THE LEGITIMACY OF THE CONTRACTING STATE

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I
INTRODUCTION: THE ORIENTATION OF PRESENT-DAY DOCTRINE ON THE CONTRACTING STATE

Globalization challenges our understanding of the state as the main source of legitimate law.[1] This article will take this claim one step further. Today, we may also see *the decline of the state, in its modern sense, from within.* Evidence for this may be found in the rising importance of contracting by the administrative state fulfilling its duties. For example, in various countries in Europe, the administrative agencies make contracts with people regarding the conditions they must meet to obtain asylum, parole, and social welfare assistance.[2] Furthermore, there are many types of contracts between administrative agencies and private companies securing public services or promoting public policies.[3] For example, the federal administration of Switzerland recently hired a private company to run the electronic cadastral register, a task clearly once thought of as a core responsibility of the state.[4]

In the law of continental Europe, the contract between the state and private persons—also generally known as the administrative contract—appears in *two manifestations*: as a private law contract between the administrative state and private persons on the one hand, and as a public law contract between the administrative state and private persons on the other. With this contract, either in the private law or the public law manifestation, the state is using the tool of legally stabilized cooperation to achieve its political goals. Thus, in the private law administrative agreement, a public element is introduced with the setting of a political goal, and in the administrative-law agreement, a traditional element of the private is introduced with the cooperation form of contract.

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1. *See* Dan Wielsch, *Relational Justice*, 76 LAW & CONTEMP. PROBS., no. 2, 2013 at 191.

2. Andreas Abegg, *From the Social Contract to a Social Contract Law—Forms and Function of Administrative Contracts in a Fragmented Society*, 3 ANCILLA IURIS 1, 22 (2008) (Switz.). For more examples, see Niels Åkerstrøm Andersen, *The Contractualisation of the Citizen—On the Transformation of Obligation into Freedom*, 10 SOZIALE SYSTEME 273, 275–79 (2004) (Switz.).

3. *See, e.g.*, Udo Di Fabio, *Vertrag statt Gesetz? - Gesetzesvertretende und Gesetzesausfüllende Verwaltungsverträge im Natur- und Landschaftsschutz*, DEUTSCHES VERWALTUNGSBLATT [DVBL] 338 (1990) (Ger.); Jody Freeman, *The Contracting State*, 28 FLA. ST. U. L. REV. 155 (2000).

4. SCHWEIZERISCHES ZIVILGESETZBUCH [ZGB], CODE CIVIL [CC], CODICE CIVILE [CC] [CIVIL CODE] Feb. 1, 1991, SR 210, art. 953 (Switz.); *see also* EGRIS—ELEKTRONISCHES GRUNDSTÜCK-INFORMATIONSSYSTEM, http://www.egris.info (last visited July 7, 2012).

From the *observational perspective of a system theory based on evolutionary theory,* what is initially evident when we consider the subject of the contract between the state and private persons is the juxtaposition of politics and law. In this juxtaposition, on the one hand we have what the political system aims to do—to unite the whole of society with the law and to bring about general prosperity. On the other hand, the aim is for the administrative state to be controlled by the rule of law: firstly, to ensure that planning security is a service provided by the law for modern society (and in particular for the economy), and secondly, to legitimize the administrative state's use of force by presenting it as a service provided by the law for the political system and for society in the wider sense. Furthermore, the contract between the state and private persons demonstrates a juxtaposition of law and those areas of society that, as a result of the contract, become linked with the political system. Normally what we have here would be a co-evolution between the political and the economic systems: instead, the need to flexibly transfer certain state functions to the economic sphere collides with the premise demanded by economics—that it should be possible, within the market environment that has been safeguarded by the state, to create a profit in economic projects, and to use this profit as a new basis for future profit-making. To put it briefly, the flexibility required in the political sphere for the implementation of public policies is set against the economic sphere's demands for planning security.[5]

According to the *current literature on contracts between the state and private persons*, the main task of legal scholars should be to "use" the legal institution of the contract to make the increasingly divergent interest structures of society useful to the administrative state, for the realization of the administrative state's own program.[6] But, when the administrative state resorts to contracts and the inevitable freedom of action and negotiation associated therewith, such increase of cooperation results in a crisis of legitimacy for the administrative state, which leaves the safe haven of traditional legitimacy mechanisms provided by democracy and the rule of law. According to current literature, this crisis is to be overcome by means of more extensive subjection to the law[7] and subjection to basic rights.[8] These two postulates are to be realized with a substantive and

5. On this perspective, see Gunther Teubner, *Vertragswelten: Das Recht in der Fragmentierung von Private Governance Regimes*, 17 RECHTSHISTORISCHES J. 234 (1998) (Ger.). On the relationship between law and the administration, see generally PHILIPPE NONET, ADMINISTRATIVE JUSTICE: ADVOCACY AND CHANGE IN A GOVERNMENT AGENCY (1969).

