

FOREWORD

THE PUBLIC DIMENSION OF CONTRACT: CONTRACTUAL PLURALISM BEYOND PRIVITY

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Pluralism is the very idea of modern society. At a fundamental level this applies to the transformation of the concept of reason. Modernity rejects the traditional notion of a substantial reason that is directed at understanding a pre-given order and a teleologically determined world. Instead, reason is now thought of as procedural, as a capacity to create a meaningful world by using specific methods, arguments, and theories. For better or worse, what counts as reasonable is decided by each field of human endeavor according to its own standards. Reason becomes plural.

The “fact of pluralism” is the starting point for a political philosophy that observes deep disagreements in present society not only about the “good” but also about the “right.”¹ The breeding ground for this development—in which reason has been differentiated into autonomous spheres of knowledge and practice—is the liberal idea of extending the principle of religious tolerance to other controversial questions about the meaning, value, and purpose of human life.² In this sense, liberalism is the historic catalyst for the pluralism that characterizes modern society. The medium for institutionalizing the freedom to endorse different instantiations of reason is the law. As it were, modernity becomes aware of itself in and through the law: “The greatest problem for the human race, to the solution of which Nature drives man, is the achievement of a universal civic society which administers law among men.”³ The type of law deemed best suited to achieve this goal was private law. Only a law whose leading idea is the enactment and protection of individual autonomy seemed

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1. Cf. T.M. Scanlon, *Provocation: Everyone Is a Philosopher!*, 125 HARV. L. REV. F. 228, 230 (2012).

2. Cf. Will Kymlicka, *Two Models of Pluralism and Tolerance*, 13 ANALYSE & KRITIK 33 (1992).

3. IMMANUEL KANT, *Idea for a Universal History from a Cosmopolitan Point of View*, in ON HISTORY 11, 16 (Lewis White Beck ed. & trans., 1963) (1784).

able to accomplish “the development of all the capacities which can be achieved by mankind . . . in the society with the greatest freedom.”

In the course of unfolding the pluralism of modern society, the distinguished position occupied by liberal thought and liberal doctrine gave way to a spectrum of concurrent theories about the purpose and the structure of private law. All of these alternatives struggle with the fact that liberal doctrine organizes itself around the notion of the individual will without addressing the relation between individual rights and the conditions under which they are exercised. Paradoxically, other than liberalism itself, these theories also respond to the liberal opening up of reason. To be sure, the reflexivity that these theories add to the reasoning of private law is not necessarily plural in the sense that they construe rights as being placed in the context of different social domains and their respective values. Economic analysis of law, for instance, substitutes the liberal commitment to freedom with another (more narrow) exclusive orientation when it models the individual only in terms of a *homo economicus*, the decisions of which are subject to the imperative of efficiency. By contrast, deliberative and systems theoretical approaches start with the assumption of a legal pluralism and explicitly focus on the relation of different normative domains in a given case. However, none of the private law theories can claim to judge among the competing accounts. Pluralism in private law theory does not just indicate an acknowledged multiplicity of methods within legal science. Rather it embodies a controversy over different concepts of law that brings about different notions of the subject, the status, and the limits of legal reflexivity along with different standards of judicial control. Pluralistic theories are not exempt. They are parties to the controversy, too. There is no room for a monopoly on pluralism in private law theory.

Social pluralism has two main institutional backings. The obvious and often discussed one is democracy. Continuous possibility of change and the limited power of temporary rulers enables a diverse spectrum of political positions. A constitutional system of checks and balances and a human rights-inspired protection of minorities provide a strong legal basis for ethical self-determination. Yet the real dynamics of social pluralism springs from another legal source. Whereas “democracy” denotes the public background of social pluralism, “contract” is its private counterpart. The transformation of modern societies from status to contract⁴ represents the release of pluralism. Freedom of contract allows individuals to pursue diverse social goals and private interests. Democracy needs legal procedural backing, but remains a political concept. Instead, contract is a genuine legal institution. Contract is the legal heart of social pluralism.

