

The Changing Forms of Contracting in a Society of Transnational Networks*

Richard R. Weiner

Professor of Political Science at Rhode Island College

&

Affiliate of the Minda de Gunzberg

Center for European Studies at Harvard University

United States of America

Email: rweiner@ric.edu

Whereas the new millennium brought with it a focus on “collision rules” within global governance and corporate governance, the economic crises emerging out of 2008 turned the focus to the failure of regulatory practices. The current crises challenge not only a neoliberal hegemony but the New Deal/Great Society coordinating state model as well; as we have moved not only beyond a society of individuals to a society of organizations. We live now in a society of transnational network contracting and corporate governance practices. This society of networks can no longer be clearly associated with traditional conceptions of state, market or civil society/ public versus private. Amidst this crisis, emerging legal challenges can no longer be coped with by institutions and ritualized routines of laissez-faire liberalism, social liberalism or neoliberalism. This paper redirects focus to an increasingly disembedded style of contracting amidst multi-polar and multi-rational regimes of conflict regulation/ dispute resolution. In doing so this paper starts from the prism of contracting practices and rituals: arguing that an understanding of how the discourse of “governing contracts” is continually and irreversibly implicated in the evolution of a network of heterarchical private relationships and public institutions.

By 1930, Weimar legal scholars on the left like Franz Neumann and on the right Carl Schmitt had posed the related issues of pluralism, heterogeneity in complexity, and heterarchy versus hierarchy as the core issues in the new twentieth century. In the Anglo-American tradition, this argument was taken up most prominently by Harold Laski. Succinctly, the legal and political challenges is one of “complementary institutions” (Schmitt’s jurisprudential term). Complementary institutions come to force amidst the background of “principal institutions” such as the partnership, the firm and the individual prerogative contract that they were originally intended to augment and serve through auxiliary legal interpretations and practices.

In the absence of an internationally agreed-upon labor regime, current practices of transnational standard-setting, especially in the setting of labor law norms, involves essentially the privatization of self-regulation. (Peer Zumbansen: “The Transnational Laws of Corporate Governance & Labor Rights”, 2005.) Numerous transnational institutions/actors have been linking international labor rights with trade liberalization initiatives. Transnational standard-setting has become essentially inter-corporate/ trans-corporate codes of conduct. At the turn of the twentieth century, Max Weber observed significantly, that in contrast to the “hard law” of an official state-based constitutional order, there had emerged in the law-creating capacity of autonomous collective associations a new domain of “soft law” serving as constituted supervening norms.

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Further, Philip Selznick by 1969 started to use the term reflexive law to refer to the necessary “regulation in the procedural coordinating of open networks of reciprocal complexity and interdependence. (See here the ongoing theorizing of Charles Sabel who raises the question: How are benchmarked norms and autonomous reflexive law continually bootstrapped?)

Private governance codes in an epoch of global capitalism are by and large not the result of bargaining, but the ultimate discretionary action of corporations. Thus, transnational standard-setting is increasingly challenging the traditional capacity of domestic labor law: that is, law within a national set of borders. Transnational standard-setting and transnational private law are constructed outside formal government rule-making as a regime of contextual preferentiality, a veritable set of self-enforcing norms of reciprocity (SERN). Such transnational practices include: performance standards; interoperability standards; ratcheting labor standards; ecological standards. Transnational law represents an emergent semi-autonomous self-regulating subsystem within a complexly differentiated global society of states and networks. This complexity amounts to a heterarchical rather than a hierarchical ordering with new modes of monitoring interest representation and the securing of transparency. French economists refer to these norms as *normes de reciprocite auto-executoires* and introduce a new economic concept: *reciproqueteurs*. (Cf. the rational choice theorizing of Elinor Ostrom.)

Where institutional complementarity, as well as the interdiscursivity and interoperability of SERN proceduralism come to predominate we advisably need to consider Chris Ansell’s notion of network institutionalism (2006) which resists centralized or dirigiste administration. Network institutionalism recognizes that network interactions are more diffuse than discrete, more social than interpersonal. In contrast to a simplistic neoliberal approach rooted in the naturalness of markets, network institutionalism emphasizes the significance of normative commitment and committedness to trust and credibility. Argumentation networks involve more than just bargaining. They emphasize persuasion and justifiability through warranted assertions and generalizable norms. Mutual monitoring and learning among network participants is encouraged along with a sense of mutual accountability and dedication to improve performance.

Institutional complementarity can also be understood in what is referred to as reflexive governance by Guenther Teubner: who presently holds the London School of Economics labour law chair held by Franz Neumann’s fellow Weimar labor lawyer comrade and Schmitt student, Otto Kahn-Freund. Network institutions reciprocally compensate for each other’s own deficiency. Complementary institutions can reinforce each other’s effects as a set of visible, trusted and credible autonomous institutional practices.

As Harry Arthurs, the Canadian labor law colleague of Peer Zumbansen at Osgoode Hall, noted at a UCLA comparative law forum – paraphrasing a French general witnessing the “charge of the light brigade” at Sebastopol in The Crimean War: “It’s magnificent, bit is it war?” Transnational network standard-setting is overwhelming, but is it law? Beyond their medical bretheren, are legal professionals increasingly lawyers sans frontiers ? Is everything polycontextural? Is anything law?

The gravity shift to autonomous subsystemic self-regulation of floating regional and global networks is rooted in standards and “best practices”, similar in the United States with The Uniform Commercial Code (UCC) in the American contract law of fair trade usages which prevails. The UCC is itself established by the autonomous American Law Institute of jurists, lawyers and law professors. There has been a renaissance of *Lex Mercatoria*: the customary law of merchants and traders operating abroad – and more specifically, transnational arbitration having some legal justification in domestic national courts. *Lex Mercatoria* involves to a great extent common sense “good faith” business practices and standards used to regulate or resolve commercial conflicts.