6. *See, e.g.*, AUGUST MÄCHLER, VERTRAG UND VERWALTUNGSRECHTSPFLEGE: AUSGEWÄHLTE FRAGEN ZUM VERTRAGLICHEN HANDELN DER VERWALTUNG UND ZUM EINSATZ DES VERTRAGES IN DER VERWALTUNGSRECHTSPFLEGE 618 (2005) (Switz.); FRANK KLEIN, DIE RECHTSFOLGEN DES FEHLERHAFTEN VERWALTUNGSRECHTLICHEN VERTRAGS 73 (2003) (Switz.).

7. *See, e.g.*, MÄCHLER, *supra* note 6, at 385–86; ULRICH HÄFELIN, GEORG MÜLLER & FELIX UHLMANN, ALLGEMEINES VERWALTUNGSRECHT N 1069–70 (2006) (Switz.); Eberhard Schmidt-Aßmann, *Das Recht der Verwaltungsverträge zwischen gesetzlicher Bindung und administrativer Gestaltung*, *in* FESTSCHRIFT FÜR HEINRICH WILHELM KRUSE ZUM 70. GEBURTSTAG (Walter Drenseck ed., 2001) (Ger.). Similarly for U.S. law, see Freeman, *supra* note 3, at 213.

8. *See, e.g.*, Isabelle Häner, *Grundrechtsgeltung bei der Wahrnehmung staatlicher Aufgaben durch Private*, 11 AKTUELLE JURISTISCHE PRAXIS 1144 (2002) (Switz.); Markus Schefer, *Grundrechtliche*

procedural consolidation of norms based on the needs of the administrative state.[9] This present-day orientation of doctrine can find support in a long tradition that has essentially sought to legitimize the new sovereign state with an administrative law that is steeped in academic thinking.[10]

The *present-day crisis of legitimacy* faced by the cooperating administrative state, however, goes too deep for us to be able to address the problem solely with the safeguards provided by public law as acquired in the struggle to defend society against the new sovereign state, or by shifting the problems into the sphere of private law, as has recently become fashionable.[11] This article discusses the legitimacy deficit of the administrative contract, including an examination of the paths legal theory may offer to account for both the political context requirements and the legitimacy requirements of the administrative contract. This examination covers three legitimacy mechanisms: rule of law, democratic, and evolutionary-reflexive theory.

II
THE NEED FOR NEW LEGITIMACY MECHANISMS FOR COOPERATIONS BETWEEN THE STATE AND PRIVATE PERSONS

In the concept of the *continental constitutional state*, the legitimacy problem is rendered invisible by a participation process that reaches out into society, and is mitigated by the subjection of administrative agencies to the same law that has come into being in this participation process. As history shows, however, both the nature and intensity of the participation system and the nature and

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Schutzpflichten und die Auslagerung Staatlicher Aufgaben, 11 AKTUELLE JURISTISCHE PRAXIS 1131 (2002) (Switz.).

9. Georg Müller, *Zulässigkeit des Vertrages und zulässige Vertragsinhalte*, *in* DER VERWALTUNGSRECHTLICHE VERTRAG IN DER PRAXIS 36–37 (Isabelle Häner & Bernhard Waldmann eds., 2007) (Switz.); Bernhard Waldmann, *Der Verwaltungsrechtliche Vertrag – eine Einführung*, *in* DER VERWALTUNGSRECHTLICHE VERTRAG IN DER PRAXIS, *supra*, at 23. For a procedural point of view, see MÄCHLER, *supra* note 6. For a German point of view, see Schmidt-Aßmann, *supra* note 7, at 67–68.

