

ARTICLE

Comparative Genealogies of “Contract and Society”

Klaas Hendrik Eller*

(Received 09 September 2020; accepted 13 September 2020)

Abstract

Since contracts form a basic institution of every legal order, the interdisciplinary orientation of concepts of contracts reveals socio-legal inclinations of a legal order more broadly. Contrasting the UK and US Common Law of contracts with developments under German law, this Article examines the relation between normative and social science approaches, notably rooted in economics, economic sociology, and social theory in the genealogy of contract law. A shared leitmotif over the 20th century has been the drive to account for the societal embeddedness of contract. However, conceptualizations of “Contract and Society” differ considerably between legal orders in their disciplinary ingredients and design. In the US, and to a lesser extent also in the UK, the rather continuous reception of legal realism has paved the way for broad interdisciplinary perspectives on contract law, ranging from classical socio-legal, empirical work (e.g., Macaulay), economics (e.g., Williamson), sociology (e.g., Powell), and critical theory (e.g., Kennedy) to today’s landscape, where essentially instrumental and ideal-normative theories compete. Alternatively, in Germany, where the realist heritage was more ephemeral, the transformations of contract law were processed from within legal discourse and foremost in their effects on private autonomy as conceptualized, for example, in German idealism, discourse theory and critical theory. Similarly, the “constitutionalization” of contract law—even if championed for fostering private law’s reflexivity—has, for the most part, defied a socio-legal orientation. Finally, the Article highlights the path dependencies with which these different starting points translate in current debates around the role of contract in transnational governance.

Keywords: Comparative contract law; socio-legal studies; relational contract; constitutionalization; transnational contract law; legal interdisciplinarity

A. Introduction: De-Essentializing Contract

Contract is arguably the most chatoyant legal institution—appearing in changing light when seen from a wide array of legal perspectives, but also at the center of an unmatched set of other disciplinary inroads, including political philosophy, ethics, economics, sociology, anthropology, psychology, and gender studies. This plurality of approaches reminds us of contract’s inherent tension between the universality of its form and the highly diverse and specific ramifications of contractual practice. This tension translates into two antagonistic points of departure of current contract scholarship that compete for doctrinal recognition: normative, ahistorical, and ideal approaches on the one hand, and socio-legal, context-specific, and particularistic approaches on the other hand. While many quibbles in contract law seem timeless and canonical, as the

*Dr. Klaas Hendrik Eller is Assistant Professor for European Private Law at the University of Amsterdam, Amsterdam Center for Transformative Private Law (ACT), klaas.eller@uva.nl.

discontinued project of a Common European Sales Law¹ reminds us, national contract laws are by no means uniform. It had created increased attention for comparative legal analysis of contract law,² first with the ambition to highlight family resemblances, especially in the EU, then with a closer look at divergences and pluralism. In today's comparative law landscape, contract law is often seen as a field of reference for principled qualifications of a legal order at large as being more or less liberal.

Despite a widespread acknowledgement of novel forms of contracting and a respective need for new conceptualizations, the historical and philosophical origins³ of contract and its peculiar location between “state” and “society”⁴ continue to form a prominent point of departure for contractual thinking. This entails a steady risk of essentializing contract on the basis of its most general definition—as a voluntary exchange⁵—which abstracts almost entirely from any parameter of the surrounding social context. Emanating from such a view of contract is a similarly essentializing image of “the market” as a natural order which law only regulates *a posteriori* and from the outside in order to protect its proper functioning.⁶

Yet, ever since the realist tradition of the early twentieth century with authors like Karl Llewellyn,⁷ Eugen Ehrlich,⁸ Felix Cohen,⁹ and Robert Hale,¹⁰ a strong strand of contract scholarship has gradually moved away from the Willistonian archetype of contract¹¹ to more contextualized approaches. Here, contract is acknowledged to give rise to a social relation, a shift that entails two important consequences. First, contract is deeply embedded in a set of social and cultural norms, or as

¹The EU Draft Regulation on a Common European Sales Law, *Commission Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law*, COM (2011) 635 final (Nov. 10, 2011), 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 benchmark in the field. For an analysis of the political stakes of this harmonization, compare Reinhard Zimmermann & Nils Jansen, *General Introduction: European Contract Laws – Foundations, Commentaries, Synthesis*, in COMMENTARIES ON EUROPEAN CONTRACT LAWS 1 (Nils Jansen & Reinhard Zimmermann eds., 2018), and Horst Eidenmüller et al., *The Common Frame of Reference for European Private Law—Policy Choices and Codification Problems*, 28 OXFORD J. LEGAL STUD. 659 (2008).

²See the excellent compilation COMPARATIVE CONTRACT LAW (Pier Giuseppe Monateri ed., 2017).

³For concise surveys, see REINHARD ZIMMERMAN, *THE LAW OF OBLIGATIONS: ROMAN FOUNDATIONS OF THE CIVIL TRADITION* (1996); JAMES GORDLEY, *THE PHILOSOPHICAL ORIGINS OF MODERN CONTRACT DOCTRINE* (1999).

⁴PEER ZUMBANSEN, *ORDNUNGSMUSTER IM MODERNEN WOHLFAHRTSSTAAT: LERNERFAHRUNGEN ZWISCHEN STAAT, GESELLSCHAFT UND VERTRAG* 242–269 (1999).

⁵See also RESTATEMENT (SECOND) OF CONTRACTS § 1 (AM. LAW INST. 1981) (“A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.”).

⁶Cf. Andrew Lang, *Market Anti-Naturalisms*, in SEARCHING FOR CONTEMPORARY LEGAL THOUGHT 312 (Justin Desautels-Stein & Christopher Tomlins eds., 2017); BERNARD E. HARCOURT, *THE ILLUSION OF FREE MARKETS: PUNISHMENT AND THE MYTH OF NATURAL ORDER* 78–102 (2012); NATHAN OMAN, *THE DIGNITY OF COMMERCE: MARKETS AND THE MORAL FOUNDATIONS OF CONTRACT LAW* (2017). On the role of the state, see Tsilly Dagan & Talia Fisher, *The State and the Market – a Parable: On the State’s Commodifying Effects*, 3 PUB. REASON 44 (2011).

⁷Karl Llewellyn, *What Price Contract? An Essay in Perspective*, 40 YALE L.J. 704 (1931). See also Alan Schwartz, *Karl Llewellyn and the Origins of Contract Theory*, in JURISPRUDENCE OF CORPORATE AND COMMERCIAL LAW 12 (Jody Kraus & Steven Walt eds., 2000).

⁸EUGEN EHRLICH, *GRUNDLEGUNG DER SOZIOLOGIE DES RECHTS* (1913) (Manfred Rehbinder ed., 4th ed. 1989).

⁹Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 6 COLUM. L. REV. 809, 839 (1935).

¹⁰Robert Hale, *Bargaining, Duress and Economic Liberty*, 43 COLUM. L. REV. 603 (1943). Cf. BARBARA FRIED, *THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT* (1998). For more on the realist legacy, see Peer Zumbansen, *The Law of Society: Governance Through Contract*, 14 IND. J. GLOBAL LEGAL STUD. 191 (2007).

¹¹SAMUEL WILLISTON (WITH GEORGE J. THOMPSON), *A TREATISE ON THE LAW OF CONTRACTS* (rev. ed. 1936–38, vol I—IV); for an insightful review compare Lon Fuller, *Williston on Contracts*, 18 N.C. L. REV. 1 (1939). Generally, on the persistent struggle around “socializing” contract, see Luke Herrine, *Socializing Contract* (May 30, 2019), available at <https://ssrn.com/abstract=2989173>.

Durkheim famously phrased: “[T]out n’est pas contractuel dans le contrat.”¹² Second, it becomes reductionist to assess the emerging contractual order from the perspective of the parties and the principle of privity alone, rather than with a view to society at large. A perspective of “contract and society”¹³ would investigate how contract becomes fragmented across spheres of social interaction and is both shaped by and is itself shaping its environment beyond the immediate parties. Contracts between or involving states, within the family, at the workplace, among global corporations, or for a home do not solely differ by subject matter.¹⁴ Their multiplicity results from their respective embeddedness in a social context that grants a peculiar reach to the idea of privity and that relies on contract for very different forms of social ordering. This heterogeneity poses a significant challenge to both descriptive and normative attempts to account for the entirety of contract law.¹⁵ It may not surprise that even normatively monist or ideal theories, be they centered around efficiency,¹⁶ autonomy,¹⁷ fairness,¹⁸ democracy,¹⁹ or distributive justice²⁰ are increasingly incorporating pluralist elements.²¹ Socio-legal explanations see the function of contract precisely in enabling cooperation despite potentially diverging, “pluralistic” normative preconceptions: The role of contract is to regulate—or make endogenous to the contractual program—certain behaviors and understandings of parties that fall within its scope, just as much as it is to explicitly make exogenous other factors.²²

This Article is interested in the underlying (inter-)disciplinary dynamics that guide this move, or rather, that guide the reflection of contract’s foundational normative and social pluralism. Contrasting the UK and US Common Law of contracts with developments under German law, this Article will examine the relation between normative and social science approaches, mostly those rooted in economics, economic sociology, and social theory, in the genealogy of contract law. It takes the perspective of asking which normative and conceptual preconditions animate the evolution of contract law, in particular, with regard to complex transactions and

¹²ÉMILE DURKHEIM, *DE LA DIVISION DU TRAVAIL SOCIAL* 189 (1893). Positioning Durkheim within early socio-legal scholarship, see Moritz Renner, *Privatrecht und Soziologie*, in *PRIVATRECHTSTHEORIE* 121 (Stefan Grundmann et al. eds., vol I, 2014).