Indeed, our society is deeply contractual. Working, housing, consuming, or entertaining would be unthinkable without a tight web of contractual relations. The institution of contract even colonizes other legal institutions like

4. HENRY S. MAINE, ANCIENT LAW 170 (15th ed. 1894) (1861).

“property” and “persons” (legal entities). Property rights in apartments, cars, or computers are replaced with more dynamic contractual relations such as renting, leasing, or services. Also, intellectual property rights are profoundly modified with the help of contract. The transformation in both areas of legal assignment of rights could be summarized as a question of “access,”⁵ which is opened and regulated by specific contracts. The same is true for legal entities. The organizational patterns of economic enterprises are transformed from monolithic mega-companies to affiliated groups. Management hierarchies are replaced with contractual networks.⁶ Within transnational trade, contracts are even the main tool for ordering conflict resolution. Contract is the main legal institution for the future evolution of society.

Yet contract is in itself a plural institution. Diverse contract laws all over the world set out different prerequisites, secondary obligations, and limits of contractual commitments. However various the answers are, they circle around the same question: When is an arrangement binding and legally enforceable? How long and how far is a contractual commitment binding? In addition to that legal pluralism, there is also a plurality of theories about the “basis of contract.”⁷ But do these theories have any practical significance? What is the use of a contract theory? All contract theories at least touch on the question why contracts are binding. Why is it important to know why contracts are binding? Because this “why” influences the legal answers about the “when” and the “how long” of the commitment. Contract theories reflect conceptions of contract. The different conceptions of contract guide not only the making of new contract regulations but also every interpretation of a rule of contract law—as well as the interpretation of the contract itself. Every contract theory implies a theory of contract law. Thus, “contractual pluralism” has at least three dimensions. The first denotes the simple fact that contracting parties pursue plural interests. The second addresses the legal pluralism of contract laws. And the third the pluralistic cluster of contract theories.

Given this pluralism of contract, there are perhaps as many definitions of contract and contract law as there are theories. Yet there is at least one common effect of pluralism. Pluralism kills the myth of privity. Put in the context of plural narratives, the private character of contractual relations that was born in the nineteenth century⁸ and had its revival in the 1980s⁹ turns out to be a liberal stricture. Pluralism reveals the public dimension of contract. Already the liberal picture of freedom of contract included one public dimension: state regulation of contract law. The nation-state set up and enforced public rules designed to back up private normativity and its

5. JEREMY RIFKIN, *THE AGE OF ACCESS* (2000).

6. GUNTHER TEUBNER, *NETWORKS AS CONNECTED CONTRACTS* (Hugh Collins ed. & Michelle Everson trans., 2011).

7. Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553 (1933).

8. PETER S. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* 217–568 (1979).

9. Following the publication of CHARLES FRIED, *CONTRACT AS PROMISE* (1981).

consequences. This simple public guarantee of contractual freedom gets lost in a globalized world. The global economy knows plural publics.

As the background of contract supplied by the nation-state often is no longer self-evident, the door for contract theory to reflect on the public dimension of contract has never been more open. Only a very naïve account of liberal theory would frame contract as detached from its institutional environment. True, contract is a vehicle for individual self-determination. Yet this self-determination unfolds in the sphere of action. According to Kant, law refers to the “external and practical relation of one Person to another, in so far as they can have influence upon each other, immediately or mediately, by their *Actions* as facts.”¹⁰ If law is then about the reality of freedom, legal analysis, as a result, must be concerned with the conditions of autonomous action.

For early liberal thought, therefore, the relation between law and the economic system was a central question. Adam Smith was the first to emphasize the interdependence of a system of justice and an economic system based on a legal order that provides for and guarantees the constituent economic liberties as individual rights.¹¹ In his account, the public interest arises from the interaction of “natural liberties,” of rules of conduct, and of market forces.¹² The genius of a sustainable liberal concept of law was the understanding that individual freedom was indirectly related to the common good through the social institution of the market. However, without this nexus of individual rights and the common good, society would not have tolerated an autonomy-based conception of contract. An explanation of the binding effect of contract in purely moral terms is a nice intellectual undertaking, but if this account did not reflect the institutional structure of society it would be meaningless as a contribution to legal reasoning. This is not to suggest that a teleological rationale is the only possible conception of contract. But it should encourage the various theoretical approaches to explain their respective visions of the relation between the legal institution of contract and those social institutions and collective values that make up the context of the very autonomy the law is meant to protect.