10. For a Swiss example of such academic thinking, see WALTHER BURCKHARDT, KOMMENTAR DER SCHWEIZERISCHEN BUNDESVERFASSUNG VOM 29. MAI 1874 Art. 114 (1914); JAKOB DUBS, DAS ÖFFENTLICHE RECHT DER SCHWEIZERISCHEN EIDGENOSSENSCHAFT DARGESTELLT FÜR DAS VOLK 14, 151, 206 (1878); ALFRED KÖLZ, NEUERE SCHWEIZERISCHE VERFASSUNGSGESCHICHTE: IHRE GRUNDLINIEN IN BUND UND KANTONEN SEIT 1848 (2004); FERDINAND ZEHENDER, DR. JAKOB DUBS, EIN SCHWEIZERISCHER REPUBLIKANER (1880). More skeptical was FRITZ FLEINER, EIDGENÖSSISCHE VERWALTUNGSGERICHTSBARKEIT 13 (Neue Zürcher Zeitung 1921). For Germany, see Otto Mayer, *Zur Lehre vom öffentlichrechtlichen Vertrage*, 3 ARCHIV FÜR ÖFFENTLICHES RECHT 3 (1888); for France, see RODOLPHE DARESTE, LA JUSTICE ADMINISTRATIVE EN FRANCE; OU TRAITE DU CONTENTIEUX DE L'ADMINISTRATION (1862); EUGENE PERRIQUET, LES CONTRATS DE L'ETAT: TRAITE COMPRENANT NOTAMMENT LES REGLES EN MATIERE DE VENTES . . . CONCESSIONS . . . PENSIONS . . . RECOMPENSES NATIONALE (1884).

11. On the relationship between privatization and contractualization in the 1990s, see Stephan von Bandemer et al., *Staatsaufgaben—Von der "schleichenden Privatisierung" zum "aktivierenden Staat,"* *in* DEN STAAT NEU DENKEN. REFORMPERSPEKTIVEN FÜR DIE LANDESVERWALTUNGEN (Fritz Behrens et al. eds., 1995) (Ger.); Gunther Teubner, *Nach der Privatisierung? Diskurskonflikte im Privatrecht*, 1998 ZEITSCHRIFT FÜR RECHTSSOZIOLOGIE 19 (Ger.); Gunther Teubner, *After Privatization? The Many Autonomies of Private Law*, 51 CURRENT LEGAL PROBS. 393 (1998) (Eng.).

intensity of the legal subjection remain contingent.[12] The possibility of consultation with those who are subject and the subjection under the law of those who wield power means that the threat of the application of force (which must always lurk behind the law) is made bearable. On the other hand the appearance of the unavailable is generated—that is, the law as established by means of instruments no longer appears as such, but on the contrary appears to be withdrawn from the direct legislator and generated by society, which subjects itself to the same law.[13] From a historico-evolutionary perspective, the underlying unity of politics and law in the modern national state has served to overcome the previously unsatisfactory enforcement of the law, as well as the difficulty of controlling a complex society. This sentiment was expressed particularly powerfully in the French Revolution, and in particular with the separation of the administrative state and the jurisdiction of the ordinary courts;[14] it is also evident in the theories of Johann Heinrich Gottlob von Justi (1720–1771).[15] Once politics and law were placed on an equal footing, it became possible for the political sphere, for better implementation and stabilization over time, to clothe its communications in the form of the law whenever required, above all in the process of legislation and in the issuing of administrative dispositions, which were modelled on court judgements. Admittedly, with the positivization of the law, the persuasive power of politics (now cast into the legal mold) and the persuasive power of the law as supported with the state monopoly on power, were massively dependent upon legitimacy provided by law. In the early days of the modern state, this legitimacy was in accordance with the hierarchically conceived state that is responsible for ensuring the unity of society—sought in the sovereign. Consultation in political matters, through non-political rationalities such as independent courts or cooperations with private persons, was precisely what was to be overcome, a relict of the feudal state.[16]

In this situation it is clear that the *contract on the one hand and legitimacy through legislation on the other hand are incompatible* in the sense that the

12. For more details, see ANDREAS ABEGG, DIE EVOLUTION DES VERWALTUNGSVERTRAGS ZWISCHEN STAATSVERWALTUNG UND PRIVATEN 216, 280, 333 (2010) (Switz.). For the foundations of this view, see MAX WEBER, WIRTSCHAFT UND GESELLSCHAFT 125 (Tübingen J.C.B. Mohr Verlag 1980) (1922) (Ger.).