¹³C.f. Lawrence Friedman, *The Law and Society Movement*, 38 *STAN. L. REV.* 763 (1986) (deliberately alluding to the methodologically diverse movement of “law and society”).

¹⁴For a taxonomy, see HANOCH DAGAN & MICHAEL HELLER, *THE CHOICE THEORY OF CONTRACTS* 93–101 (2017).

¹⁵C.f. GORDLEY, *supra* note 3; Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 *YALE L.J.* 541 (2003).

¹⁶E.g., Richard Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 *HOFSTRA L. REV.* 487 (1980); STEVEN SHAVELL, *FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW* 289 et seq. (2004); ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* Ch. 8 (6th ed. 2012). C.f. Eric A. Posner, *Economic Analysis of Contract Law After Three Decades: Success or Failure*, 112 *YALE L.J.* 829 (2003).

¹⁷DAGAN & HELLER, *supra* note 14; Hanoch Dagan & Michael Heller, *Autonomy for Contract, Refined*, 38 *L. & PHIL.* (forthcoming 2020); Hanoch Dagan & Michael Heller, *Why Autonomy Must Be Contract’s Ultimate Value*, 18 *JERUSALEM REV. LEGAL STUD.* 148 (2019); Hanoch Dagan & Avihay Dorfman, *Justice for Contracts* (August 11, 2019), available at <https://ssrn.com/abstract=3435781>; Thomas Gutmann, *Theories of Contract and the Concept of Autonomy*, Centre for Advanced Study in Bioethics Münster Working Paper No. 2013/55.

¹⁸Florian Rödl, *Contractual Freedom, Contractual Justice, and Contract Law (Theory)*, 76 *L. & CONTEMP. PROBS.* 57 (2013).

¹⁹Martijn W. Hesselink, *Democratic Contract Law*, 11 *EUR. REV. CONT. L.* 81 (2015).

²⁰LYN TJON SOIE LEN, *MINIMUM CONTRACT JUSTICE: A CAPABILITIES PERSPECTIVE ON SWEATSHOPS AND CONSUMER CONTRACTS* (2017); Hugh Collins, *Distributive Justice Through Contracts*, 45 *CURRENT LEGAL PROBS.* 49 (1992). Cf. Aditi Bagchi, *Distributive Justice and Contract*, in *PHILOSOPHICAL FOUNDATIONS OF CONTRACT LAW* 193 (Gregory Klass et al. eds., 2014).

²¹See Roy Kreitner, *On the New Pluralism in Contract Theory*, 45 *SUFFOLK U. L. REV.* 915 (2012); Nathan Oman, *Unity and Pluralism in Contract Law*, 103 *MICH. L. REV.* 1483 (2005). For a call to account for plural spheres of valuation, see also Hanoch Dagan, *Pluralism and Perfectionism in Private Law*, 112 *COLUM. L. REV.* 1409 (2012). On balancing normative goals, Jody S. Kraus, *Reconciling Autonomy and Efficiency in Contract Law: The Vertical Integration Strategy*, 11 *PHIL. ISSUES* 420 (2001).

²²C.f. NIKLAS LUHMANN, *DAS RECHT DER GESELLSCHAFT* 459 (1993) (Ger) (stating that contracts “stabilize a specific difference over time, while being indifferent to anything else,” “indifference for the sake of difference”, translation KHE).

transnational arrangements. Contracting practice here looks very unlike the idea of a bilateral “meeting of minds,” which, with some perseverance, remains the prototype of contract law debates. Consequently, the individual justification of contract rooted in autonomy and an idea of human agency needs to be complemented by a broader societal justification that is concerned with the social institutions—such as markets or chains of production—that contract gives rise to. This Article will illustrate how the disciplinary framing underlying the push towards more socially contextualized conceptions of contract differs between the jurisdictions discussed. A central explanation for this is that along the lines of legal realism, the US—and to a lesser extent also the UK—have sought to contextualize contract from the outside, that is, by a broad range of interdisciplinary perspectives. In turn, the German debate has processed transformations of contract law from within the legal discourse and through the lens of its ramifications on private autonomy.

Accordingly, despite a surprising congruence across Western legal orders in the evolution of contractual paradigms over the twentieth century,²³ this shift was ultimately animated by different normative and socio-theoretical considerations across jurisdictions. On the one hand, the gradual move from Willistonian formalism to a “material” or “social”²⁴—and occasionally to a more “procedural” or “reflexive”²⁵—paradigm has echoed a changing philosophical discourse around the antinomies of freedom.²⁶ The philosophical contribution highlighted the normative insufficiency of a formal idea of freedom in light of structural coercion or dependency—as illustrated, for example, in labor law.²⁷ On the other hand, a significant second stream stems from the realm of socio-legal analysis. Both Maine²⁸ and Weber²⁹ provided early accounts of how the scope of contractual ordering within a given society expanded as societies moved from traditional segmentation and hierarchical stratification to functional differentiation.

The picture hitherto allows two cautious observations regarding attempts of contextualizing and embedding contract in society. First, in a scholarly landscape dominated by deontological analysis, such projects surely form a minority current. Second, among such projects, the scope, interdisciplinary inspiration, doctrinal realization of such embedding, and the respective imaginary of “non-contractual elements of contract” vary between jurisdictions. Against this

²³Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850-2000*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL* 19 (David Trubek & Alvaro Santos eds., 2006); Duncan Kennedy, *The Globalisation of Critical Discourses on Law: Thoughts on David Trubek's Contribution*, in *CRITICAL LEGAL PERSPECTIVES ON GLOBAL GOVERNANCE: LIBER AMICORUM DAVID M. TRUBEK* 3 (Gráinne de Búrca et al. eds., 2014).

²⁴MARC AMSTUTZ ET AL., *SOZIALES VERTRAGSRECHT: EINE RECHTSEVOLUTIONARISCHE STUDIE* (2006); Claus-Wilhelm Canaris, *Wandlungen des Schuldvertragsrechts – Tendenzen zu seiner “Materialisierung”*, 200 *ARCHIV FÜR CIVILISTISCHE PRAXIS* 273 (2000).

²⁵Rudolf Wiethölter, *Proceduralization of the Category of Law*, in *CRITICAL LEGAL THOUGHT: AN AMERICAN-GERMAN DEBATE* 501 (Christian Joerges & David M. Trubek eds., 1989); Rudolf Wiethölter, *Materialization and Proceduralization in Modern Law*, in *DILEMMAS OF LAW IN THE WELFARE STATE* 221 (Gunther Teubner ed., 1986); Gunther Teubner, *Substantive and Reflexive Elements in Modern Law*, 17 *L. & SOC'Y REV.* 239 (1983); GRALF-PETER CALLIENS, *PROZEDURALES RECHT* (1999); Dieter Hart, *Zur konzeptionellen Entwicklung des Vertragsrechts*, AG 66 (1984); Karl-Heinz Ladeur, *Prozeduralisierung zweiter Ordnung—Am Anfang war das Verfahren*, in *PROZEDURALISIERUNG DES RECHTS* 82 (Tatjana Sheplyakova ed., 2018).

²⁶GONÇALO DE ALMEIDA RIBEIRO, *THE DECLINE OF PRIVATE LAW: A PHILOSOPHICAL HISTORY OF LIBERAL LEGALISM* (2019).

²⁷John Gardner, *The Contractualisation of Labour Law*, in *PHILOSOPHICAL FOUNDATIONS OF LABOUR LAW* 33 (Hugh Collins, Gillian Lester & Virginia Mantouvalou eds., 2019).

²⁸HENRY SUMNER MAINE, *ANCIENT LAW* 174 (1861).

²⁹MAX WEBER, *WIRTSCHAFT UND GESELLSCHAFT: GRUNDRISS DER VERSTEHENDEN SOZIOLOGIE* 387–97, 503–13 (5th ed. 1972). Weber's historical sociology went as far as to decry non-formal elements to modern law, especially those in contract, as potentially countering the formal rationality of modern society and prone to cause social regress, partly because it would expand the discretion of bureaucracy to the detriment of its predetermination and control through parliament. C.f. Wolfgang Mommsen, *Max Webers Begriff der Universalgeschichte*, in MAX WEBER, *DER HISTORIKER* 51, 52–54. (Jürgen Kocka ed., 2011); Hans-Peter Müller, *Rationalität, Rationalisierung, Rationalismus. Von Weber zu Bourdieu?*, in *DIE RATIONALITÄT DES SOZIALEN* 43 (Andrea Maurer & Uwe Schimank eds., 2011); Martin Albrow, *Legal Positivism and Bourgeois Materialism: Max Weber's View of the Sociology of Law*, 2 *BRITISH J.L. & SOC'Y* 14 (1975).

background, this Article will first showcase the plurality of arrangements of “contract and society” in a double intention to illustrate contract’s heterogeneity as a legal institution, and to use contract theory—more broadly speaking— as a test case for socio-legal inclinations of a legal order. Second, this Article will then turn to the issue of long-term, project-specific, in other words “relational,” contracting as a focal point to analyze how the Common Law of contracts, especially in the UK and the German legal order, have conceptualized the challenge such contracts pose to traditional contract thinking, and what paths of adjustment they have developed. Finally, in an outlook, this Article will project these experiences from the national level towards the analysis of transnational law and discuss their respective influence—for the novel task of private governance by contract—beyond the state.