As such, *Lex Mercatoria* is a confidential non-formalistic system of alternative dispute resolution centered on private arbitration courts – with an emphasis on the commercial ethic of an embedded global liberalism of the Washington free trade consensus of 1945. The new conflict of laws practice that has emerged beyond traditional federalism is found in arbitral codes of non-formalistic discretionary ruling and interpretation; and amounts to a new form of court shopping.

The International Chamber of Commerce reports 550 filings and 300 awards under the newly emerging UCC of transnational commercial law: UNIDROIT –that is, the “Principles of International Commercial Contracts.” This started informally in the 1970s and became codified in 1994. Also reported is the growth in private arbitral courts for transnational commercial dispute resolution: 10 in 1910; 100 in 1985; over 150 in 2005.

Transnational arbitration houses become substitutes for national constitutional courts. Arbitral authority and enforcement are turned to for legal certainty and predictable outcomes. Arbitral practices are consolidated into stable rules and procedures of transnational law: as Philip Jessop predicted in his prescient Storrs Lectures at the Yale Law School in 1956. In some cases, arbitrators are pushed to maximize values other than the parties’ private right to contract: pace Richard Posner and the “law and economics movement” in jurisprudence.

Guenther Teubner sees the new *Lex Mercatoria* as a corporatist legal form: a functional hierarchy of preference, to mix Ostrom and Karl Renner. Where Teubner sees us moving to is a heterarchical/multilateral global society of networks: where there is cybernetic coordination (“structural coupling”) amidst spontaneous exogenous adaptation and evolving endogenous encapsulated pressures. Rather than Friedrich von Hayek’s society of spontaneous private law creation, Teubner avoids separation of spontaneous making of law, convention, habit and custom from constructivist making of public law by governments and autonomous social law by functionally differentiated subsystems; autopoiesis in the language of Teubner’s mentor Niklas Luhmann. We move from a hierarchy of law to a polyarchy or heterarchy of legal pluralism.

What Teubner and Luhmann refer to in cybernetic terms as polycontextural logoc (PCL). With this superseding of traditional non-producing routines Teubner argues that there is a decline in the legitimacy of the “rule of law”: what Jurgen Habermas refers to as the fundamental validity claims of law are incrementally eroded. Teubner sees the shrinking potential of nation state politics vis a vis the economy as a globalized self-deconstruction of the law-making process. The results are regimes of autonomous law. In globalized capitalism, autonomous private law is transformable into the governance of autonomous social law that goes beyond the “social law” ideas of the Weimar labor lawyers like Neumann and Kahn-Freund. The functional differentiation described incrementally by Durkheim, Parsons, Eisenstadt and Luhmann now include regimes of norm and law creation in the differentiated domains of science, technology, medicine, education, media, the Internet, and transportation.

Contracts as Zumbansen reminds us (2007) are social arrangements that visibilize and negotiate conflicting rationalities and interests. Under the hegemony of neoliberalism, contracting has been interpreted formalistically, not sociologically, as the Legal Realists of The New Deal did. Expert managerialism functionally applied is extracted from its Progressive/ Social Democrat shell. Privatization and individual responsibility is emphasized domestically, while global private regimes are constructed outside.

Governance by relational and network contracts have become the central regulatory concept: not government by public administrative agencies. Governance by contract provides the arrangement of exchanges. Governance by contract attends to the regulation of exchanges.

Society is no longer seen as having a center or an apex. Society is understood as being comprised not by a collective conscience, but multiple yet non-unified institutionalizing social reality constructions: multiple rationalities. Multilateral/ multipolar. Multirational/ subsystemic/ subcultural.

To conclude, Zumbansen like Teubner sees law as normative in a pluralistic or polycontextural manner. Law's content is not just singularly defined by market rationalism, religious fundamentalism, or social justice. Law reflects and regulates societal conflicts by "addressing" the internal codes involved subsystemically or subculturally. Zumbansen in "The Law of Society: Governance through Contract" (CLPE: Osgoode Hall Law School, Toronto: 2007: p.45) affirms that

"It [the law] is always exposed to and involved in these[social] conflicts. As such, it could be said that the law , instead of reflecting the values of individualism, collectivism or communitarianism in its totality will only in parts reflect these or other social values."

Contract involves obligation, not just exchange. Obligation is not solely defined by markets, property relations and commodity exchange. Zumbansen and Teubner present an alternative understanding of contracting as "structural coupling" and "reconciling" among social subsystems and their norms and values, as well as intersubjective reciprocity and mutual recognition within units of social subsystems. The institutional complementarity and polycontexturality immanent within the governance of social law endures.

APPENDIX:

As detailed scholarly by Ostrom, Ian Macneil and Oliver Williamson, relational contracts unlike traditional discrete contracts between two or more legal individuals (including legal fictions for firms known as corporations) do not define discrete transactions. Rather they are normative frameworks defining the manner in which commercial exchanges ought to operate in practice. They do not focus on exchange that takes place at one point of time. Rather they take a multi-year holistic and "blanketing" approach to ongoing exchanges and performance. In more recent economics, this form of contracting unlike neo-classical "total market" stress relationships of trust, reciprocity, integrity, solidarity, and flexibility. Increasingly many relational contracts have become known as network contracts. Further, Charles Sabel uses the concept "braiding" to denote institutional complementary use of pre-existing practices of reciprocity, mutuality and solidarity of informal contractual agreements as endogenous trust considerations within formal contracting agreements of private and social law.