13. JÜRGEN HABERMAS, FAKTIZITÄT UND GELTUNG: BEITRÄGE ZUR DISKURSTHEORIE DES RECHTS UND DES DEMOKRATISCHEN RECHTSSTAATS (1992) (Ger.). On administrative law, see Schmidt-Aßmann, *supra* note 7, at 65–67.

14. ROLAND MOUSNIER, LA VENALITE DES OFFICES SOUS HENRI IV ET LOUIS XIII 325–26 (1945); *see also* ROLAND MOUSNIER, LES INSTITUTIONS DE LA FRANCE SOUS LA MONARCHIE ABSOLUE 1598–1789 (1974) (Fr.); ALEXIS DE TOCQUEVILLE, L' ANCIEN REGIME ET LA REVOLUTION 191–92, 202 (1856) (Fr.). For more details, see ABEGG, *supra* note 12, at 32–36.

15. JOHANN HEINRICH GOTTLOB VON JUSTI, DIE GRUNDFESTE ZU DER MACHT UND GLÜCKSEELIGKEIT DER STAATEN, ODER, AUSFÜHRLICHE VORSTELLUNG DER GESAMTEN POLICEY-WISSENSCHAFT 464–65 (1760) (Ger.); JOHANN HEINRICH GOTTLOB VON JUSTI, GRUNDSÄTZE DER POLIZEIWISSENSCHAFT 615–17 (1782) (Ger.).

16. *See* NIKLAS LUHMANN, DAS RECHT DER GESELLSCHAFT 414–45 (1993) (Ger.). On the historical events bearing withness of transition see ABEGG, *supra* note 12, at 33–35.

contractual connection between the political and economic spheres actually threatens to dissolve the legitimacy mechanism of the sovereign, and subsequently that of the democratic constitutional state, which assumes sovereignty from the monarchical ruler. If the administrative state wishes to intervene in areas of society by means of cooperation, then the sovereignty of the state (that is, its claim to bring about unity and prosperity in society precisely by the fact that all power is monopolized in the state) is called into question. Admittedly, it was possible for this problem to be mitigated in the constitutional state, so that (1) subjection to the sovereign was consistently transferred to subjection to the legislation, and (2) this subjection to the legislation—precisely through its open textual structure—was made less stringent when administrative courts were able to preside over a more broadly interpreted subjection to the legislation.[17] This would not remove, however, a fundamental incompatibility between cooperations involving the state and private persons on the one hand, and the legitimacy models of the modern state on the other hand: if the administrative state wishes to cooperate with private persons in order to fulfill its functions, or if it is obliged to do so, then it must to a certain extent also have the corresponding freedom to negotiate the ends and means of such cooperations. Here, the administrative state is at least potentially determining not only the path to the political goal, but is also increasingly determining the goal itself, with the result that the concept of "legality of the administrative state," as the guarantor of social organization under the rule of law, and as the mediator of democratic legitimacy in the form of a sophisticated participation process, is called into question.[18]

In light of the self-radicalizing dynamic of contracts between the state and private persons, and their function of case-by-case bringing together a society that is drifting apart, the concept of subjection to statutory law cannot on its own create sufficient legitimacy; therefore it is interesting to look for *possible ways to take account of the requirements of the political context, and in particular, to ensure legitimacy.*

III
RULE-OF-LAW LEGITIMACY MECHANISMS

Advocates of rule-of-law legitimacy mechanisms are often positively disposed towards the self-regulation of society and not generally opposed to cooperation between the state and private persons. They are critical, however, of the blurring of the outlines of the concept of administrative law, stating that

17. *See, e.g.*, ALEXIS DE TOCQUEVILLE, DE LA DEMOCRATIE EN AMERIQUE 101 (1835–1840) (Fr.) (discussing the evolution of the Conseil d'Etat, focusing more on the control of the administration within the state hierarchy than on the rights of the citizens). *See also* Jean-Marie Auby, *The Abuse of Power in French Administrative Law*, 18 AM. J. COMP. L. 549, 549–50 (1970). On the evolution of the doctrine of *excès de pouvoir*, see FRANÇOIS BURDEAU, HISTOIRE DU DROIT ADMINISTRATIF: DE LA RÉVOLUTION AU DÉBUT DES ANNEES 1970, 83, 167–74 (1995) (Fr.); Barna Horvath, *Rights of Man: Due Process of Law and Excès de Pouvoir*, 4 AM. J. COMP. L. 539 (1955).