B. “Contract and Society”: Situating the Impact of Socio-Legal Analysis

The birth of modern contract law as a distinct discipline is often located in the second half of the nineteenth century for US law,³⁰ and was brought to its pinnacle in the works of Langdell³¹ and Williston.³² For Europe, the grand treatises by Pothier,³³ Savigny,³⁴ and Blackstone³⁵ suggest a much earlier development.³⁶ Conceptually, contract law emerged as a set of rights and duties that stood alongside the preexisting system of ownership rights in property. It comprised rules for the entire lifecycle of a contract in the general effort of laying the foundations of a formalist, well-ordered model of contractual thinking that was induced from the sub-types of contract and adjudged cases. The implications of the formalist vision were not limited to doctrinal particulars, but rather formed a comprehensive mode of thought that extended to the whole of private law. The idealizations of a Kantian will theory resonate just as much in contract law as they do in property law and theories of legal personality. Hegel, while having a thicker idea of contractual justice than Kant’s theory of contract law, likewise saw contract’s essence in the recognition among property owners.³⁷ In other words, formal contract law was entrenched in a general private law architecture of pre-existing legal subjectivity, property rights, and a primacy of civil society over the state. Consequently, the institution of contract is inseparable from other basic institutions of private law³⁸ because the scope of contracting parties and objects of transaction are decided upon outside of contract law. This liberal architecture justified contract on the basis of the formal equality of the parties—overlooking how the socio-political situatedness shapes contracting opportunities and behavior in morally significant ways. Accordingly, contracting shapes contexts beyond the contracting parties. Relegated to a “private affair and not a social institution,”³⁹ the free bargaining process provided for the congruency of contract with the social order as a whole.

³⁰KEVIN TEEVEN, A HISTORY OF THE ANGLO-AMERICAN COMMON LAW OF CONTRACT 217 (1990).

³¹CHRISTOPHER C. LANGDELL, A SUMMARY OF THE LAW OF CONTRACTS (1880). For a contemporary analysis, c.f. Bruce Kimball, *Langdell on Contracts and Legal Reasoning: Correcting the Holmesian Caricature*, 25 L. & HIST. REV. 345 (2007).

³²Williston, *supra* note 11.

³³JEAN-ROBERT POTHIER, TRAITÉ DES OBLIGATIONS (1761).

³⁴II FRIEDRICH CARL VON SAVIGNY, DAS OBLIGATIONENRECHT ALS THEIL DES HEUTIGEN RÖMISCHEN RECHTS (1853).

³⁵WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (1765–69). For more on Blackstone’s underlying conception of law and social theory, see Duncan Kennedy, *The Structure of Blackstone’s Commentaries*, 28 BUFF. L. REV. 205 (1979) with a reply by Alan Watson, *The Structure of Blackstone’s Commentaries*, 97 YALE L.J. 795 (1988).

³⁶ALFRED SIMPSON, A HISTORY OF THE COMMON LAW OF CONTRACT 199 (1987).

³⁷C.f. GEORG WILHELM FRIEDRICH HEGEL, GRUNDLINIEN DER PHILOSOPHIE DES RECHTS § 63 (1820). For a synthesis, see Peter Landau, *Hegels Begründung des Vertragsrechts*, 59 ARCHIVES FOR PHIL. L. & SOC. PHIL. 117–38 (1973).

³⁸See Thomas Vesting, *Einbau von Zeit: Rechtsnormativität im relationalen Vertrag*, 52 KRITISCHE JUSTIZ 626 (2019); Maria Rosaria Marella, *Who is the Contracting Party? A Trip Around the Transformation of the Legal Subject*, in COMPARATIVE CONTRACT LAW, *supra* note 2, at 205.

³⁹Friedrich Kessler, *The Contracts of Adhesion—Some Thoughts about Freedom of Contract Role of Compulsion in Economic Transactions*, 43 COLUM. L. REV. 629, 630 (1943).

1. Legal Realists: Combining Micro- and Macro-Sociology of Contract Law

Legal realists paved the way for a more complete picture of contract. Even though the movement was strongest in its intellectual firepower and lasting effects on legal thought in its variant of American Legal Realism,⁴⁰ Europe knew parallel streams dubbed either “realism”⁴¹ or early “sociology of law.”⁴² European authors made important contributions to the US variant. This section seeks to develop how realist jurisprudence reframed the embeddedness of contract in society and reshuffled the relation between black-letter contract law and additional elements central to contract’s operation. It will become clear that legal realism has opened the door to a necessarily eclectic set of social science approaches to contract law, which raises questions of disciplinary pluralism.⁴³ Without the realist pioneers, critical approaches to contract law⁴⁴ as well as the impactful frameworks of welfare⁴⁵ and institutional economics⁴⁶ would be largely inconceivable. Above being a political or distinctively normative project, legal realism was a jurisprudential movement that promoted a legal mode of thought. Their project was, generally speaking, to counter the distortive effects of the formal model of contract by deciphering its constructed nature and to make political and societal stakes part of the analysis. Despite being somewhat politically heterogeneous, the realists’ generation would possibly regard some of their theoretical heirs of today with suspicion.

In his trailblazing contribution of 1931, Karl Llewellyn asks “what price contract?”⁴⁷ What could, misleadingly at first sight, be understood as going into a similar direction as Coase’s analysis of “social costs,”⁴⁸ takes the social anchoring of contract in society seriously by assuming it cannot be aptly expressed in economic terms alone. His interest goes into the “role of contract in the social order, the part that contract plays in the life of men.”⁴⁹ Compared to the formalist mainstream of his time, Llewellyn’s approach entails looking behind the edifice of doctrine and asking what type of society and market, or social and economic relations, contract gives rise to. In an inquiry that qualifies as institutionalist *avant la lettre*, albeit one inevitably pursued on the basis of an “arm-chair” economic sociology, Llewellyn connects contract to markets that emerge from aggregate and decentralized contracting. For him, individual contracts, and *a fortiori* the market, are animated to a large extent by norms that are operational irrespective of court intervention and a lawyer’s lens—an idea he attributes to Eugen Ehrlich’s “living law.”⁵⁰ Rather, contract is tasked with developing the constitutional side of the self-government of society,⁵¹ not in a *laissez faire* sense, but with the idea to incorporate non-economic effects, which, for Llewellyn, seem more

⁴⁰For concise overviews, see Hanoch Dagan, *The Realist Conception of Law*, 57 U. TORONTO L.J. 607 (2007); BRIAN LEITER, *NATURALIZING JURISPRUDENCE: ESSAYS ON AMERICAN LEGAL REALISM AND NATURALISM IN LEGAL PHILOSOPHY* (2007).

⁴¹On the Scandinavian realist movement, see Jes Bjarup, *The Philosophy of Scandinavian Legal Realism*, 18 RATIO JURIS 1 (2005); Gregory S. Alexander, *Comparing the Two Legal Realisms—American and Scandinavian*, 50 AM. J. COMP. L. 131 (2002).

⁴²On the trajectory of German sociology of law, compare Stefan Machura, *Law in Other Contracts German Sociology of Law: A Case of Path Dependency*, 8 INT’L J.L. CONTEXT 506 (2012).

⁴³For a normative perspective on disciplinary pluralism in private law, compare Stefan Grundmann, *Pluralistic Private Law Theory* (2020) (unpublished manuscript) (on file with author); Stefan Grundmann, *Methodenpluralismus als Aufgabe—zur Legalität von ökonomischen und rechtsethischen Argumenten in Auslegung und Rechtsanwendung*, 66 RABELSZ 423 (1997); MARIETTA AUER, ZUM ERKENNTNISZIEL DER RECHTSSTHEORIE 35 (2018) (drawing on Duncan Kennedy to advocate for “fancy theory,” in other words, an experimental patchwork of approaches to overcome disciplinary silos).

⁴⁴C.f. Duncan Kennedy, *The Political Stakes in ‘Merely Technical’ Issues of Contract Law*, 1 EUR. REV. PRIV. L. 7 (2001).

⁴⁵See Schwartz, *supra* note 7; Horst Eidenmüller, *Rechtswissenschaft als Realwissenschaft*, 54 JURISTENZEITUNG 53 (1999).

⁴⁶For an explicit reverence to realist pedigree, see Oliver E. Williamson, *Revisiting Legal Realism: The Law, Economics and Organization Perspective*, 5 INDUS. & CORP. CHANGE 383 (1996).

⁴⁷Llewellyn, *supra* note 7.

⁴⁸Ronald Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

⁴⁹Llewellyn, *supra* note 7, at 705.

⁵⁰*Id.* at 706 n.6 (“This whole paper builds at every point on Ehrlich, as any such paper must.”).

⁵¹*Id.* at 727–31.

sophisticated to capture.⁵² Such “constitutions” can only exist in plural, carefully attuned to the living institutional setting of corporations, factories, trade-unions, churches, and households. Contract law’s principal role here is to provide an adjustable, indicative framework that parties can turn to in case of unexpected disagreement, or when the cooperative spirit ceases. Does the relative insignificance of contract law for most transactions imply it could simply be abrogated? Llewellyn hastens to specify that growingly complex markets—and therefore expanding reliance on impersonal trust—become easier with a credible threat of enforcement through state law.⁵³ As much as state power is not the ultimate and only “basis of contract,”⁵⁴ Llewellyn does not go as far as to dismiss the state legal system and the judiciary as its incarnation. The “rule of law,” in other words, remains an unshattered reference for him, unlike the critical tradition and later empirical works. One resulting limitation—perhaps less significant in his time than nowadays—is that Llewellyn concentrates on “legal” markets and on contracts in their “legal” enforceability, as opposed to “illegal” or “black” markets on which contracts exist as social artefacts without aspirations of enforceability.⁵⁵

The realist movement did not lobby for a holistic project of legal reform that would implement their analysis broadly speaking, even though many of its protagonists identified as social reformers.⁵⁶ To be sure, sectoral reforms like the social current in labor and rental law were unmistakably fueled by realist inspiration. Similarly, the rise of contracts of adhesion corroborates the realists’ observations on contract law, because boilerplate transcends the usual framework by overshadowing the individuality of parties and reflecting the impersonality of the market within the institution of contract.⁵⁷ Next to such specific fields of application, the deeper shortcomings of formal contract law that realism as a jurisprudential movement laid bare are too heterogeneous to be mitigated by a single legislative act, specifically because a central tenet of the realist project was precisely to highlight the decay of unity in contract law. More specifically, only rather small parts of realist scholarship even aimed at the legislator, while others were directed at courts or—in the most frequent scenario—gathering information on the legal process irrespective of a peculiar addressee and oftentimes even highlighting the relative insignificance of formal legal actors in parliaments and court chambers.⁵⁸

II. The Realist Heritage: Diverging Trajectories

Despite the transnational character of the realist movement, the mark left by the realist tradition on contract law paradigms varies considerably between and within Europe and the US. This becomes clear in a comparative socio-legal analysis of the changing paradigms of contract over the twentieth century until today.⁵⁹ In UK and US Common Law, realism has facilitated and

⁵²*Id.*

⁵³*Id.* at 720–21. See Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

⁵⁴Morris R. Cohen, *The Basis of Contract*, 56 HARV. L. REV. 553 (1933).

