RELATIONAL JUSTICE

DAN WIELSCH*

I
INTRODUCTION: JUSTICE UNFIXED

Justice, arguably, is a relational concept. This is inherent in the early definitions of justice that link the term to the virtue of individuals. More precisely, Aristotle refers to justice in a general sense as the most perfect virtue because it is displayed towards others (*pros heteron*).[1] The famous formula *suum cuique tribuere* also requires a relational understanding.[2] This concept is composed of variables that are in need of determination if a specific conception of justice is to result; it leaves open the object of assignment and, at the same time, it presupposes already existing standards about what is due. This openness is not a deficiency of the formula but, instead, a call for reflexivity, which aims at justifying the relevant standards of appropriateness. At least since the natural rights theories in modern times, the matter of justice has been focused on the configuration of rights and duties and therefore on relations *vis-à-vis* others. Whereas the operational dimension of justice is about the compliance of actions with given legal norms that configure rights and duties—administered by courts that are supposed to treat like cases alike—the second reflexive dimension is about the justification for these norms from an impartial point of view.

In the past, both dimensions of justice were mainly linked to the state as a result of methodological individualism and legal statism. Although claims of justice are usually viewed as primarily addressed to individuals and their actions, the state comes to the fore when—in the operational dimension—moral reasoning itself requires an effective legal system for the exact administration of justice. Regarding the reflexive dimension of justice, the focus on the state is mainly due to the idea of democratic law. An impartial justification of legal norms is thus supposed to be achieved through that procedural universality that is characteristic of democratic legislation and that makes possible the equal consideration of all interests involved.[3]

This article is also available at http://lcp.law.duke.edu/.

* Professor of Law, University of Cologne, Germany.

1. *See* ARISTOTLE, NICOMACHEAN ETHICS 1129b–1130a (T.E. Page et al. eds., H. Rackham trans., Harvard Univ. Press rev. ed. 1934) (c. 384 B.C.E.).

2. *See* PLATO, POLITEIA, 332b-332c. (P. Shorey trans., Harv. Univ. Press rev. ed. 1969). For the Latin expression, see CICERO, DE OFFICIIS, Liber I, § 5, 15 (G.P. Goold, ed., Walter Miller trans., Harvard Univ. Press 1975) (c. 44 B.C.E.); *see also* Ulpianus Dig. 1.1.10 (Th. Mommsen ed., Weidmann Verlag 1870).

3. *See* Jürgen Habermas, *Law and Morality*, Lecture at Harvard University, Oct. 1–2, 1986, *in* THE TANNER LECTURES ON HUMAN VALUES 219, 275 (S. McMurrin ed., 1988) (Habermas explains that, for Kant, the test for the lawfulness of any legal norm is the criterion whether a law could have

This double fixation of the relational character of justice—its reference to individual action as well as confining its reflexive dimension to state law—becomes inadequate where the normative environment of people cannot be assessed solely in terms of individual rationality but must be viewed as constituted by the imperatives of emergent communicative systems following a special functional logic. The inadequacy of this dual focus is also apparent where regulation of social relations in important fields moves from the state to private actors.

One might expect that these developments resonate especially in the domain of contract law. This is due to the fact that contract is the main legal form by which individuals configure the rights and duties that are to apply to their interaction with each other. Contracts may therefore function both as an entry point for emergent rationalities to influence the normative configuration set out by the parties and as a transmission device to make specific private orders normatively binding throughout society. In either way, social normativities compete with state law to assert normative control in and over bilateral relations. From a factual perspective, this means that the law must come to grips with phenomena of social regulation without assuming a center of normative hierarchy that would be able to integrate the different social demands involved. Regarding the requirements for justification of legal norms, this implies that procedural universality as promised by national legislation cannot operate as the touchstone for impartiality any more. As it seems, legal analysis needs to reflect on the public dimension of contract especially where the assumption of representing public interest through the state cannot be maintained. Here, the law is in need of new modes of justification.

II
CONSTRUCTION AND RECONSTRUCTION OF NORMATIVE WORLDS

A. Radical Normative Pluralism in (Contract) Law

A good starting point for legal analysis, given circumstances of normative pluralism, is a constructivist theory of observation. Unlike legal theories that are based on premises of cognitive idealism, a constructivist approach does not presume a common world shared by an analog structure of cognition present in individuals. Instead, it contends that all observation is dependent on distinctions being made in the medium of meaning, and that recognition of the environment, within a certain context of communications that process meaning, therefore is dependent on the distinctions applied in observation.[4]

The use of a specific cognitive model is of major relevance to legal analysis. As Robert Cover explained, no set of legal institutions exists apart from the narratives that locate it and give it meaning.[5] He emphasized that normative

arisen from the united will of an entire people).

4. *See* Hugo Fjelsted Alrøe, *Science as Systems Learning*: *Some Reflections on the Cognitive and Communicational Aspects of Science* 7 CYBERNETICS & HUMAN KNOWING 57, 67 (2000).