The public dimension of contract can remain unexplored as long as contract is situated in the context of the nation-state. Under these circumstances, theory could afford to reason with its eyes shut to the consequences of privity of contract because it would know that the basic structure of society in which contracts operated was justifiable.¹³ However, in a world where contracts get

10. IMMANUEL KANT, *Metaphysics of Morals*, in THE PHILOSOPHY OF LAW: AN EXPOSITION OF THE FUNDAMENTAL PRINCIPLES OF JURISPRUDENCE AS THE SCIENCE OF RIGHT (W. Hastie trans., 1887) (1798).

11. ERNST-JOACHIM MESTMÄCKER, A LEGAL THEORY WITHOUT LAW 16–17 (2007).

12. 2 ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 687 (R.H. Campbell & A.S. Skinner eds., 1981) (1776).

13. For the idea of a division of responsibility between private law institutions and public law requiring that particular transactions be assessed on their own terms and not be subjected to claims of distributive justice, see JOHN RAWLS, POLITICAL LIBERALISM 267–68 (1993).

disembedded from background justice, contract theory is forced to answer how contract is compatible with the requirements of its social context. Even a seemingly self-sufficient autonomy-based account must explain how contract achieves social stability. As has been rightly pointed out, even a liberal justification has occasion to show that contract must “express norms of freedom and equality that, even if specific to contract and distinct from those underlying distributive justice, are fully consonant with the latter.”¹⁴

Given this indispensable public dimension, contract theory always is a political endeavor. The articles in this symposium outline the landscape of contemporary foundations of contract and highlight the role of the public in each conception. Liberal, egalitarian, economic, systemic, deliberative, and critical approaches present different faces of a public dimension of contract. Different contract theories imply distinct ideas about contractual pluralism as well. The different conceptions of contract pluralism presented in this issue range from those that factually describe the heterogeneous interests of the parties or the diversity of legal orders to those focused on the conflicts of ethical values and the collisions of social systems.

The first two contributions to this issue offer a possible metaconceptual framing for contractual pluralism. Both take normative value pluralism seriously and try to establish a theoretical structure for a plurality of contract principles. Revealing the public dimension in promissory and conventional contract theories, Bertram Lomfeld offers a genuine deliberative solution to the demand of normative pluralism.¹⁵ He frames a comprehensive pluralistic account of “contract as deliberation” from the perspective of discourse theory. The basis of contract has many ethical roots, which in the context of contract law appear as different principles of interpretation. A coherent pluralistic theory has to reshape monistic principles as relative reasons within a deliberative second-order framework. Such a deliberative theory of law displays every social conflict as a collision between different normative reasons. The decision of the legislator in favor of a particular rule or the decision of the judge in a particular case constitutes a political balancing act between colliding reasons. Contracts become deliberative institutions. Parties to a particular contract promise each other reasons, the weighing of which they can enforce through law. With such a deliberative contract theory the conflict between promissory and conventional theories blurs. A contract is a “promise of reasons” that can be cashed in a conventional legal framework. Every contract then has a public dimension referring to the public giving and receiving of reasons. Every contract is a genuine social contract.

Likewise dismissing monistic normative accounts, Hanoch Dagan presents a structurally pluralist theory of contract in which contract law is an umbrella of a

14. Peter Benson, *Contract*, in *A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY* 29, 62 (D. Patterson ed., 2010).