⁵⁵The ongoing role of law on “illegal” markets is similarly unaddressed in moral debates around the limits of marketization of certain commodities. See, e.g., DEBRA SATZ, WHY SOME THINGS SHOULD NOT BE FOR SALE: THE MORAL LIMITS OF MARKETS (2012). Empirical studies suggest that “illegal” markets operate on the basis of replicated forms of normativity and enforcement that realists should study. Cf. THE ARCHITECTURE OF ILLEGAL MARKETS: TOWARDS AN ECONOMIC SOCIOLOGY OF ILLEGALITY IN THE ECONOMY (Jens Beckert & Matias Dewey eds., 2017).

⁵⁶Katharina I. Schmidt, *Law, Modernity, Crisis: German Free Lawyers, American Legal Realists and the Transatlantic Turn to “Life,” 1903-1933*, 39 GERMAN STUD. REV. 121 (2016).

⁵⁷Kessler, *supra* note 39, at 633 (referring to the “high price” paid by society “for the luxury of an apparent homogeneity in the law of contracts”).

⁵⁸Marc Galanter, *Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law*, 13 J. LEGAL PLURALISM & UNOFFICIAL L. 1 (1981).

⁵⁹On such a methodology, see Annelise Riles, *Comparative Law and Socio-legal Studies*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW 772 (Mathias Reimann & Reinhard Zimmermann eds., 2d ed., 2019); David Nelken, *Comparative*

encouraged socio-legal perspectives on contract law with varying leading disciplinary references over time. The most salient contestation comes from a recent surge in moral contract theories,⁶⁰ not from mere doctrinalism. Turning to the UK context more specifically, it is remarkable that both pioneers of a regulatory approach to contract⁶¹ and of a more recent “legal institutionalism”⁶² develop their views with regard to UK examples.

In his influential monograph of 1999, Hugh Collins formulates avenues for an understanding of contract that does justice to forty years of empirical studies since Macaulay, and thus moves beyond a “closed” legal doctrinal perspective. He discusses contract as a legal institution in a state of flux, undergoing a metamorphosis from the formalism of UK orthodox doctrine⁶³ to a contextual support of parties’ manifold projects in business and beyond. Collins develops a theory that collapses the distinction between private law and regulation as contract itself becomes a realm of regulation, both used for regulatory purposes and endowed with regulatory effects. He locates contract as a “hybrid” between discourses of law, economics, and sociology of business, and decidedly links Macaulay’s and Macneil’s contribution to a systems theory conceptualization of law as a communicative system. Consequently, economic, social, and legal inroads to contract are closely entangled, and it becomes the office of the judge to prove awareness of the multi-sidedness of a case. Unlike some of his critics,⁶⁴ Collins does not stop at the point of acknowledging the practical difficulties that such ambitions for judicial reasoning pose. The reconstruction of those principles and reasonable expectations that nurture parties’ cooperation can be inferred from a theory-based understanding of parties’ intentions, notably, with recourse to models of complex transactions in economic sociology.⁶⁵ Here, Collins distinguishes himself from scholarship on “relational” contracting.⁶⁶ Unlike Macneil, who interprets contractual behavior in light of a predetermined set of “types of transactions,” Collins seeks to identify the “normative points of reference that guide behavior,” hence the specific contractual project undertaken by the parties. The more robust judicial entitlement to considerations of distributive justice⁶⁷ is thus grounded in a “sociological jurisprudence”⁶⁸ that uses both substantive and procedural mechanisms of contract doctrine to mitigate the “alienation” of the facts of a case and the subversion of extra-contractual norm systems between the parties when being translated into legal categories. Overall, Collins’ concern with jeopardizing social bonds and atypical cooperative projects translates the realist project to contemporary business reality, although the exclusivity of business as a field governed by contract seems reductive.

“Legal institutionalism” may serve as a second example of a mode of legal thought developed with a view to UK Common Law that has strong allegiance to a realist pedigree. It uses an

Sociology of Law, in AN INTRODUCTION TO LAW AND SOCIAL THEORY 329 (Reza Banakar & Max Travers eds., 2002); Naomi Creutzfeldt et al., *Introduction: Exploring the Comparative in Socio-legal Studies*, 12 INT’L J.L. CONTEXT 377 (2016). For a synthesis, see DAVID CAMPBELL, LINDA MULCAHY & SALLY WHEELER, CHANGING CONCEPTS OF CONTRACT (David Campbell, Linda Mulcahy & Sally Wheeler eds., 2013).

⁶⁰In the aftermath of Charles Fried, see CHARLES FRIED, CONTRACT AS A PROMISE: A THEORY OF CONTRACTUAL OBLIGATION (1981).

⁶¹HUGH COLLINS, REGULATING CONTRACTS (1999).

⁶²Notably, see Simon Deakin et al., *Legal Institutionalism: Capitalism and the Constitutive Role of Law*, 45 J. COMP. L. & ECON. 188 (2017); KATHARINA PISTOR, THE CODE OF CAPITAL: HOW THE LAW CREATES WEALTH AND INEQUALITY (2019).

⁶³Collins states that the US Uniform Commercial Code and the Restatement (Second) of Contracts have allowed legal formalism to disintegrate much faster than in the UK. See COLLINS, *supra* note 61, at 199.

⁶⁴John Gava & Janey Greene, *Do We Need a Hybrid Law of Contract? Why Hugh Collins is Wrong and Why it Matters*, 63 CAMBRIDGE. L.J. 605, 616–19 (2004).

⁶⁵Hugh Collins, *The Research Agenda for Implicit Dimensions of Contract*, in IMPLICIT DIMENSIONS OF CONTRACT 1 (David Campbell et al. eds., 2003).

⁶⁶See *infra* Section C.

⁶⁷For a recent reconceptualization of distributive justice with regard to private law, see Hanoch Dagan & Avihay Dorfman, *Poverty and Private Law: Beyond Distributive Justice* (June 27, 2020), available at <https://ssrn.com/abstract=3637034>.

⁶⁸See DIE FÄLLE DER GESELLSCHAFT: EINE NEUE PRAXIS SOZIOLOGISCHER JURISPRUDENZ (Bertram Lomfeld ed., 2017).

interwoven framework from economic sociology, institutional economics, and political economy to identify certain institutions as a backbone and central characteristic of capitalism and highlights the role of law in establishing and maintaining them.⁶⁹ Institutions mark the settings of human interaction which are governed by respective operating rules. Institutions, here, appear as “part and parcel of any mode of production”⁷⁰; they shape, rather than merely follow, modes of production. For instance, legal institutionalism points out that technology can only become a central driving force of economic innovation when coupled with a supportive set of property rights, finance, and other legal parameters. In this, “legal institutionalism” builds on previous institutional accounts of law, and both transposes and profoundly sharpens the institutional economics’ insights into law.⁷¹ Unlike Williamson,⁷² who, drawing on Coase,⁷³ established the role of law in building economic institutions but saw law—particularly private ordering—as essentially serving efficiency between firms and markets, “legal institutionalists” claim a more holistic understanding of the law and its basic concepts as social and economic institutions. While taking private ordering in its current pervasiveness and practical appeal seriously, “legal institutionalists” likewise reflect on the power structure implicated in private ordering and see the state as contested, yet still an irreducible element to the very concept of law. Legal rules are evaluated not solely in their influence on rational acting individuals, but in their institutional effects, namely those effects that, under realistic assumptions arise from the aggregate use of the particular rights and entitlements that a legal rule confers. In this light, for instance, the circulation of knowledge in society crucially depends on the design of institutions, among them legal institutions such as intellectual property and competition law.⁷⁴

In contrast, in Germany, it was the realist tradition that introduced a thicker concept of “contract” compared to the rather marginal idea embodied in the German Civil Code of 1900. Not only was the codification under the influence of German idealism with its three freedoms of contract, property, and the freedom to make a will, but legal sociology was also still in its infancy and unable to call for a more contextualized assessment of contract. In fact, in the eyes of contemporary critics like Otto von Gierke,⁷⁵ the codification paid insufficient reverence to the Germanicist tradition, which had developed independently of a nation state for more than a century and thus incorporated collective effects of individual rights into the idea of freedom of contract. Still, the realist heritage was particularly ephemeral in Germany because communitarian thinking was discredited and again fell into oblivion in the post-war period. Consequently, unlike in the Common Law trajectory, contract law’s evolution in the second half of the twentieth century did not follow a sequence of changing interdisciplinary references. Rather, it was structured around the analytical legal typology of a “material” and “reflexive” law coupled with a pivotal role given to the “constitutionalization” of contract law. Franz Wieacker’s eminent study on the “social model” of the

⁶⁹Deakin et al., *supra* note 62.

