

In the Blind Spot: The Hybridization of Contracting

*Gunther Teubner**

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. Contracting needs two diametrically contradictory but complementary theories which 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 have developed at length elsewhere.¹ Today, contract is no longer the consensual

* Professor of Private Law and Legal Sociology, University of Frankfurt and London School of Economics. Translated by Iain L. Fraser. I wish to thank Isabell Hensel and Anton Schütz for their critical comments and constructive suggestions.

¹ Gunther Teubner, *Contracting Worlds: Invoking Discourse Rights in Private*

exchange relationship between two legal subjects to which the judge grants legal force as long as the *nudum pactum* can at least be endowed with a *causa*.² 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 relationship of the contract has metamorphosed into a polycontextural relationship, 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?

Today's individual contract typically breaks down into several operations within different contexts: (1) an economic transaction that, recursively intermeshed in accordance with the intrinsic logic of the economy, changes the market situation; (2) a productive act that, in accordance with the intrinsic logic of the relevant social context (e.g., technology, medicine, media, science, art, and other social areas where goods and services are produced), changes the productive situation; and (3) a legal act that, recursively intermeshed with other legal acts in accordance with the intrinsic logic of the law, changes the legal situation.³ The outcome of the prevailing 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 occurring in a

Governance Regimes, 9 SOC. & LEGAL STUD. 399 (2000) [hereinafter Teubner, *Contracting Worlds*]. Some consequences for legal doctrine are suggested in Gunther Teubner, *Expertise as Social Institution: Internalising Third Parties into the Contract*, in IMPLICIT DIMENSIONS OF CONTRACT: DISCRETE, RELATIONAL AND NETWORK CONTRACTS 333 (David Campbell et al. eds., 2003) [hereinafter Teubner, *Expertise*].

2 On the social history of contracting in the continental law area, see FRANZ WIEACKER, *A HISTORY OF PRIVATE LAW IN EUROPE: WITH PARTICULAR REFERENCE TO GERMANY* (1996); cf. ANDREAS ABEGG, *DIE ZWINGENDEN INHALTSNORMEN DES SCHULDVERTRAGSRECHTS: EIN BEITRAG ZU GESCHICHTE UND FUNKTION DER VERTRAGSFREIHEIT* (2004); DIETER GRIMM, *SOZIALE, WIRTSCHAFTLICHE UND POLITISCHE VORAUSSETZUNGEN DER VERTRAGSFREIHEIT: EINE VERGLEICHENDE SKIZZE* (1987). For the common law, see PATRICK S. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* (1979); LAWRENCE M. FRIEDMAN, *CONTRACT LAW IN AMERICA: A SOCIAL AND ECONOMIC CASE STUDY* (1965).

3 ABEGG, *supra* note 2; MARK AMSTUTZ, *Die Verfassung von Vertragsverbindungen*, in *DIE VERNETZTE WIRTSCHAFT: NETZWERKE ALS RECHTSPROBLEM — SYMPOSIEN ZUM SCHWEIZERISCHEN RECHT* 45 (2004); HANS CASPAR VON DER CRONE, *RAHMENVERTRÄGE: VERTRAGSRECHT — SYSTEMTHEORIE — ÖKONOMIE* 85 (1993); THOMAS MÜLLER, *VERWALTUNGSVERTRÄGE IM SPANNUNGSFELD VON RECHT, POLITIK UND WIRTSCHAFT* 144 (1997).

different mutually-closed discourse. 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 to illustrate the importance of distinguishing amongst these three dimensions.⁴ There is a whole array of concrete projects of considerable scale that expertise is contracted for: complex acquisitions of property, large credit operations, construction projects, high-risk financial transactions and the like. 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, is not a party to the expertise contract. In many legal orders, there is considerable controversy as to 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; and (3) in the social context of producing the expertise. Each of these contracting worlds imposes on the transaction a 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 share more or less identical boundaries, it is the peculiarity of the expertise transaction that is exposed to a collision of different privities that contract law is asked to decide. In expertise contracts, a fundamental conflict, the direct collision between the principles of contractual loyalty and expertise impartiality, comes to the fore. Expertise per se must be orientated firmly toward principles of scientific inquiry. Bilateral contracting, on the other hand, creates for the expert the legitimate duties of cooperation, trust, interdependence and loyalty toward the economic interests of the mandator. The question underlying the aforementioned controversy is whether third-party liability, the liability of the expert to the beneficiary, provides an adequate solution to this conflict.

