad strands of contract theory have adopted a 'fear of contract'[104], as Roy Kreitner puts it, and mobilise to defend a unitary, formal and purportedly 'unpolitical' concept of contract. Such a conceptualization, to be sure, is *itself* a *political* project.

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[101] See also for a contract justice approach Lyn Tjon Soie Len, *Minimum Contract Justice. A Capabilities Perspective on Sweatshops and Consumer Contracts* (Oxford: Hart, 2017).

[102] See Samuel Moyn, *Not Enough: Human Rights in an Unequal World* (Cambridge/MA: Harvard University Press, 2018). In a similar argument, the structural blindness of human rights approaches have been pointed out by Hila Shamir as regards answers to human trafficking. In her critique, she points out that a human rights paradigm has only narrow impact due to its focus on victim rescue rather than transformation of root causes, that it can have normalizing effects with regard to structures of exploitation by selecting only the most extreme cases and that its ex post approach may be insufficient to combat widespread harmful practices, cf Hila Shamir, 'A Labor Paradigm for Human Trafficking', 60 *UCLA Law Review* 76-136 (2012).

[103] For an illustrative linking between analytical concepts and social theory regarding the notion of law *tout court* Detlef von Daniels, *The Concept of Law from a Transnational Perspective* (Aldershot: Ashgate, 2010).

[104] Kreitner, 'Fear of Contract' (above Fn 9).

This chapter has illustrated the constitutive role of contracts in the regulation and critique of transnational social institutions such as global value chains. Such chains use 'contract governance' to bind a multitude of actors and span the globe, yet at the same time also their contestation and re-embedding through sustainability clauses, certification schemes or codes of conduct uses contract to voice its concerns. Such initiatives have obvious spill-over effects beyond individualistic categories and defy a mere efficiency analysis. As a more general observation, transnational contracts are a self-validating practice—they shift for themselves and create their own structures and sources of legitimacy. An inward turn to the concept of contract itself is the necessary and right response. Such an inquiry is not unprecedented, especially among authors who engage critically with the conceptual bifurcations and dichotomies of modern law. The chapter has presented two antagonistic scholarly projects in this regard, one inspired by a realist and critical tradition and the other one with a liberal orientation. While both are formulated from the inside of contract law and theory and abstain from recurring to specific legislative adjustment, they differ profoundly in their conceptualization of the 'political' nature of transnational contracts. In this regard, realist approaches can more easily be linked to social theories of globalization and develop a nuanced stance on the complexities and contingencies of a transnational contractual pluralism.

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