18. Schmidt-Aßmann, *supra* note 7, at 65–66.

the creation of self-regulatives and cooperations relieves the administrative state of its burdens, to the point of becoming a substitute for it, transferring responsibility for fulfillment of public purposes to private persons.[19] Consequently, advocates of rule-of-law legitimacy propose that the concept of administrative enforcement should be extended and that hybrid organizational structures should be reincorporated into administrative law as a new administrative reality,[20] whereby the traditional transfer of legitimacy would be restored through the functional synthesis of public law and politics under the continental form of rule of law, the "Rechtsstaat."[21]

In this view, basic rights ought to apply if any form of private order becomes existentially dependent upon politics.[22] In addition, the responsibility of the state as a guarantor vis-à-vis affected third parties ought not to lapse. As soon as the state brings public purposes into the sphere of self-regulation by using financial allocations or framework conditions, corresponding subjective rights are directed against the state, placing the state under an obligation to exert an influence on self-regulatives or on contracts.[23]

But these proposals are based on a *state-centered* view of society, as if the state, or the political system, were still able to consider and decide how the whole of society is to be constituted, and as if the state could still be identified as such in every case. In fact, the political system has largely lost this ability in our polycontextural society, that is, a society producing a multitude of autonomous programs and semantics. The political system knows as little as the law does about the autonomies of other social subsystems, to say nothing of the way these subsystems react to agitation arising from their environment; neither does the political system have the resources to hold these diverse social subsystems together in one unit by its own power.[24] And it is precisely for this reason that today the political system is no longer able to fulfill the great Social Contract by which the state is supposed to centralize all power and thereby bring about security and prosperity for all. So this great Social Contract is split up into a multitude of small contracts between the political system, which has not given up its claims, and society, which in spite of being split up in a multitude of autonomous programs and semantics is still dependent upon the services provided by the political system.

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19. Udo Di Fabio, *Verwaltung und Verwaltungsrecht zwischen gesellschaftlicher Selbstregulierung und staatlicher Steuerung*, *in* KONTROLLE DER AUSWÄRTIGEN GEWALT: VERÖFFENTLICHUNGEN DER VEREINIGUNG DER DEUTSCHEN STAATSRECHTSLEHRER 237, 240–42 (1997) (Ger.).

20. *Id.* at 241–42, 252. Similarly, proposing the expansion of administrative law to reincorporate the new emerging structure for the United States, see Kenneth A. Bamberger, *Regulation as Delegation: Private Firms, Decisionmaking, and Accountability in the Administrative State*, 56 DUKE L.J. 377 (2006).

21. Di Fabio, *supra* note 19, at 251.

22. *Id.* at 256–67.

23. *Id.* at 262–71, especially at 270–71.

24. On this perspective, see WEBER, *supra* note 12, at 599–600.

Theories like the *supervision state*, according to which the political system is no longer the sole producer of the collective assets of society but still retains a kind of overall supremacy over the production of these assets,[25] lead us in the right direction but fail to recognize the sheer radicality of the *emerging contracting state*: because of the general lack of means to harmonize the autonomous programs and semantics that have developed within our fragmented society, unity cannot (or cannot any longer) be achieved by power (or by religion either), but only tentatively, as an isolated and momentary unity of a fragmented society.

Consequently the strategy of expanding public law and thus the political bias of the administrative contract to include cooperations between the state and private persons would be shown to be a move in the wrong direction.

Therefore, in addition to a modified concept of basic liberties ("Grundrechte") applied to public law contracts, which I will not further specify at this time, I will look at what democratic legitimacy mechanisms have to offer.

IV
DEMOCRATIC LEGITIMACY MECHANISMS

Jürgen Habermas, a German sociologist and a philosopher in the tradition of critical theory, has strongly influenced the recent discussion on democratic legitimacy mechanisms. Habermas essentially understands the *democratic constitutional state* as the institutionalization of processes and communication preconditions for discursive formation of opinion and will; these processes and preconditions make legitimate lawmaking possible. Because this institutionalization operates through the law, private autonomy is secured. And as a result of institutionalized opinion and will formation working together with informal public communication, societal integration (solidarity) is achieved. However (according to Habermas), the central problem of the cooperating administrative state is the increased *detachment of instrumentalized law from legitimized non-disposable law*, because by using the form of contract the administrative state evades its statutory basis as passed by the legislator.[26]

Consequently there can be no return to the old concept of the constitutional state, for with the reflexive discourse with alternative forms of action and legal forms, general abstract legislation can no longer be a central component of the obligation and legitimacy effect of the constitutional state.[27] Thus, a new form of

25. HELMUT WILLKE, IRONIE DES STAATES: GRUNDLINIEN EINER STAATSTHEORIE POLYZENTRISCHER GESELLSCHAFT 335–36 (1992) (Ger.).