What "is" this interdiscursive contractual relationship? How do the dynamics of the conflict work and how are the various contractual acts attuned to one another? This would seem to be one of the thorniest problems deriving from the contemporary disintegration of the unity of the contract.

Can we still discern some operational, structural, or systemic "unity" of the contract that can be a suitable substitute for the exchange between

4 For details, see Teubner, *Expertise*, *supra* note 1.

two people? The different disciplines involved affirm this emphatically: they base the unity of contract either on legal consensual obligation or on economic efficiency or on productive transformation and then superimpose their specific perspectives on the other aspects. Contract is thus economized or legalized or socialized. But this is false, "imperialistic" interdisciplinarity.⁵ In contrast, social theory, if it deserves this label, should not let itself be taken over by any of these partial perspectives, but instead should elucidate the social multidimensionality of the single contract in transdisciplinary fashion. The sobering consequence is that a unity of the contract can no longer be construed. A contract is neither a unitary process (of social transactions in the broadest sense grasping the relational essence of contract⁶), nor a unitary structure (usually perceived as an ensemble of norms enacted by private autonomy⁷), nor a unique event/operation/act (such as, in legal doctrine, the agreement of the contracting parties⁸). The single contract is always already a multiplicity of differing processes, structures, operations.

Its unity then consists, if at all, only of the interconnection, in the so-called structural coupling of the economy, the productive context, and the law (parallels would be property and the constitution, as institutions linking law to different social worlds).⁹ 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,

5 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* (Boudewijn Bouckaert & Gerrit De Geest eds., 2000).

6 This is, however, the trend in relational contracting theory, which views the contract as a "socially embedded" legal relationship. *See* Ian R. Macneil, *Relational Contract: What We Do Know and Do Not Know*, 1985 *WIS. L. REV.* 483; Robert Gordon, *Unfreezing Legal Reality: Critical Approaches to Law*, 15 *FLA. ST. U. L. REV.* 195 (1987); Melvin A. Eisenberg, *Relational Contracts*, in *GOOD FAITH AND FAULT IN CONTRACT LAW* 291 (Jack Beatson & Daniel Friedmann eds., 1994). *See also* the critical comments on Teubner, *Contracting Worlds*, *supra* note 1, in Oliver Gerstenberg, *Justification (and Justifiability) of Private Law in a Polycontextural World*, 9 *SOC. & LEGAL STUD.* 419 (2000); Ian R. Macneil, *Relational Contract Theory: Challenges and Queries*, 94 *NW. U. L. REV.* 877 (2000); David Campbell, *The Limits of Concept Formation in Legal Science*, 9 *SOC. & LEGAL STUD.* 439 (2000).

7 As in legal institutionalism. *Cf.* NEIL MACCORMICK & OTA WEINBERGER, *AN INSTITUTIONAL THEORY OF LAW* (1986).

8 As in the still dominant legal doctrine. *See, e.g.*, DIETER MEDICUS, *BÜRGERLICHES RECHT* 19, para. 24 (2004).

9 NIKLAS LUHMANN, *LAW AS A SOCIAL SYSTEM* 395 (2004).

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 standards.¹⁰ 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 of course only in the language of cost factors, profit expectations, economic property rights and preferences. And finally, an imaginary space for the reconstruction of resources and obligations appears within the productive act. But even such a re-entry of one system into the other 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 no, since they are not directly accessible to each other — a condition that would make interaction possible. What transpires is only a mutual irritation of economic transaction, production relationship, and legal relationship, which sensitizes 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 dynamics.

Our first interim finding is that social differentiation splits the formerly

10 On this reciprocal reconstruction of the contract in the different contracting worlds as productive misunderstanding, see Teubner, *Expertise*, *supra* note 1; Teubner, *Contracting Worlds*, *supra* note 1; Gunther Teubner, *The Two Faces of Janus: Rethinking Legal Pluralism*, 13 *CARDOZO L. REV.* 1443 (1992).

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 an insurmountable 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 — gaps that it might have been the proper role of the modern contract to fill — remain unfilled. If that is so, the question arises as to whether elsewhere in modern society, outside the operationally closed systems, there may exist social mechanisms that are located "between" these systems 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.¹¹

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? This locus of pan-social identity-finding is just what several authors have often sought.¹² 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.¹³ There is only "diffuse" communicative linkage of legal acts and productive

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

12 Particularly significant in this respect is Klaus Bendel, *Funktionale Differenzierung und gesellschaftliche Rationalität*, 22 ZEITSCHRIFT FÜR SOZIOLOGIE 261 (1993), with his concept of "intersystemic discourse." Similar advances also can be found in Ulrich K. Preuss, *Rationality Potentials of Law: Allocative, Distributive and Communicative Rationality*, in CRITICAL LEGAL THOUGHT: AN AMERICAN-GERMAN DEBATE 525 (Christian Joerges & David M. Trubek eds., 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 AUTONOMY IN A NEW PERSPECTIVE 187 (Alberto Febbrajo & Gunther Teubner eds., 1992).