15. Bertram Lomfeld, *Contract As Deliberation*, 76 *LAW & CONTEMP. PROBS.*, no. 2, 2013 at 1.

diverse set of contract institutions, where each institution responds to a different regulative principle.¹⁶ Nonetheless, his structurally pluralist account is an explicitly autonomy-based contract theory. Therefore, he revisits Joseph Raz's account of the relationship between contract law and voluntary obligations. He relies on Raz's starting proposition that the entering of voluntary obligations has a genuine social value and that the role of contract law should be to protect this practice. Yet he refutes Raz's further propositions about the supportive role of contract law and how contract law in its entirety should be guided by the one regulative principle of autonomy. Instead he argues with Raz against Raz, relying on Raz's own account of autonomy as self-authorship that imposes on the state important responsibilities in supporting pluralism. For Dagan, an autonomy-based contract law should offer an umbrella for diverse contract institutions. The main task of an autonomy-based contract theory is to distill its distinct regulative principles, to elucidate their contributions to human flourishing, and to offer reform if needed.

The next set of contributions focuses on distinct normative contract principles. Here, contractual pluralism denotes the evident phenomenon of plural interests pursued through contractual relations. Although the theoretical approaches in this section tend to be monistic in the sense that one particular value structurally trumps others, the mere existence of alternative monistic reconstructions of the legal order that can all claim to be equally plausible unintentionally confirms the relevance of the fact of social pluralism for legal theory.

In his remarks on liberal contract theory, Thomas Gutmann views the modern concept of contracts as inextricably linked to individual rights protecting the autonomy of persons.¹⁷ Building on a deontic understanding of rights as legally respected choices, he casts contracts as tools for the free will to enter into normatively binding agreements by transferring one's rights to another person. Private law should focus on the internal relationship of mutual recognition between the parties and check if the free will in question is compromised. It must respect the normativity of contract that is constituted by the equal autonomy of persons. Any instrumentalization of contracts for collective ends infringes upon this normativity; contracts must remain unrestrained by duties of social justice. As a consequence of the broad recognition of the principle of private autonomy in Western legal systems, a liberal theory of contract can methodologically afford to pursue a "happy positivism." It criticizes alternative theories for the source they try to derive their normativity from. While some theories are rejected for an alleged total lack of normative reasoning (namely, sociological jurisprudence and critical legal studies), others are deemed to suffer from a pre-modern fixation on duties

16. Hanoch Dagan, *Autonomy, Pluralism, and Contract Law Theory*, 76 LAW & CONTEMP. PROBS., no. 2, 2013 at 19.

17. Thomas Gutmann, *Some Preliminary Remarks on a Liberal Theory of Contract*, 76 LAW & CONTEMP. PROBS., no. 2, 2013 at 39.

(neo-Aristotelian approaches), consequentialist thinking (economic analysis), or inconsistency with private autonomy (social justice approach). Since no other reason for contractual normativity than self-determination of the individual is admitted, Gutmann contends that there is no choice of paradigm for the theory of contract but that any alternative approach must be parasitic upon the liberal one.

For Florian Rödl, contract law is the expression of a coherent moral structure reflecting the idea of human equality.¹⁸ His argument is based on a hermeneutic reconstruction of the basic structure of contract law. Neither a procedural nor an instrumental conception of freedom of contract would be able to explain the existence of fairness-based legal norms whose purpose is to fill contractual gaps or to scrutinize contracts for unfair terms. Rather, he submits, the only way to give a coherent account of the stock of fundamental private law rules is to assume that contractual freedom must be exercised in line with contractual justice; unfair contracts cannot be claimed valid by appealing to contractual freedom. This holds true not just for auxiliary terms but also with respect to price. Courts determine a test of fair price (*justum pretium*) with the help of general clauses that incorporate common usage and trade practice. To the extent that competition ensures equal distribution of bargaining power, the law can refer to the results of countless deliberations among parties to a transaction about the fair price of a commodity. This background is also a source of the critical potential of Rödl's approach because it prompts the law to identify those conditions that are likely to inhibit the conclusion of just agreements, such as, for example, structural market failures.