⁷⁰Geoffrey M. Hodgson, *Conceptualizing Capitalism: A Summary*, 20 *COMPETITION & CHANGE* 37 (2015).

⁷¹Dick Ruiters, *Economic and Legal Institutionalism: What can They Learn From Each Other*, 5 *CONST. POL. ECON.* 99 (1994).

⁷²OLIVER E. WILLIAMSON, *THE ECONOMIC INSTITUTIONS OF CAPITALISM* 68 (1985); Oliver E. Williamson, *Transaction-Cost Economics: The Governance of Contractual Relations*, 22 *J.L. & ECON.* 233 (1979).

⁷³Ronald Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386 (1937); RONALD COASE, *THE FIRM, THE MARKET, AND THE LAW* (1988).

⁷⁴C.f. Dan Wielsch, *Private Governance of Knowledge: Societally-Crafted Intellectual Properties Regimes*, 20 *IND. J. GLOBAL LEGAL STUD.* 907 (2013).

⁷⁵OTTO VON GIERKE, *DIE SOZIALE AUFGABE DES PRIVATRECHTS* 12 (1889). See also Olivier Jouanjan, *Le souci du social: Le “moment 1900” de la doctrine et de la pratique juridiques*, in *LE “MOMENT 1900”*. CRITIQUE SOCIALE ET CRITIQUE SOCIOLOGIQUE DU DROIT EN EUROPE ET AUX ÉTATS-UNIS 13 (Olivier Jouanjan & E. Zoller eds., 2015); TILMAN REGEN, *DIE SOZIALE AUFGABE DES PRIVATRECHTS: EINE GRUNDFRAGE IN WISSENSCHAFT UND KODIFIKATION AM ENDE DES 19 JAHRHUNDERTS* (2001).

grand codifications⁷⁶ is firmly rooted within legal analysis. A “social model” for Wieacker crystallizes typically implicit assumptions about society, markets, and the realization of freedom that underlies legal thinking and court practice. Despite its double nature as normative and descriptive, “social models” are not understood as inroads for interdisciplinary, socio-legal work, but serve as a basis for a historical and philosophical reconstruction of legal developments since the entry into force of the German Civil Code.⁷⁷ This orientation shines through in the structure of leading discussions of German contract law calibrated around the extent and justification of private autonomy⁷⁸ as a vantage point, while socio-legal perspectives on that same topic remained of rather marginal standing.⁷⁹ Even the extensive discussion of shortcomings of the regulatory or welfare state—a prime domain, in principle, for socio-legal analysis—was conducted through the legal lens of private autonomy and the related risks of normalizing effects and petrification of social roles.⁸⁰

Interestingly, the innovation⁸¹ provided for by the growing influence of fundamental rights on contract law⁸² seems to have further solidified a reasoning that is at least not outspokenly interdisciplinary. Even if not positivist in a strict sense, and vested with the potential to foster self-reflection within contract law,⁸³ the “constitutionalization” of contract law has barely opened up a new disciplinary repertory. Instead, recurring *topoi* pertain to the alleged risk of a levelling down of an existing hierarchy of norms and a venturesome turn in the theory of fundamental rights.⁸⁴ This partly stems from the fact that private autonomy as guaranteed under Art. 2(1) of the Grundgesetz is conceived predominantly in individualistic terms and not socially situated and mediated through the power of social institutions. The liberal epistemology of fundamental rights that is common for their role in curtailing state power complicates the accommodation of sociological theories of fundamental rights⁸⁵ that are based on non-ideal and situated theories of society.

⁷⁶FRANZ WIEACKER, DAS SOZIALMODELL DER KLASSISCHEN PRIVATRECHTSGESETZBÜCHER UND DIE ENTWICKLUNG DER MODERNEN GESELLSCHAFT (1953).

⁷⁷See also MARIETTA AUER, MATERIALISIERUNG, FLEXIBILISIERUNG, RICHTERFREIHEIT 27 (2005).

⁷⁸Notably, see Ludwig Raiser, *Vertragsfunktion und Vertragsfreiheit*, in 1 FS ZUM HUNDERTJÄHRIGEN BESTEHEN DES DEUTSCHEN JURISTENTAGES 1860–1960 101 (1960); Ludwig Raiser, *Vertragsfreiheit heute*, in JURISTENZEITUNG 1 (1958); I WERNER FLUME, ALLGEMEINER TEIL DES BÜRGERLICHEN RECHTS, DAS RECHTSGESCHÄFT 1 (4th ed. 1992).

⁷⁹But see WALTER SCHMID, ZUR SOZIALEN WIRKLICHKEIT DES VERTRAGS (1983).

⁸⁰See, e.g., JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 413 (William Rehg trans., 1996). Similarly, the disciplinary pluralism in the work of Rudolf Wiethölter, informed through the triad of critical theory, systems theory, and political economy, while decidedly inviting social science models in private and business law, does so with cautious concern for the legitimating patterns of dominant legal thought. Cf. Ruldolf Wiethölter, *Sozialwissenschaftliche Modelle im Wirtschaftsrecht*, 18 KRITISCHE JUSTIZ 126 (1985).

⁸¹On such effects of fundamental rights, see GERRIT HORNING, GRUNDRECHTSINNOVATIONEN (2015).

⁸²For leading cases, see BVerfG, 1 BVR 26/84, Feb. 7, 1990, <https://dejure.org/dienste/vernetzung/rechtsprechung?Gericht=BVerfG&Datum=07.02.1990&Aktenzeichen=1%20BvR%2026%2F84>; BVerfG, 1 BVR 567/89, 1044/89, Oct. 19, 1993, <https://dejure.org/dienste/vernetzung/rechtsprechung?Gericht=BVerfG&Datum=19.10.1993&Aktenzeichen=1%20BvR%20567%2F89>; BVerfG, 1 BVR 3080/09, Apr. 11, 2018, <https://dejure.org/dienste/vernetzung/rechtsprechung?Gericht=BVerfG&Datum=11.04.2018&Aktenzeichen=1%20BvR%203080>. Among the abundant literature, see also Claus-Wilhelm Canaris, *Verfassungs- und europarechtliche Aspekte der Vertragsfreiheit*, in WEGE UND VERFAHREN DES VERFASSUNGSLEBENS: Festschrift für Peter Lerche zum 65. Geburtstag 873 (Peter Badura & Rupert Scholz eds. 1993); Stefan Grundmann, *Constitutional Values and European Contract Law—an Overview*, in CONSTITUTIONAL VALUES AND EUROPEAN CONTRACT LAW 3 (Stefan Grundmann ed., 2008); Felix Maultzsch, *Die Konstitutionalisierung des Privatrechts als Entwicklungsprozess*, JURISTENZEITUNG 1040 (2012).

⁸³Dan Wielsch, *Grundrechte als Rechtfertigungsgebote im Privatrecht*, 213 ARCHIV FÜR DIE CIVILISTISCHE PRAXIS 718 (2013).

⁸⁴Matthias Kumm, *Who is Afraid of the Total Constitution? Constitutional Rights and Principles and the Constitutionalization of Private Law*, 7 GERMAN L.J. 341 (2006).

⁸⁵See NIKLAS LUHMANN, GRUNDRECHTE ALS INSTITUTION (6th. ed. 2019). Cf. Gunther Teubner, *Ein Fall von struktureller Korruption? Die Familienbürgschaft in der Kollision unverträglicher Handlungslogiken* (BVerfGE 89, 214 ff.), 83 KRITV 338 (2000); Gert Verschraegen, *Human Rights and Modern Society: A Sociological Analysis From the Perspective of Systems Theory*, 29 J.L. & SOC'Y 258 (2002).

C. The Interdisciplinary Matrix of Legal Analysis and the Conceptualization of “Relational” Contracting

One of contract theory’s recurring threads is to conceptualize new modes of economic organization and the related contractual devices. Contractual practice often seems to be the first mover, yet ultimately legal practice can only express itself within the available legal imaginaries of contract, including those originating in practice. As a result, the most adequate depiction seems to be that of a co-evolution between contract law and economic organization based on division of labor, specialization, and cooperation.⁸⁶ Arguably, the most significant evolutionary step of the second half of the twentieth century in the field, and an ongoing domain of scholarly innovation, is the discovery of “relational” contracting, that is, the specificity of contracts related to long-term and/or multi-party projects that often use network-types of organization.⁸⁷ Fittingly for a mode of contracting that lies at the heart of a global trend towards accelerated and fluid modes of production,⁸⁸ the conceptualization of “relational” contracts has been a truly interdisciplinary and cross-jurisdictional endeavor.⁸⁹ Indeed, critical contributions stem from lawyers, institutional economists, and economic sociologists, to name just the central proponents. Today, “relational” contract theory finds at least as much resonance outside of law, notably in management,⁹⁰ as it does within the legal academy.

I. The Discovery of “Relational” Contracting: From Socio-Legal Studies to Institutional Economics

As a legal concept,⁹¹ “relational” contracts have been developed in a critical dialogue between the lawyers Stewart Macaulay and Ian Macneil. Both works—while not identical in their interdisciplinary orientation—have become the new “orthodoxy” within socio-legal scholarship on contracts⁹² and took inspiration from legal realism.⁹³ Stewart Macaulay’s empirical study of the manufacturing business in Wisconsin in the 1960s⁹⁴—conducted during a time of flourishing socio-legal research—marked a primer for the study of relational contracting. It challenged two important standing assumptions of lawyers at the time, namely that legal design is crucial

⁸⁶Gunther Teubner, *Idiosyncratic Production Regimes: Co-Evolution of Economic and Legal Institutions in the Varieties of Capitalism*, in *THE EVOLUTION OF CULTURAL ENTITIES: PROCEEDINGS OF THE BRITISH ACADEMY* 161 (Michael Wheeler et al. eds., 2002); IGLP Law and Global Production Working Group, *The Role of Law in Global Value Chains: A Research Manifesto*, 4 *LONDON REV. INT. L.* 57 (2016); Klaas Hendrik Eller, *Is ‘Global Value Chain’ a Legal Concept? Situating Contract Law in Discourses around Global Production*, 16 *EUR. REV. CONT. L.* (2020).