5. *See* Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4, 7 (1983).

rules are placed in a rich contextuality that must be opened up in order to understand the law itself.[6] This is due to the fact that interpretive commitments determine what law means and what law is to be.[7] The creation of legal meaning ("jurisgenesis") takes place through an essentially cultural process in which the normative register of society becomes related to the various constructions of reality.[8] Although Cover assumes that these interpretive commitments are always the commitments of a community of people, his insights are suited for abstraction.[9] Not just collectives with a certain historical identity are engaged in the idiosyncratic creation of meaning. According to systems theory, every social communications system operates on the basis of specific distinctions and processes meaning in a particular way, thereby developing its peculiar social identity. As far as these systems of meaning production engage with legal institutions, there is a universe of different normative worlds—a situation of "radical legal pluralism," so to speak. Constructivist approaches that take notice of the epistemic involvements of normative orders therefore seem especially appropriate to analyze law on the basis of a genuine normative pluralism, as they do not need to assume some kind of (state-imposed) unity.

A reconstruction of contract in terms of a constructivist theory of observation starts with the idea that contract refers to different sources of normative meaning. Contract directs the relations of participating actors. Any temporary relation between actors can be described as a specific form of a social communications system, an "interaction system." This interaction system may be free from any legal reference—such as in, for instance, a relation of friendship. Under certain circumstances, however, the law connects legal obligations to this relation even if the actors have not yet concluded a contract—such as, for instance, a duty to negotiate with care.[10] Once the actors have concluded a contract, the law protects this emergent social interaction system through various instruments such as, for instance, the principle of *favor contractus*.[11] Contracts then can be said to "stabilize a specific difference over time while being indifferent to everything else, including the consequences of the contract on individuals and businesses not party to it."[12]

---

6. *Id.*

7. *See id.* at 7–8.

8. *Id.* at 10–11.

9. Cover himself suggests such further development in the line of constructivist thinking since he explicitly draws on this sociological approach. *See id.* at 4 n.2.

10. For a survey of European legal systems with regard to legal obligations in pre-contractual dealings (with special emphasis on the differences between English law and the continental legal systems), see Sjef van Erp, *The Pre-contractual Stage*, *in* TOWARDS A EUROPEAN CIVIL CODE 493 (Arthur S. Hartkamp et al. eds., 4th ed. 2011).

11. For a discussion of this legal instrument for protection of the emergent relationship, see Bertram Keller, *Favor Contractus: Reading the CISG in Favor of the Contract*, *in* SHARING INTERNATIONAL COMMERCIAL LAW ACROSS NATIONAL BOUNDARIES: FESTSCHRIFT FOR ALBERT H. KRITZER ON THE OCCASION OF HIS EIGHTIETH BIRTHDAY 247 (Camilla B. Andersen & Ulrich G. Schroeter eds., 2008). *See also* MICHAEL JOACHIM BONELL, AN INTERNATIONAL RESTATEMENT OF CONTRACT LAW 102 (3d ed. 2005).

12. NIKLAS LUHMANN, LAW AS A SOCIAL SYSTEM 396 (Klaus Ziegert trans., 2004).

Contracts channel the observations of the emergent interaction system in a peculiar way. Interaction can now be expected to occur in the way set forth in the contract. A contract enables the participating actors (known as action systems) to observe the observations of each other.[13] The function of a contract consists of the creation of a new environmental reference for the actors involved. Therefore, at least two perspectives need to be distinguished. From the perspective of the interaction system, actors are regarded as "parties" and form part of the interaction system's environment. From the perspective of the actors, it is in turn the contract that becomes an important part of their social environment, as it provides the environmental conditions for the autonomy of actors.

The change of perspective for legal analysis implied in this genuine societal approach—starting from social relations instead of individuals—is essential.[14] The new reference is the social relation as such.[15] To be sure, under a legal order subscribing to the principle of private autonomy, the structure of the interaction system is, in the first instance, fixed by the normative claims of the parties. However, the "will" of each actor is put into perspective; it is just one of multiple possible references to the environment of the contract. Bilaterally agreed rights and duties may be supplemented and may sometimes even be derogated from the publicly authorized rules as set out in the private law of states. The

13. A less demanding form of coordinating the observations of autonomous systems is the social institution of the market. The market enables systems to observe the observations of other systems. It is a way for the economic system to make itself partially visible: a totality of operations in a definite moment of time that can be observed independently by participating economic actors. The economic system itself is a system of transactions (and not of reasons).

14. Besides systems theory, the approach of relational sociology explicitly changes the starting point for analysis from the individual to social relations. It contends that the units involved in interaction derive their meaning, significance, and identity from the functional roles they play in that interaction. *See* Mustafa Emirbayer, *Manifesto for a Relational Sociology*, 103 AM. J. SOC. 281, 287 (1997). For a comprehensive exposition on this topic, see generally, PIERPAOLO DONATI, RELATIONAL SOCIOLOGY (2012).