13 In this context, see Helmut Willke, *Societal Guidance Through Law*, in STATE, LAW, AND ECONOMY AS AUTOPOIETIC SYSTEMS: REGULATION AND AUTONOMY IN A NEW PERSPECTIVE, *supra* note 12, at 353. 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 (1997).

acts to acts of payment, and vice versa. The reason for this absence is the difference institutionalized in modernity between society as a whole and functional subsystems. While this difference supplements the difference among subsystems, it in turn creates a new unbridgeable "gap."

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 relationship, but also an 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., into 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 of 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,¹⁴ 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 coordination of which they effect with every successful operation as a "contractual act" (negotiations, conclusion of the contract, performance, amendment, breach of contract, etc.). But 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 emerging 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,

14 2 NIKLAS LUHMANN, *Interaktion, Organisation, Gesellschaft*, in *SOZIOLOGISCHE AUFKLÄRUNG* 9-20 (3d ed. 1986).

comes a further twofold reconstruction of the communicative *consensus* (or, better yet, of several communicative *consensūs*) in the consciousness of the individuals involved. The set of differences within society is further enhanced by the difference between society and mind, without any unity thereby being created.

At the center 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 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.¹⁵ 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 contract 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 very distinction would 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

15 More precisely, in the blind spots of the re-entries, i.e., the contractually relevant system/environment distinctions, each of which is 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.

advantage; without it, no construction is possible. That implies renouncing perfection. The eye that sees everything is no longer able to see anything.¹⁶

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 its theory is actually a latency that is simply necessary for constructional reasons. Then, however, the consequence for the modern contract as such is that 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 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 to put it in a different conceptual tradition, "The unknownness of the abstraction of exchange is thus a constitutive component of the exchange action itself."¹⁷

Yet even when latency is safeguarded, it does not set the unruly question of the binding nature of contract to rest. For the very attraction of the

16 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 (Paul Watzlawick & Peter Krieg eds., 1991); Heinz von Foerster, *Das Gleichnis vom blinden Fleck: Über das Sehen im allgemeinen*, in *DER ENTFESSELTE BLICK: SYMPOSION, WORKSHOPS, AUSSTELLUNG 14* (Gerhard Johann Lischka ed., 1993).

17 SLAVOJ ZIZEK, *ENJOY YOUR SYMPTOM!* 16 (1992).

gap lies not only 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, there is a constant gnawing suspicion that the agreement of the contracting parties is not capable of binding the diversifying projects.¹⁸ And it is not just suspicion but the actual difference in 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,¹⁹ 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 maneuvers 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 same time, complexifying the binding aspects that have been discussed above: contract as inter-system structural coupling, contract as pan-social integration, contract as organization or as interaction (see Part 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.²⁰

18 This is one of the motives for interdisciplinary attempts to find the contractual binding outside the law, for example, in the "relational contract" or in economic (!) structures.

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

20 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).

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: each must be able to illuminate the other's blind spot.

Can this yield a generalizable model for polycontextual observation that 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.²¹ 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; and (3) choose a second, strictly complementary non-congruent theory, with a leading distinction "orthogonal" to the first theory's distinction and, accordingly, focusing on its blind spot, and vice versa. 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 the mutual attraction between the two? 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. 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 integration of complement and difference is possible, since each buries the other in its difference technique.

21 PAUL FEYERABEND, *WIDER DEN METHODENZWANG: SKIZZE EINER ANARCHISTISCHEN ERKENNTNISTHEORIE* (1976).

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: transactions in the economy, contract conclusions in law, productive acts in the various other worlds of meaning, exchanges 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, among various levels of social formation — interaction, organization, society — among 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.²² Both systems theory and actor-network theory agree that hybridization and differentiation are neither mutually exclusive nor reciprocally restrictive, but, rather, the relation between them is one of mutual enhancement. Hybrids are not simply compromises, mediations, that weaken the differentiations of modernity through integration, yet arise only once the differentiation has produced and stabilized differences; indeed, they base their very existence on the stable persistence of the difference.²³ 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 relationship between differentiation and hybridization. Latour starts by insisting on the mutual enhancing of

22 BRUNO LATOUR, WE HAVE NEVER BEEN MODERN (1993) [hereinafter LATOUR, NEVER BEEN MODERN]; BRUNO LATOUR, POLITICS OF NATURE: HOW TO BRING THE SCIENCES INTO DEMOCRACY (2004) [hereinafter LATOUR, POLITICS OF NATURE]; NIKLAS LUHMANN, SOCIAL SYSTEMS (1995).