26. HABERMAS, *supra* note 13.

27. This argument presupposes the continental tradition of concealing the differences between law and statute. *See* Thomas Vesting, *Rechtswissenschaftliche Beobachtung des Rechtssystems: Einheitsbildung und Differenzerzeugung*, *in* ALLGEMEINES VERWALTUNGSRECHT—ZUR TRAGFÄHIGKEIT EINES KONZEPTS (Hains-Heinrich Trute et al. eds., 2008) (Ger.).

constitutionality has to be sought—one that governs the disposability of legitimacy grounds and the nature of the way they are handled.[28]

Today, according to Habermas, it is the citizen of the state that is supposed to enter into the legitimization process—in place of the independent market participant in a liberal constitutional state or the client in a social welfare administration. It is for the citizen to take part in political discourses in which the preconditions necessary for equal freedom—and thus the criteria for equal and unequal treatment—are formed. Consequently, administrative actions requiring legitimacy would have to be supplemented by justification discourses, in which it would admittedly not be possible for the formation of opinion and will to operate through the normal processes of legislation, but would acquire legitimacy by other means—for example through justification before a public justice criticism forum, which would consist of more than just legal experts and which could make problematic decisions of principle a subject of public debate. Specifically, this relates to legitimacy in the context of the weighing of collective assets, legitimacy in the context of the choice between competing means and goals, and normative assessment of individual cases, which existing general abstract statutory regulations have not allowed.[29]

This new kind of administrative action, separated from the traditional democratic constitutional state, can (according to Habermas) acquire legitimacy in other ways. But it can do so solely because the administrative action makes good the present absence of normative grounds with an inner democratization (or, it could also be said, a democratization that is expanded to incorporate society). Depending on the sphere in question, this expanded democratization can (in addition to the protection provided by law) arise from administrative participation, that is, the internal institutionalization of ombudsman forums, procedures similar to court procedures, hearings and publications, participation in decisions by affected parties or their representatives, and so on. Consequently, the reduction of legal protection is also to be dealt with, for example, by the extension of the reservation of statutory powers and of the concept of intervention, the extension and reconfiguration of the protection of basic liberties ("Grundrechte"), and the expansion of collective legal protection forms. As in the concept of the welfare state, it is important that the individual, or the person to whom the administrative action is addressed, must be placed in such a position that he is able to expand and safeguard his interests and ensure that they are taken into account in decision-making processes.[30]

However, *caution is necessary*, for the polycontextural nature of modern society must be taken into account. The question whether (as Teubner would say) the differentiation of society already contains a normative principle,[31] or

28. HABERMAS, *supra* note 13, at 527–29.

29. *Id.* at 90–106, especially at 105, 527–37.

30. *Id.* at 527–31; *see also* DIETER GRIMM, DIE ZUKUNFT DER VERFASSUNG 414 (1991) (Ger.).

31. Gunther Teubner, *Ein Fall von struktureller Korruption? Die Familienbürgschaft in der Kollision unverträglicher Handlungslogiken (BVerfGE 89, 214 ff.)*, 81 KRITISCHE

whether the observer has to take this differentiation as a basis for his model of society in order to gain an adequate picture on which to base his conclusions,[32] need not detain us here. For simply because the polycontextural society is recognized as a society under the law, the dangers of a one-sided regulation of society by the political sphere, such as those that threaten to arise in the context of the implementation of Habermas's proposals, are recognized. In this sense, therefore, any direct intervention in the complex structures that have evolved in unfamiliar subsystems have to be viewed with caution. In particular, the findings of the interventionist state, developed over a lengthy period of time, would have to give rise to reservations: self-organized discourses such as those of economics do not allow targeted control through political processes in such a way as to give rise to the politically envisaged effects in all cases.[33] On the contrary, in the process of translation from one system to another, these political programs acquire a life of their own and can easily produce the opposite result of what was intended.[34]

Still, we must confirm Habermas's finding that numerous forms of cooperation between the state and private persons do not fulfill the requirements of the political system regarding legitimate regulation: for example, in administrative contracts, the economic system may link up with politics, but within the specific cooperation (insofar as it is subject to private law) it does not accomplish the re-entry of the political, or does so only in an unsatisfactory manner. How, then, can the requirements of legitimate law be supported, without our falling into the trap of interventionist illusions?