⁸⁷Another paradigm case, yet from a totally different field of private law, is marriage. *C.f.* Elizabeth S. Scott & Robert E. Scott, *Marriage as Relational Contract*, 84 *VAND. L. REV.* 1225 (1998).

⁸⁸*See, e.g.*, Stefano Ponte & Timothy Sturgeon, *Explaining Governance in Global Value Chains: A Modular Theory-Building Effort*, 21 *REV. INT. POL. ECON.* 195 (2014); Joonkoo Lee & Gary Gereffi, *Global Value Chains, Rising Power Firms and Economic and Social Upgrading*, 11 *CRITICAL PERSP. INT. BUS.* 319 (2015).

⁸⁹Stefan Grundmann, *Towards a Private Law Embedded in Social Theory: Eine Skizze*, 24 *EUR. REV. PRIV. L.* 409 (2016).

⁹⁰*See, e.g.*, Donald J. Schepker et al., *The Many Futures of Contracts: Moving Beyond Structure and Safeguarding to Coordination and Adaptation*, 40 *J. MGMT.* 193 (2014); Bjoern Ivens & Keith Blois, *Relational Exchange Norms in Marketing: A Critical Review Macneil’s Contribution*, 4 *MARKETING THEORY* 239 (2004).

⁹¹Hugh Collins, *Is a Relational Contract a Legal Concept?*, in *CONTRACT IN COMMERCIAL LAW* 37 (James Edelman et al. eds., 2016).

⁹²Sally Wheeler, *Visions of Contract*, 44 *J.L. & SOC’Y* 74 (2017).

⁹³*But see*, Robert E. Scott, *The Case for Formalism in Relational Contract*, 94 *Nw. U. L. REV.* 847 (2000).

⁹⁴Stewart Macaulay, *Non-Contractual Relations in Business—a Preliminary Study*, 28 *AM. SOC. REV.* 55 (1963). For later discussions of his own work, see Stewart Macaulay, *Long-Term Continuing Relations: The American Experience Regulating Dealerships and Franchises*, in *FRANCHISING AND THE LAW—DAS RECHT DES FRANCHISING: THEORETICAL AND COMPARATIVE APPROACHES IN EUROPE AND THE UNITED STATES* 179 (Christian Joerges ed., 1991); Stewart Macaulay, *Relational Contracts: Floating on a Sea of Custom? Thoughts About the Ideas of Ian Macneil and Lisa Bernstein*, 94 *Nw. U. L. REV.* 775 (2000); David Campbell, *What Do We Mean by the Non-Use of Contract*, in *REVISITING THE CONTRACTS SCHOLARSHIP OF STEWART MACAULAY* 159 (Jean Braucher et al. eds., 2003).

in a transaction, and that thinking about economic organization could be aligned with the Coasian⁹⁵ dichotomy of market and firm correlating with contract and organization. Macaulay's series of interviews and reviews of contract terms led him to conclude that the degree of meticulous planning and recourse to legal sanctions in business relations is surprisingly low. Contracts—and contract lawyers—oftentimes seem to hinder rather than enable transactions by being at odds with the logic of the social relation that surrounds them. The underestimated non-contractual elements include business customs, good faith relationships, past transactions, personal and professional relations between actors across businesses, as well as mechanisms of trust, reciprocity, and reputation. One company even estimated that the majority of its contracts might be unenforceable and yet would not hinder its business.⁹⁶ Macaulay concludes that the scope and type of planning is unlike the one found in classical and neo-classical theory. A more thorough planning manifests itself with regard to the core obligations of the contract and existential risks.⁹⁷ Yet, instead of substantive solutions, legal rules will often be limited to deciding on internal procedures and decision-making authority. Furthermore, within a company, management will be leaning less towards legal planning than accountants and legal departments, whose very role is a formal legal assessment and who will often be unaware of or skeptical towards inter-party dynamics at the management level. The picture shifts after termination of a contract, in other words when the continuation of a business relation is no longer a promising trajectory.

Macneil, in a seminal article and subsequent work,⁹⁸ has further developed the study of relational contracts, sharpened its definition, and expanded its scope, conceptualization, and disciplinary portfolio. First, Macneil went beyond Macaulay by introducing network-patterned multi-party settings that later became a primary case of application of relational contracts, especially spurred by the economic sociology of networks represented, for example, by Powell.⁹⁹ Second, he integrated “relational” contracts into an abstract typology of phases of contract law's development, ranging from classical via neo-classical to relational contract law.¹⁰⁰ The features Macneil understands as distinctive for relational contracting become clear in this confrontation: Classical contract law governs discrete “spot” transactions and focuses on locking parties' consensus at a given time into a perpetual state (“presentation”), abstracting from surrounding factors, uncertainties, and externalities. Neo-classical contract law overcomes some of the rigors of its predecessor by situating contract formation in time, including provisions that govern adjustments, through indexes as external references, good faith or renegotiation, or disputes clauses. Ultimately, however, neo-classical contract law continues to see the formalized consensus as the anchoring point of a transaction. The third “system” is what Macneil refers to as “relational contract law.” Such contracts feature an organizational dimension that distinguishes it from an exchange relation.¹⁰¹ They are constitutive of a “minisociety”¹⁰² and thus require rules to

⁹⁵Coase, *supra* note 73.

⁹⁶Macaulay, *supra* note 94.

⁹⁷*Id.*

⁹⁸Ian Macneil, *The Many Futures of Contracts*, 47 S. CAL. L. REV. 691 (1974). As scholarship under the label of “relational” contracting grew, Macneil himself grouped his work under the headings of a “new social contract” and later “essential contract theory.” See IAN MACNEIL, *THE NEW SOCIAL CONTRACT: AN INQUIRY INTO MODERN CONTRACTUAL RELATIONS* (1980); Ian Macneil, *Values in Contract: Internal and External*, 78 NW. U. L. REV. 340 (1983); Ian Macneil, *Contracting Worlds and Essential Contract Theory*, 9 SOC. & LEGAL STUD. 431 (2000).

⁹⁹Walter W. Powell, *Neither Market nor Hierarchy—Network Forms of Organization*, 12 RES. ORGANIZATIONAL BEHAV. 295 (1990).

¹⁰⁰For a discussion, compare Jaakko Salminen, *Towards a Genealogy and Typology of Governance Through Contract Beyond Privity*, 16 EUR. REV. CONT. L. 25 (2020) (comparing Macneil, Williamson, and conceptualizations around global value chains [GVCs]).

¹⁰¹Drawing on these characteristics, see THE ORGANIZATIONAL CONTRACT: FROM EXCHANGE TO LONG-TERM NETWORK COOPERATION IN EUROPEAN CONTRACT LAW (Stefan Grundmann et al. eds., 2013).

¹⁰²Ian Macneil, *Contracts: Adjustment of Long-Term Economic Relations under Classical, Neoclassical, and Relational Contract Law*, 72 NW. U. L. REV. 854, 901 (1978).

harmonize conflict between the more discrete and long-term behavior in order to preserve the relation against threats of opportunism. Accordingly, without vanishing altogether, the “original consent” cannot stand unquestioned as the ultimate reference, but will need to be balanced with competing goals of safeguarding, coordination, and adaptation. In short, “relational” contracts pursue no single purpose, but become flexible multi-purpose vehicles.¹⁰³

Methodologically, Macneil broadened the interdisciplinary scope of the study of “relational” contracts by including economic, behavioral, and historical elements, thereby allowing for an easier reception within nascent institutional economic literature, especially in the work of Oliver E. Williamson. Williamson,¹⁰⁴ along the lines of Coase’s introduction of transaction costs, drew on Macneil’s typology to identify the most suitable governance structure. In this, his analysis aims at curbing the specific vulnerability of long-term relations by addressing three causes. The stability of a long-term, relational contract hinges on the degree of asset specificity or relation-specific investment—forming part of “sunk costs”—, the degree of uncertainty between parties, and the frequency of individual interaction and transaction within the broader frame that is the relational contract.

II. Developing “Relational” Contract Law and the Politics of Method: The Case of UK and US Common Law

Relational contracting has inspired a broad interdisciplinary legal literature on specific contractual arrangements, normative regimes, and industry studies. While the scholarly debate outside of law—for example in management, sociology of networks, institutional economics, critical theory, and anthropology—is genuinely global, the legal debate is mostly global in its analytical streams—such as on concepts of “contract governance”¹⁰⁵—yet fragmented along boundaries between jurisdictions or at least legal systems in its doctrinal processing. Because models and knowledge from other disciplines cannot simply be “applied” doctrinally, but necessarily undergo a process of translation,¹⁰⁶ patterns of reception of “relational” contracting allow some cautious remarks on the inclination of a legal order towards interdisciplinary legal work generally speaking, and on the disciplines that find most voice within doctrinal scholarship. Even if it is intuitive and widely accepted that—unlike in the formal, classical model of contract—“non-contractual” elements play an important part of the story, it remains to be seen how they should be identified for the purpose of legal analysis, and even more so, how law might contribute to strengthen those complementary elements. These questions cannot be solved doctrinally by means of legal systematization alone, but are a genuine field of interdisciplinary inquiry. Though for long, the discussion centered around the question of the influence of “economics” versus “sociology,” the latter finding support and being promulgated in socio-legal studies, today’s analysis needs to be attentive to inner disciplinary debates. For legal reception, some of the most salient recent debates in economics—neo-classical versus behavioral,¹⁰⁷ or in sociology—constructivist versus positivist—suggest very different understandings of law and its regulatory function.