23 Michael Hutter & Gunther Teubner, *The Parasitic Role of Hybrids*, 149 J. INSTITUTIONAL & THEORETICAL ECON. 706 (1993).

modernity and non-modernity, but, ultimately, in the last instance as it were, decides in favor of non-modernity. In the parliament of things, it is the politics of the hybrid that wins. Latour ultimately grants primacy to hybridization over differentiation.²⁴ The contract would then be a hybrid that combines economic, productional, and legal aspects. Luhmann, by contrast, plumps for late modernity. In the refined conceptual maneuvering 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 one another in structural coupling.

The so-called 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 favor 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 upheld: 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?

Moreover, 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

24 LATOUR, POLITICS OF NATURE, *supra* note 22; LATOUR, NEVER BEEN MODERN, *supra* note 22.

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 polycontextuality it so highly favors, from which it will not even except itself.²⁵ 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 narrations.²⁶ 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, as well as the 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

²⁵ LUHMANN, *supra* note 13, at 1132.

²⁶ An implicit concept of the contract can be found in Jaques Derrida, *Force of Law: The Mystical Foundation of Authority*, 11 CARDOZO L. REV. 920 (1990); on law in general, see JAQUES DERRIDA, *GIVEN TIME* (1992).

the continents. Energy, force, drive, desire, power, are concepts of only very limited use in systems theory. Expectation (versus action), medium (versus form), complexity difference (versus evolution) are the few "energy-containing" phenomena; the rest of the forces "hold 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 in 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, translation process: "bringing the seeds of pure language to maturity in translation seems never achievable."²⁷ The obligation to restore the "break," the fragmentation, the social estrangement, exists despite the impossibility of fulfillment.²⁸ 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.²⁹

It would be the "task of the translator" to seek among the systems

27 WALTER BENJAMIN, 2 GESAMMELTE SCHRIFTEN 15 (1977).

28 For a deconstructive perspective on translation, see ALFRED HIRSCH, ÜBERSETZUNG UND DEKONSTRUKTION (1997).

29 For more on this, see Teubner, *Contracting Worlds*, *supra* note 1.

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 a mutual connecting of 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.³⁰

Here, an analysis orthogonal to the system/environment perspective must step in, taking the mutual interaction, among the systems, of the binding forces of the contract, the contractual "transformation of a distinction into a Möbius strip,"³¹ 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 seems to be its highly particularistic nature: the very renunciation of a general transformational grammar in the relation between the discourses involved, the very non-generalizable idiosyncratic nature of any contractual agreement, make 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.

30 This refers to Wiethölter's concept of reciprocity. Rudolf Wiethölter, *Just-ifications of a Law of Society*, in PARADOXES AND INCONSISTENCIES IN THE LAW 65, 65-75 (Oren Perez & Gunther Teubner eds., 2006).

31 BAECKER, *supra* note 11, at 207.

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.³² 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 own choosing under market conditions. This would be only a partial aspect, which would reduce 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-transparency."³³

This freedom is threatened whenever totalizing 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 monopolize the right to interdiscursive translation and superimposes the economic translation on the other discourses. Freedom of contractual translation is directed against an economic imperialism, against tendencies of the economic discourse to erect the new tower of rationality. The new babylonian

32 For more details on the following normative argument, see Teubner, *Contracting Worlds*, *supra* note 1.

33 JACQUES DERRIDA, *Des tours de Babel*, in *PSYCHÉ. INVENTIONS DE L'AUTRE* 207 (1987).

confusion of languages, however, would destroy the project of an economic rationalization of the world and introduce the obligation of a necessary and simultaneously impossible translation amongst the different languages of the social world.