V
EVOLUTIONARY-REFLEXIVE LEGITIMACY

The difficult question, in the language of evolutionary theory, is how the different social systems, supported by law, can in the context of cooperations be made to take account of the differentiation of their environmental systems and their principal requirements to reach a point of equilibrium. Or to put it in more concrete terms: How can the political system, on the one hand, be made to respect the self-organization of non-political discourses (as a re-entry of such a self-organization, for example that of economics into politics)—in spite of constantly changing political programs that have to be implemented, and in spite of the continuing responsibility to guarantee unity in society? And how, on

VIERTELJAHRESSCHRIFT FÜR GESETZGEBUNG UND RECHTSWISSENSCHAFT [KRITV] 388 (2000) (Ger.); *see also* Di Fabio, *supra* note 19, at 262.

32. MARC AMSTUTZ, ANDREAS ABEGG & VAIOS KARAVAS, SOZIALES VERTRAGSRECHT (2006) (Switz.).

33. *See* Gunther Teubner, *Das regulatorische Trilemma: Zur Diskussion um post-instrumentale Rechtsmodelle*, 13 QUADERNI FIORENTINI PER LA STORIA DEL PENSIERO GIURIDICO MODERNO 109 (1984) (It.).

34. *See, e.g.*, Peter Oestmann, *Gesetzgeberische Eingriffe in die Privatautonomie und ihre Folgen: Das Beispiel der Sicherungsrechte im Mietvertrag*, 86 KRITV 96 (2003) (Ger.) (discussing German tenancy law).

the other hand, can the self-organized non-political discourses, such as in particular the economic system, be made to consider the political requirements and in particular the need for politics to have legitimacy in terms of the use of political power (as a re-entry of politics into the rationality of self-organized systems)—particularly if, in the context of cooperation between the state and private persons, the traditional path of legislation, as Habermas himself points out,[35] no longer leads to the desired goal and, at the same time, the law in a polycontextural society has neither the knowledge nor the opportunity to implant specific and effective regulations in the discourses involved in the contract?

A procedural approach can assist us in our uncertainty concerning the correct law—for example, Wiethölter's approach, which (like Habermas's) promises always and repeatedly to bring about the integration of the society of the law through the participation of society in the "just-i-fication" ("Recht-Fertigung") of the law, and thereby simultaneously brings about a new kind of legitimacy.[36]

If the task of producing (in the process of cooperations between the state and private persons) norms that are adequate for society and at the same time legitimate can no longer be *solely* delegated to the economic sphere (by means of private autonomy) or to the political sphere (by means of legislation), then the *weight of the legitimacy mechanisms*—as I have shown in my historical studies of the contracting state—*is shifted to the courts.*[37]

If—jumping now to a timid normative claim derived from the democratic legitimacy mechanisms—it is important to promote the possibilities available to the parties to the contract, for engaging with each other and for giving consideration to the respective requirements, then we must not only turn our attention to the structural links (such as the contract) that make it possible for the parties to perceive themselves as—in the language of systems theory—the environment of the other systems, but also *focus on the structures in which each party embedded in its own discourse reacts to requirements arising from its environment*.

In terms of doctrine, it is interesting to observe that decisions dealing with the contracting state often make use of *regime collision rules.* Such rules are normally worded in an open manner, so that the evolutionary dimension of the co-existence of regimes can be covered. Traditionally, such conflict of laws rules in the law of property have been designed with the compatibility of the economic sphere and the security of human existence in mind. But, in their layout they are formulated in a sufficiently open manner to be able to take on this compatibilization function in a very general sense. An example from Swiss

35. HABERMAS, *supra* note 13, at 527–37.

36. Rudolf Wiethölter, *Materialization and Proceduralization in Modern Law*, *in* DILEMMAS OF LAW IN THE WELFARE STATE (Gunther Teubner ed., 1982).