“Relational contracting” naturally presents itself as a focal point of research for numerous disciplines. It shifts the vantage point of analysis from contracting parties with a preconfigured set of preferences to the emerging social relation. Cautious to avoid a simplifying understanding of an “efficient” design of complex relations, it highlights the social mechanisms that reinforce or jeopardize cooperation in long-term interactions. Just like the *Böckenförde dilemma* has observed with

¹⁰³Mika Viljanen, *Actor-Network Theory Contract Theory*, 16 EUR. REV. CONT. L. 74 (2020).

¹⁰⁴WILLIAMSON, *supra* note 72.

¹⁰⁵CONTRACT GOVERNANCE: DIMENSIONS IN LAW AND INTERDISCIPLINARY RESEARCH (Stefan Grundmann et al. eds., 2015).

¹⁰⁶See Gunther Teubner, *Rechtswissenschaft und-praxis im Kontext der Sozialtheorie*, in RECHT UND SOZIALTHEORIE: INTERDISZIPLINÄRES DENKEN IN RECHTSWISSENSCHAFT UND—PRAXIS 145 (Stefan Grundmann & Jan Thiessen eds., 2014).

¹⁰⁷See, e.g., Oren Bar-Gill, *The Behavioral Economics of Consumer Contracts*, 93 MINN. L. REV. 749 (2007); Richard A. Epstein, *The Neoclassical Economics of Consumer Contracts*, 92 MINN. L. REV. 803 (2007).

regard to the liberal secularized state, contract also—and most specifically complex contracts and private ordering—“lives by prerequisites which it cannot guarantee itself.”¹⁰⁸

Because both US and UK Common Law adhere to an ideal of “completeness” of contracts, treating a social relation, not individual parties’ will, as a unit of analysis was a far-reaching step to make.¹⁰⁹ The doctrinal reaction to the discovery of “relational” contracts was to equate relational contracts with “incomplete” contracts that suggest a role of the state in regulating or “completing” such contracts.¹¹⁰ This task strongly alludes to one’s normative presuppositions and thus takes different directions depending on whether, for example, “efficiency,” “autonomy,” or “distributive justice” form the goal of regulation, and depending on the status of bottom-up norm creation, for example, through social groups,¹¹¹ business communities, or trading partners.¹¹² Macaulay, for instance, holds that private parties develop fully-fledged, complex normative regimes that make use of the parties’ proximity and expertise to guarantee for a constant adjustability. For him, such “private government”¹¹³ neither can nor should be easily influenced, let alone replaced, by state intervention—an idea that has lost much of its innocence in later years.¹¹⁴

Having debuted in socio-legal “law in action” from Wisconsin, “relational contracting” has made its way through social norms theory and institutional and behavioral economics to the present day where three diverging impulses seem to reign. One is an empirical micro-modelling approach that tests the hypothesis of behavioral and institutional economic models on the basis of simplified concepts of contract.¹¹⁵ Main fields of application are to date specialized fields, such as consumer, contract, and credit law. The second is more closely linked to sociological theories of networks and social systems, and takes a critical distance towards an agency-driven legal model.¹¹⁶ Finally, a third model is barely a model of “relational” contracting properly speaking, but rather a movement that counters the very project of embedding contract and commenced with Charles Fried’s “Contract as Promise.”¹¹⁷

III. From “Relational Contracts” to “Networks”: German Contract Law and the Criticality of Sociological Jurisprudence

German contract law has never developed a thick notion of a “relational contract” and has maintained reservations against the concept, both among doctrinal¹¹⁸ and socio-legal scholars.¹¹⁹ These

¹⁰⁸Ernst-Wolfgang Böckenförde, *Die Entstehung des Staates als Vorgang der Säkularisation*, in STAAT, GESELLSCHAFT, FREIHEIT: STUDIEN ZUR STAATSTHEORIE UND ZUM VERFASSUNGSRECHT 41–64 (1976).

¹⁰⁹See Jay M. Feinman, *The Reception of Ian Macneil’s Work on Contract in the USA*, in THE RELATIONAL THEORY OF CONTRACT: SELECTED WORKS OF IAN MACNEIL 59 (David Campbell & Ian Macneil eds., 2001); Peter Vincent-Jones, *The Reception of Ian Macneil’s Work on Contract in the UK*, in THE RELATIONAL THEORY OF CONTRACT: SELECTED WORKS OF IAN MACNEIL 67 (David Campbell & Ian Macneil eds., 2001); David Campbell & Hugh Collins, *Discovering the Implicit Dimensions of Contracts*, in IMPLICIT DIMENSIONS OF CONTRACT 25 (David Campbell et al. eds., 2003).

¹¹⁰C.f. Scott, *supra* note 93.

¹¹¹See Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986).

¹¹²See, e.g., Matthew Jennejohn, *The Private Order of Innovation Networks*, 68 STAN. L. REV. 281 (2016); Ronald J. Gilson et al., *Braiding: The Interaction of Formal and Informal Contracting in Theory, Practice and Doctrine*, 110 COLUM. L. REV. 1377 (2010).

¹¹³Stewart Macaulay, *Private Government*, in LAW AND SOCIAL SCIENCE 445 (Leon Lipson & Stanton Wheeler eds., 1986).

¹¹⁴ELIZABETH ANDERSON, *PRIVATE GOVERNMENT: HOW EMPLOYERS RULE OUR LIVES (AND WHY WE DON’T TALK ABOUT IT)* (2017).

¹¹⁵For an overview, see Zev Eigen, *Empirical Studies of Contract*, 8 ANN. REV. L. & SOC. SCI. 291 (2012); Russell Korobkin, *Empirical Scholarship in Contract Law: Possibilities and Pitfalls*, U. ILL. L. REV. 1033 (2002).

¹¹⁶Hugh Collins, *Networks and Comparative Sociological Jurisprudence*, in SOZIOLOGISCHE JURISPRUDENZ. FESTSCHRIFT F. GUNTHER TEUBNER ZUM 65. GEBURTSTAG 249 (Gralf-Peter Callies et al. eds., 2009).

¹¹⁷FRIED, *supra* note 60. For an overview of recent US scholarship in the field, see Eyal Zamir, *Contract Law and Theory: Three Views of the Cathedral*, 81 U. CHI. L. REV. 2077 (2014); Herrine, *supra* note 11.

¹¹⁸For an overview, compare II MICHAEL MARTINEK, *STAUDINGER COMMENTARY* § 662, ¶¶ 68–88 (14th ed. 2006); WALTER DORALT, *LANGZEITVERTRÄGE* (2018).

¹¹⁹Gunther Teubner, *Contracting Worlds: The Many Autonomies of Private Law*, 9 SOC. & LEGAL STUD. 399 (2006).

reservations had two main origins. In part, they were linked to peculiar features of German contract law, which, going back to organicist Germanic theories such as those of Otto von Gierke,¹²⁰ echoes a “relational” dimension already in its key concept of *Schuldverhältnis* (obligation).¹²¹ Interestingly, reference to Gierke was made in the US specifically by realists going back to Roscoe Pound¹²² in order to oppose the then-flourishing reception of the Continental European will theory, and as part of a broader movement of restoration of US contract law.¹²³ It has therefore been argued that “relational” contract law conceptualizes adjustments that are necessary predominantly under the Common Law.¹²⁴ It contributed to this impression that the German reception focused on the potential need for a new “contract type” of *Dauerschuldverhältnis* (long-term contractual relation) instead of fleshing out relational elements in existing “contract types.”¹²⁵ Put this way, existing leverage through general clauses, third party beneficiaries, or “piercing the veil” was overlooked in its potential to accommodate complex networked patterns.¹²⁶ The second reason for skepticism in the German debate arose from a critique of an all-too-easy construction of social embeddedness as stable and holistic that was suggested by the social theory underlying “relational” contracting and its interdisciplinary inspirations.¹²⁷ The underlying, and at times outspoken, debate¹²⁸ centers around methodologies of delimitating the social context to a contract and is accordingly particularly illustrative for the present context. The conceptual move of “embedding” contract in society will differ in scale and manner depending on which social science discipline prevails in informing legal analysis. Both welfare and institutional economics emphasize an efficient design between parties, while effects on third parties that result from the non-irritability and closure of multilayered networks are investigated by social theories that take complexity as a starting point. Systems Theory¹²⁹ in particular here offers its critical gist by shedding light on the relation between business networks and their social environment.¹³⁰ Unlike in an organization, networks lack centralized institutions and procedures of observing and reflecting their environmental effects. Law’s ability to perceive and effectively curtail such effects therefore hinges upon selecting interdisciplinary references beyond the micro-level.¹³¹

¹²⁰See GIERKE, *supra* note 75.

¹²¹Jürgen Oechsler, *Wille und Vertrauen im privaten Austauschvertrag*, 60 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 91, 93 (1996).

¹²²Roscoe Pound, *The End of Law as Developed in Juristic Thought*, 30 HARV. L. REV. 201 (1917); ROSCOE POUND, *THE SPIRIT OF THE COMMON LAW* (1921).

¹²³POUND, *supra* note 122, at 114–17.

¹²⁴Oechsler, *supra* note 121, at 93 (“late reimport” into German law). For a synoptical comparison of Common and Civil Law systems, compare THOMAS LUNDMARK, *CHARTING THE DIVIDE BETWEEN COMMON AND CIVIL LAW* (2012).