In the eyes of Hugh Collins, the expansion of constitutional and human-rights control of private law indicates the end of private autonomy as limited to negative freedom from interference.¹⁹ Once the legal framework is understood in terms of competing rights, legal analysis is forced to consider the real choices available to both parties. In particular, there can then be no remaining scope for an unregulated private sphere of freedom to choose a contractual partner. Whereas English common law acknowledged only a few exceptions to this principle, Collins argues that anti-discrimination laws on the European and national level challenge the liberal distinction between a (regulated) public and a (unregulated) private sphere in which individuals are said to enjoy unfettered choice. Given the willingness of constitutional courts to apply anti-discrimination rules in the context of private transactions and the family (as is apparent in the scrutiny of a will by the European Court of Human Rights in *Pla and Puncernau v. Andorra*²⁰), Collins concludes that a completely insulated private sphere can no longer exist. If law is meant to promote the positive

18. Florian Rödl, *Contractual Freedom, Contractual Justice, and Contract Law (Theory)*, 76 LAW & CONTEMP. PROBS., no. 2, 2013 at 57.

19. Hugh Collins, *The Vanishing Freedom to Choose a Contractual Partner*, 76 LAW & CONTEMP. PROBS., no. 2, 2013 at 71.

20. App. No. 69498/01, 2004-VIII Eur. Ct. H.R. 334.

freedom of all members of a society, the boundaries to the protection of this sphere must be set by the competing rights of others, the relative importance of which are measured by reference to a test of proportionality. Public interest enters private law by the insertion of human rights.

Lorenz Kähler discusses the emergence of “contract management” to enhance the efficiency of contracts.²¹ IT-based internal monitoring manages the contractual lifecycle from the conclusion of the contract to any eventual litigation. In order to govern and keep track of a growing number of contracts, business corporations increasingly make use of this tool of analysis. Understood as a reaction to their sheer number, as well as the length and vagueness of many business contracts, contract management adds another level of standardization to mass contracting that goes beyond the use of boilerplate. Although in principle a voluntary measure to promote efficiency, contract management provides the legislator (and potentially private standard-setters) with an innovative opportunity for “secondary” contract regulation that does not come in at the point of performance of duties between the parties, but instead considers how one party deals with all of its existing contracts. For instance, the European Gender Directive requires equal treatment of all contracting parties.²² A form of secondary control is also introduced by the risk-management rules of the finance industry, with mechanisms to prevent the contractual risk from spreading to third parties. As such, contract-management duties limit contractual freedom. At the same time, however, they might prospectively replace regulations of primary contractual obligations and thus ultimately broaden contractual freedom.

Whereas this second set of theories locates the public dimension of contract mainly in contract law, viewing contractual pluralism as an indicator for the plurality of interests within the frame of a respective public legal policy, critical legal theory denounces exactly this political power to determine the conceptions and realities of contract as a means of social oppression. Along these lines Alessandro Somma criticizes the politics of private law using the example of the European Project of a Common Contract Law.²³ The distinction between private and public law constitutes an artificial boundary that was only introduced through the bourgeois order of property and the subsequent class stratification in capitalist society. The ordoliberal way of social market economies, which are located between liberal and socialist orders, does not lead to any real kind of emancipation. While this “order of liberation” does not destroy its subjects, it establishes a “biopolitical” power that enforces a particular way of life. Thereby every ordoliberal “biopolitics” intends to reduce

21. Lorenz Kähler, *Contract-Management Duties as a New Regulatory Device*, 76 LAW & CONTEMP. PROBS., no. 2, 2013 at 89.

22. Council Directive 2004/113/EC of December 13, 2004, implementing the principle of equal treatment between men and women in the access to and supply of goods and services.

23. Alessandro Somma, *Private Law as Biopolitics: Ordoliberalism, Social Market Economy, and the Public Dimension of Contract*, 76 LAW & CONTEMP. PROBS., no. 2, 2013 at 105.

social pluralism. Private law, too, exercises such ordering police functions. The project for a Common European Contract Law then appears as an ordoliberal move to reduce the contractual pluralism within Europe and to enforce a unitizing European biopolitics.