37. ABEGG, *supra* note 12; Andreas Abegg, *The Evolution of the Contracting State and its Courts*, 59 AM. J. COMP. L. 611 (2011).

law is the general group of clauses relating to good morals,[38] personality rights,[39] and good faith.[40]

It is interesting to observe the courts' reasoning in cases involving a contract between the state and private persons concerning an issue that has not been foreseen by the legislator. The courts often observe that the aim of the contract corresponds to a reasonable and common set of values and that the rules chosen to achieve the aims of the contract were necessary in light of these values. This type of reasoning corresponds to Article 28 of the Civil Code, which gives a person infringing another person's personality rights the possibility to justify his behavior.

In the eyes of systems theory, precisely through the broad structure of such a collision rule, the intention is for a complex process of *"social" legislation* to be initiated in the interplay of law, academic discipline, and the systems involved in the conflict. In such "social" legislation the systems involved are urged to generate new variations, directed by the considerations of the courts and the need to justify deficits of legitimacy with regard to the interest involved. These new variations are then examined by academics to ensure that they are consistent with the current system of law. If necessary, the new variations are again presented to the courts for selection, and may be rejected again—a process that continues until a selection capable of providing stabilization has been found. In short, the conflict has to be referred back to the systems concerned—by all means with an indication of the solution to be sought and the corresponding conditions with regard to options.

This is where this evolutionary-procedural theory meets the *deliberative theory*, according to which the courts assist private players to envisage normative goals, as the result of successful learning processes, without setting aside the principle of self-restriction. For private players are themselves called upon to find such normative goals by means of experimental forms of self-organization. In this model, the deliberative theory sees opportunities for a transnational democracy at the global level, realized through private law.[41] Yet

38. OBLIGATIONENRECHT, CODE DES OBLIGATIONS, CODICE DELLE OBBLIGAZIONI [CODE OF OBLIGATIONS] Jan. 1, 1912, SR 220, art. 19–20 (Switz.).

39. SCHWEIZERISCHES ZIVILGESETZBUCH [ZGB], CODE CIVIL [CC], CODICE CIVILE [CC] [CIVIL CODE] Dec. 10, 1907, SR 210, art. 27–28 (Switz.).

40. SCHWEIZERISCHES ZIVILGESETZBUCH [ZGB], CODE CIVIL [CC], CODICE CIVILE [CC] [CIVIL CODE] Dec. 10, 1907, SR 210, art. 2–3 (Switz.); See the corresponding comments in Peter Gauch, *Der Schätzer und die Dritten*, *in* NORM UND WIRKUNG: FESTSCHRIFT FÜR WOLFGANG WIEGAND ZUM 65. GEBURTSTAG (Wolfgang Weigand et al eds., 2005) (Switz.).

41. Oliver Gerstenberg, *Privatrecht, Verfassung und die Grenzen judizieller Sozialregulierung*, *in* ULFRID NEUMANN AND LORENZ SCHULTZ, VERANTWORTUNG IN RECHT UND MORAL—ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE [ARSP]—BEIHEFT 74 (2000) (Ger.); Oliver Gerstenberg, "*Radikale Rechtsfortbildung*" *im (Europäischen) Vertrags - und Haftungsrecht: Ein Beitrag zur Methodendiskussion*, *in* RECHTSVERFASSUNGSRECHT: RECHT–FERTIGUNG ZWISCHEN PRIVATRECHTSDOGMATIK UND GESELLSCHAFTSTHEORIE (Christian Joerges & Gunther Teubner eds., 2003) (Ger.); Oliver Gerstenberg, *Law's Polyarchy: A Comment on Cohen and Sabel*, 3 EUR. L. J. 343 (1997) (U.K.); Jürgen Neyer & Christian Joerges, *From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalization of Comitology*, 3 EUR. L. J. 273 (1997) (U.K.).

it remains grounded in particular in the old danger of (primarily political) power, and consequently, on its basis of the theory of action, it cannot fully take account of the numerous differentiated rationalities of society and the correspondingly different dangers faced by social sectors.

With a simple "no, that is not right" and relatively vague requirements in terms of dogma as envisaged in the normative requirements specified above, therefore, a process is to be set in motion whereby, in a procedural manner, empirically supported solutions are sought that obey the strict normative requirements of the law and at the same time are recognized in those rationalities that have brought the conflict before the law. In particular, following a court decision it is principally for legal scholars and law practitioners to find variations on the doctrine.