Private law today is, of course, not living in splendid isolation from its environing society, but, rather, in close structural coupling, via the mechanisms of contract, with the economic subsystem of society.³⁴ 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, and 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 relations by their economic contractualization has four dimensions: (1) bilateralization — complex social relations are translated into a multitude of closed bilateral relations; (2) selective performance criteria; (3) externalization of negative effects; and (4) power relations.³⁵

This shows how urgently private law needs rid itself of this monopoly of economic calculation and forge 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 — certainly to a limited degree — whenever contract law uses the famous general clauses of "public policy" to invalidate an economically viable contract due to non-economic criteria or those of "good faith" to balance economic criteria against other social criteria of performance. But these are merely marginal corrections of the dominant economic worldview that is imported into the law by myriads of economic transactions. These marginal corrections need to be replaced by a condition of full 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.³⁶ As we saw earlier, in the expertise contract a fundamental conflict, the direct collision between the principles of contractual loyalty and expertise impartiality, comes to the fore.³⁷ Expertise, if it is supposed to work

³⁴ LUHMANN, *supra* note 9, at 395.

³⁵ Hugh Collins, *The Sanctimony of Contract*, in *LAW, SOCIETY, ECONOMY* 63 (Richard Rawlings ed., 1997).

³⁶ For more details, see Teubner, *Expertise*, *supra* note 1.

³⁷ For the larger historical and social background of these conflicts, see DAVID SCIULLI, *THEORY OF SOCIETAL CONSTITUTIONALISM* 40 (1992).

properly, needs to guide its orientation firmly 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 — all are primary among them.³⁸ Bilateral contracting, on the other side, creates for the expert the legitimate obligation of cooperation, trust, interdependence, and loyalty toward the economic interests of the mandator. The expert is under 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 — clashes directly with the ethos of scientific inquiry — public knowledge, universalism, disinterestedness, originality, and skepticism.

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."³⁹

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 enters. 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 interpersonal relations. While the concrete project, whether in the technological, social, scientific, or medical sector, requires one comprehensive multilateral relationship, which formalizes the agreed upon

38 For a recent comprehensive reformulation of the fundamental social norms in the scientific community, see JOHN ZIMAN, *REAL SCIENCE: WHAT IT IS, AND WHAT IT MEANS* 28 (2000).

39 SCIULLI, *supra* note 37, at 207.

cooperation of several actors, the concrete contract and the economic market relation are 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 favor 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 counterbalanced 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 that — as a matter of law — the private autonomy of the parties has to respect. Whenever expertise is organized 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 symbolizes 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 one-sided private interests and independent expertise where knowledge is applied in a disinterested way with built-in controls of reliability and where it is independent from personal loyalty and reciprocity considerations. Expert liability to third parties marks the boundary between the fields of economic rationality and scientific rationality.

To generalize from this 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 twentieth century, Lyssenkow's political biology as well as Silicon Valley's instrumentalization of science, not to speak of the worst. Totalizing regimes control the meta-rules of translation between discourses. They monopolize the right of the ultimate translation that 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 institutionalized practice as to make legal recognition plausible.⁴⁰ But this presupposes a conceptual readiness of the law to respond to the pressures of social development. The conceptualization 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, rather, need to be reconstructed as "discourse rights" in the situation of today's polycontextuality. The normative correlate of contract as translation would be an extension of constitutional rights into the context of private governance regimes. This, however, requires a fundamental rethinking of the horizontal effect of constitutional rights.⁴¹

40 For incipient and inchoate law as result of social practices that press for legal institutionalization, see PHILIP SELZNICK, *LAW, SOCIETY AND INDUSTRIAL JUSTICE* 32 (1969). In less normative language, a similar argument for the emergence of constitutional rights as social institution has been developed by NIKLAS LUHMANN, *GRUNDRECHTE ALS INSTITUTION: EIN BEITRAG ZUR POLITISCHEN SOZIOLOGIE* 186 (1965).

41 For 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 *O.J.L.S.* 61 (1998); CHRISTOPH GRABER, *ZWISCHEN GEIST UND GELD* (1994). For the debate on constitutional rights in private contexts, see Gunther Teubner, *The Anonymous Matrix: Human Rights Violations by "Private" Transnational Actors*, 69 *MOD. L. REV.* 327 (2006); Gavin W. Anderson, *Social Democracy and the Limits of Rights Constitutionalism*, 17 *CAN. J.L. & JURIS.* 31 (2004); Aharon Barak, *Constitutional Human Rights and Private Law*, 3 *REV. CONST. STUD.* 218 (1996); ANDREW CLAPHAM, *HUMAN RIGHTS IN THE PRIVATE SPHERE* (1996); HUGH COLLINS, *JUSTICE IN DISMISSAL: THE LAW OF TERMINATION OF EMPLOYMENT* (1992).