¹²⁵DER KOMPLEXE LANGZEITVERTRAG: STRUKTUREN UND INTERNATIONALE SCHIEDSGERICHTSBARKEIT (Fritz Niklisch ed., 1986).

¹²⁶See GUNTHER TEUBNER, *NETZWERK ALS VERTRAGSVERBUND: VIRTUELLE UNTERNEHMEN, FRANCHISING, JUST-IN-TIME, IN SOZIALWISSENSCHAFTLICHER UND JURISTISCHER SICHT* (2004).

¹²⁷See Teubner, *supra* note 119.

¹²⁸*Id.*; 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 N.W. U. L. REV. 877 (2000); David Campbell, *The Limits of Concept Formation in Legal Science*, 9 SOC. & LEGAL STUD. 439 (2000).

¹²⁹Niklas Luhmann, *Temporalization of Complexity*, in *SOCIOCYBERNETICS* 95 (Johannes van der Zouwen & R. Felix Geyer eds., 1978).

¹³⁰See Gunther Teubner, *From “Economic Constitution I, II” to the “Self-justifying Law of Constitutional Law”: On the criticality of Rudolf Wiethölter’s Critical Systems Theory*, *ANCILLIA JURIS* 1 (2020); Andreas Fischer-Lescano, *Ironie der Autonomie: Die Rechtswissenschaft im Pakt mit der ökonomischen Macht*, 47 KRITISCHE JUSTIZ 414 (2014).

¹³¹KLAAS HENDRIK ELLER, *RECHTSVERFASSUNG GLOBALER PRODUKTION* (forthcoming, 2020).

D. Outlook: Path Dependencies of “Contract and Society” in Transnational Contract Governance

The methodological stakes are even higher when shifting to the transnational level. Contract is a pivotal trope of transnational ordering across various fields of social interaction.¹³² Contract here becomes immersed in the fault lines of globalization, that is, of enhanced self-referentiality of social systems unfolding against the backdrop of a hierarchical global political economy.¹³³ Because recourse to domestic democratic legitimation is cut off for the most part, contract theories need to come to grips with the role of the political. The very question of seeing the transnational realm and its power imbalances and more remote interconnectedness as a novel challenge to contract law depends on theoretical presuppositions that create path dependencies for debates within national jurisdictions. The phenomena of interest here cover the emergence of a fully-fledged transnational law of commercial contracts—“new *lex mercatoria*”—as well as, more generally, contracts as a governance mechanism and backbone of transnational social institutions of various types, enabled through the transnational reach of private autonomy.¹³⁴ The latter is exemplified, for example, by cross-boundary commercial and investment contracts, but also by the role of contract in transnational “private” ordering in fields as diversified as financial markets, sports, digital communication, or copyright. Here, contracting realities become disembedded from background justice provided for by nation states—irrespective of the claim that “private autonomy” might conceptually be granted only within a given legal order.¹³⁵ As soon as private law can no longer rely on a well-curated division of labor with a public regulatory framework to bridge it with concerns of common interest, a crucial element in formalist and neo-formalist contract theories falls apart and thereby shifts 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,¹³⁶ such stable political references become ultimately fictitious in the transnational realm. In other words, contracts form miniature transnational legal orders; they build communities and ultimately society at large—a task that is not mastered *en passant* by enabling and restricting individual transactions—but requires an attention to broader societal effects. The role of contract in animating global value chains,¹³⁷ for instance, illustrates how contract becomes an arena for matters of distribution, participation, and equality in the global realm¹³⁸—a role that reaches far beyond providing for an efficient design of buyer-seller relationships. This has deep methodological implications for contract law theories.

Scholarship on “relational” contracting has introduced a thinking about contracts as a tool for social, not merely interpersonal, ordering. Even though much more anonymous than in Macaulay’s local study of Wisconsin businesses, global trade relations rely on a comparable multi-layered web of norms encompassing custom, social norms—such as reputation and trust—and law.¹³⁹ However, the dominant approaches in the Common Law debate, rooted in welfare and institutional economics, appear increasingly problematic when transposed to the transnational level. In essence, they seek to guide legislators in the regulation of business contracts by

¹³²See ZUMBANSEN, *supra* note 4.

¹³³Klaas Hendrik Eller, *Transnational Contract Law*, in OXFORD HANDBOOK OF TRANSNATIONAL LAW (Peer Zumbansen ed., forthcoming 2020). For conceptualizations of “transnational law,” see generally GRAF-PETER CALLIESS & PEER ZUMBANSEN, *ROUGH CONSENSUS AND RUNNING CODE: A THEORY OF TRANSNATIONAL PRIVATE LAW* 27–152 (2010); Roger Cotterell, *What is Transnational Law?*, 37 L. & SOC. INQUIRY 500 (2012).

¹³⁴Horatia Muir Watt, *Party Autonomy in Global Context: An International Lawyer’s Take on the Political Economy of a Self-Constituting Regime*, in COMPARATIVE CONTRACT LAW, *supra* note 2, at 512.

¹³⁵HEIN KÖTZ, *VERTRAGSRECHT* ¶ 22 (2d ed. 2012) (“Vertragsfreiheit gilt freilich nur im Rahmen der Rechtsordnung.”).

¹³⁶For such a call, compare Martijn W. Hesselink, *Democratic Contract Law*, 11 EUR. REV. CONT. L. 81 (2015).

¹³⁷See Ponte & Sturgeon, *supra* note 88; Lee & Gereffi, *supra* note 88.

¹³⁸See Eller, *supra* note 86; Ioannis Kampaourakis, *Empiricism, Constructivism, and Grand Theory in Sociological Approaches to Law: The Case of Transnational Private Regulation*, in this issue.

¹³⁹THOMAS DIETZ, *INSTITUTIONEN UND GLOBALISIERUNG* (2010).

curtailing contract law to the maximization of parties' contractual surplus from transactions, while refraining from any other goal.¹⁴⁰ Besides the absence of a central legislator beyond the state, what is more problematic is the resulting lack of any embedding institution geared towards mediating a business rationale with public interests. The transnational character forms a blind spot in theories of "relational" contracting, appearing as a proxy for the general complexity of such contract regimes. This can be read as a direct outgrowth of the conceptual architecture of relational contract theory and has widely inhibited its influence in the field of transnational contract law. The more broadly received projects in transnational law perform an inward turn to contract law by fusing it with social theory to reflect upon its broader and conflicted social function. Especially promising is the theme of an inner "constitutionalization" of private law regimes, which was probed distinctively in Germany at the national level, in the interplay between private law and fundamental rights. From this perspective, theories of "societal constitutionalism"¹⁴¹ stand in direct lineage to a specific configuration of socio-legal research at the domestic level.

E. Conclusions

Across jurisdictions, the drive to account for the non-contractual elements and extra-contractual effects of contract law has been a leitmotif of contract law's development since at least the beginning of the twentieth century. This Article has examined the relation between normative and social science approaches, notably rooted in economics, economic sociology, and social theory in the genealogy of contract law. Contrasting the UK and US Common Law of contracts with developments under German law, it has been shown that the disciplinary framing underlying the push towards more societally contextualized conceptions of contract differs considerably. One explanation can be seen in the rather continuous reception of legal realism, certainly in the US, and to a lesser extent also in the UK. This has paved the way for broad interdisciplinary perspectives on contract law, ranging from classical socio-legal, empirical work, via economics, sociology, and critical theory, to today's landscape, where essentially instrumental and ideal-normative theories compete. In Germany, however, the realist heritage was less powerful, partly because of a widespread reluctance to blur a rule-based model of law in the post-war era. By consequence, the transformations of contract law were processed from within legal discourse and foremost in their effects on private autonomy as conceptualized, for example, in German idealism, discourse theory, and critical theory. Similarly, the "constitutionalization" of contract law—even though championed as fostering private law's reflexivity of its social effects—has not in its core promoted a socio-legal or interdisciplinary legal discourse.

These findings can be backed by a case study on the discovery and conceptualization of "relational," in other words long-term and often multi-party, contracting. A veritable product of interdisciplinary contributions,¹⁴² "relational" contract has become a prominent concept in US and UK Common Law and inspired a contract law taxonomy going from classical, via neo-classical, to relational contract law.¹⁴³ The German legal order, in turn, had an easier task in conceptualizing such contractual regimes, partly on the basis of doctrines originating in the Germanicist tradition and echoing the values of trust and expectation. Still, the German debate was also divided about which disciplines—and more importantly— which underlying theories of society to turn to in order to inform law about the "reality" of complex business transactions. The resulting picture of comparative socio-legal analysis of the changing paradigms of contract is not limited to retracing past legal developments. It also proves profitable when turning to the role of

¹⁴⁰C.f. Schwartz & Scott, *supra* note 15, at 544.

¹⁴¹GUNTHER TEUBNER, CONSTITUTIONAL FRAGMENTS: SOCIETAL CONSTITUTIONALISM AND GLOBALIZATION (2012); Marc Amstutz et al., *Civil Society Constitutionalism: The Power of Contract Law*, 14 IND. J. GLOBAL LEGAL STUD. 235 (2007).

¹⁴²Grundmann, *supra* note 89.

¹⁴³Macneil, *supra* note 102.

contract in transnational governance. Contract is the central building-block for many developments in the transnational legal realm, and our ability to conceptualize it hinges strongly upon our preconceptions rooted in domestic theories of contract law. The transnational, however, does mark a different terrain in its political, economic, and social structure, and thus for most contract theories, requires conceptual adjustment. In critically following such attempts, being able to identify path dependencies to domestic discourses seems particularly valuable.