The example of European contract law leads to another genuine contractual pluralism that is associated with the globalization of law. Here, the public dimension transcends the public policy of one domestic contract law. Transnational contracts listen to multiple legal backgrounds and contract laws. Within that legal pluralism transnational contracts create or form their own legal orders. Not only the legal framework, but the global public is more diversified, too. Already within a nation-state, a unified political public is a contrafactual myth. At any rate, a transnational public dimension demands an even more pluralistic theoretical setting of contract. Transnational contractual pluralism denotes plural legal orders and plural publics.

Peer Zumbansen enfoldes the idea of contract from the perspective of transnational private governance.²⁴ Within the current global shift “from government to governance,” contract celebrates its comeback as the central social institution. Contractual governance is the dominant ordering paradigm for the *lex mercatoria* or law merchant, which is the main self-regulating legal regime of transnational private interactions. But transnational accounts have mostly oversimplified, stripped-down, mechanical concepts of contracting. Its reductionist models emphasize governing contracts as key instruments of private ordering relations, thereby ignoring the historically evolved, complex “embeddedness” of contract. A bridging perspective might attempt to scrutinize a direct “public” dimension of transnational private ordering by analyzing, for example, compulsory standards in international commercial arbitration. Yet a more profound theory of transnational contracts has to find its own methodological answer to contractual governance. A transnational-contract-theory approach scrutinizes the nature of the law–non-law as much as the private–public distinction. Transnational contract theory prompts us to study the emergence of hybrid, unruly, and messy regulatory regimes as instantiations of an evolving legal rationality in the context of world society.

In a globalized world, states are no longer the stable reference point for a public backing of contractual relations. Yet in a paradoxical erosion of legitimacy described by Andreas Abegg, the state as central authority has itself become more and more dependent on collaboration with private persons.²⁵ Private contracts concerning administrative action and social benefits, private public partnerships, and contractual assignment of public functions constitute increasingly important instruments of public action. The contractual structure leads to a juxtaposition of law and those subsystems of society that are

24. Peer Zumbansen, *Transnational Private Regulatory Governance: Ambiguities of Public Authority and Private Power*, 76 LAW & CONTEMP. PROBS., no. 2, 2013 at 117.

25. Andreas Abegg, *The Legitimacy of the Contracting State*, 76 LAW & CONTEMP. PROBS., no. 2, 2013 at 139.

contractually linked with the political system. This intervention by cooperation requires limited freedom to negotiate the means and, ultimately, the ends of administrative action and thereby fundamentally calls into question the principle of strict “legality of the administration.” In search of new modes of legitimacy recognizing the polycontextuality of modern society, Abegg rejects rule-of-law legitimacy mechanisms that would extend administrative law and enforcement principles to state contracting. The genuinely state-centered perspective still adheres to the idea of one great “Social Contract,” which is today broken up into multiple smaller contracts between the political and other functional systems in a fragmented society. Habermasian democratic legitimacy—developed with regard to the constitutional state—allows for a supplement of legislation by “justification discourses” arising from the inner democratization and participation of affected parties. However, as Abegg argues, only a proceduralist perspective adopted by an evolutionary-reflexive theory can truly avoid the dangers of political bias. In a procedure involving the legal system and its courts, legal academia, and the systems affected, a specific kind of “social legislation” is developed to foster each system’s sensitiveness to the requirements of its environment. Drawing on Swiss case law, general clauses seem an appropriate instrument to be turned into reflexive “regime collision rules.”

A third level of contractual pluralism leaves behind the idea of subjective understanding as the premise for social action and focuses on plural social environments and systems. For Pasquale Femia, the public dimension of contract lies in the common textuality.²⁶ Within his deconstructive method of law the textuality of a contract diminishes the importance of the will of the parties as a source of contractual normativity. The language of consensus conceals that every individual contract constitutes a highly specialized system for generating and transferring private power. Through writing, incidences of complex social interaction are broken down into distinct actions. Social dissent disappears in the dark of a discourse based on professional jargon. This pathological selectivity of contracts leads to a “paranomic” situation, an epistemic breakage in which normative discourse conceals its actual effects. The public dimension of contract thus consists in the difference between text as an independent modality of norms and shifts in real power relations. The critical counter-strategy of a deconstructive theory thus attempts to publicly visualize the power-divisional strategy of contracts through small but incessant ruptures. In particular, the application of fundamental rights in private law is able to open up the paranomic language of contracts and to draw attention to the political dimension of contracts.

From a system-theoretical perspective, Marc Amstutz is particularly interested in the relationship between contract law and the evolution of social

26. Pasquale Femia, *Desire for Text: Bridling the Divisional Strategy of Contract*, 76 LAW & CONTEMP. PROBS., no. 2, 2013 at 151.

structures.²⁷ As a social fact, every contract is embedded in a context of different function systems, in which subsystems develop in order to fulfill the purpose of the contract. For the provision of complex services, several contracts may be connected with each other in networks. Through this network, an emerging order of expectations develops that imposes itself on the discourses initiated by the conclusion of the individual contracts. A strictly bipolar contract law is not able to capture the specific mode of operation of networks and is unable to decide which of the discourses involved may cause a malfunction of the network. Appropriate legal rules for networks can only be achieved when one transfers the method for determining the applicable law in cases of a conflict of laws to the plurality of contractual normativities in a network. To the extent that one determines the law applicable to a particular legal relationship according to the social function of that relationship, network conflicts should be solved in accordance with that particular contract that ensures the functionality of the entire network.

Also fertilizing systems theory for the purpose of legal analysis, Dan Wielsch finally reconnects to the contractual meta-pluralism of the first contributions.²⁸ He concentrates on the relationship between rights and their social environment. The legal institution of contract helps to stabilize emergent social systems of interaction, which extend the spheres of freedom of the parties involved. However, the will of the parties constitutes only one of several autonomies in whose reference a particular contract is situated. A concept of “relational justice” thus obliges the court to consider all relevant social references of contractual rights. Only this explication of the public dimension of contract makes it possible to judge the appropriateness of a legal rule for each individual conflict. Conversely, the recognition of privately created norms as law presupposes that the process of norm generation has taken account of diverse social perspectives. This is particularly important when the content of contracts is formed by standard terms exempt from individual disposition. Since this way of contracting is prone to neglect environmental reference, fairness tests are needed as public rules of recognition for this form of private regulation. In any case, considering the social multi-referentiality of rights is a central criterion for legitimacy of state law and private law alike. The concept of relational justice tries to contribute to legal theory’s task of determining the substantial requirements of lawmaking under conditions of normative pluralism.

Is there a common lesson to be gleaned from these different approaches? Could these theories ever enter into a productive dialogue? From a pluralistic standpoint it is important to acknowledge that the pluralism of contract theories itself has a public or political dimension. Some reflections on contract theory offer criteria to evaluate contract theories in terms of “fit,” “coherence,”

27. Marc Amstutz, *Contract Collisions: An Evolutionary Perspective on Contractual Networks*, 76 LAW & CONTEMP. PROBS., no. 2, 2013 at 169.

28. Dan Wielsch, *Relational Justice*, 76 LAW & CONTEMP. PROBS., no. 2, 2013 at 169.

“morality,” or “transparency.”²⁹ But the reference to common standards of contract theory is too simple and is itself rooted in one particular idea about the relation between contract and law. This sketch of the theoretical landscape of the public dimension of contract attempts to domesticate, confine, and open the terms “contract” and “public,” and thereby contribute to the necessary reordering of the fragile public–private distinction in general.

The overview in this issue reveals the political dimension of theoretical conceptions of contract. Of course this is not an exclusive phenomenon of contract theory. All basic institutions of private law at the same time constitute the social framework of our everyday life and are constituted of and influenced by diverse theoretical backgrounds. To reveal this often overlooked societal dimension of private law is the essential ambition of the private law theory (PLT) project.³⁰ Dismissing old and rigid categorizations, PLT piece by piece unfolds a genuine public dimension of private law altogether.

29. STEPHEN A. SMITH, *CONTRACT THEORY* 3–31 (2004).

30. More information about the PLT Project, its transnational network, and ongoing activities can be found online at <http://privatelawtheory.net>.