15. For a relational approach in legal theory, see Martha Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE L. J. 1860, 1884 (1987) (rights can be understood as "the articulation of legal consequences for particular patterns of human and institutional relationships"); Jennifer Nedelsky, *Reconceiving Rights as Relationship*, 1 REV. CONST. STUD. 1, 14 (1993) (conceptualizing rights in terms of relationships they structure). The context of these relational approaches is the feminist and communitarian critique leveled against a conception of autonomy as self-sufficient independence. Against this liberal conception, relational approaches stress that autonomy is a process of parts that mutually specify themselves. *S*ee *id*. at 8 ("What makes autonomy possible is not separation, but relationship."). *See generally* Gidon Gottlieb, *Relationism: Legal Theory for a Relational Society*, 50 U. CHI. L. REV. 567 (1983). For application in the field of property law, see JOSEPH W. SINGER, ENTITLEMENT: THE PARADOXES OF PROPERTY 134 (2000) (property rights as legal rules that shape relationships regarding control of valuable resources). In the field of contract law, relational contract theory asks us to consider that contracts are not discrete but need to be analyzed in the context of complex exchange relations. *See* IAN R. MACNEIL, THE NEW SOCIAL CONTRACT 10 (1980). It correctly assumes that contracts are embedded within broader normative contexts. As the focus of this approach is on the relation between individuals, it leaves open the issue of the normative structure of the social context for further exploration. *See also* Dori Kimel, *The Choice of Paradigm for Theory of Contract: Reflections on the Relational Model*, 27 OXFORD J. LEGAL STUD. 233, 236 (2007) (criticizing the watering-down of the understanding of relationship in relational contract theory).

meaning of the contract as observed by the parties may differ from the meaning the legal system gives to the contract. In this way, the same contract is part of different normative worlds.

B. Modes of Legal Reflexivity

Contracts are not just afforded meaning in the context of the interaction of parties. At the same time, they constitute operations of the legal system. In fact, this simultaneity of system relevance is constitutive for the social function of contracts. It provides the social system of interaction the complexity of the law as a highly differentiated calculus of justice determinations. Yet this complexity is largely built by way of a simplified form of self-observation of the legal system. In the mode of doctrinal argumentation, the legal system observes itself as a fabric of texts referencing each other to preserve a consistent order of decisions; doctrine provides the law with redundancy and allows for novelty only as "differences added in small numbers to the stream of reassurances."[16] The text of the contract—and the normative claims it puts forward—is subject to the arguments stored in other texts of the legal system, the function of which is limited to representing the system within the system.[17] This kind of doctrinal argumentation does not amount to reflexivity in a way that would allow for the *rational* control of an autonomous legal system. This would instead require the legal system to observe itself as a system within an environment by specifically reflecting on the unity of the difference between system and environment. If translated from constructivist observer theory into the language of causality, this means that "a system must control its effects on the environment by checking their repercussions upon itself."[18] The system would have to be able to expose its own distinctions to reality, to test them, and to thereby observe how the system and the environment would change if the distinctions were changed. In order to actually operate in this way, legal reasoning has to be supplemented with models that account for the social (in other words, environmental) effects of rights. An approach that binds itself to the limitations of cognitive idealism and the rationality of the "subject," such as liberal theory, cannot grasp the potential for rationality at the level of social systems.

When legal analysis is thus prompted to develop models of law's social effects, it must do so in all dimensions that are relevant. The will of the parties and the interaction system structured by a contract already indicate a plurality of references to be elucidated. In fact, the same legal structure can be of relevance in different social systems simultaneously. For instance, as most contracts structure economic deals, legal analysis must take into consideration that itera-

16. Martin Shapiro, *Toward a Theory of* Stare Decisis, 1 J. LEGAL STUD. 125, 131–32 (1972).

17. *See* Niklas Luhmann, *Legal Argumentation: An Analysis of its Form*, 58 MOD. L. REV. 285, 287 (1995).

18. For this restatement of rationality when cognition theory switches from the distinction between subject and object to the distinction between operation and observation, see NIKLAS LUHMANN, SOCIAL SYSTEMS 474–75 (Timothy Lenoir & Hans Ulrich Gumbrecht eds., John Bednarz Jr. trans., Stanford Univ. Press 1995).

tions of autonomous transactions based on freedom of contract entail competition in the economic system. Because the emerging social order of competitive markets, in turn, constitutes the actual conditions for autonomous contracting (and therefore is another important environmental reference of the contract) the effect of private rights on these orders constitutes a normative problem. Only when legal reasoning recognizes the normative relevance of the individual contract for the economic order *and* the normative relevance of the economic order for the individual contract, the law soars up to a comprehensive reflexivity that is essential for law's social responsibility.

Among legal theories that do account for the social effect of rights, economic analysis of law is perhaps the most influential. It basically claims that law is best understood as a tool to promote economic efficiency as modeled by Pareto superiority and mitigated by the Kaldor-Hicks criterion.[19] However, the main problem with this approach is that it leverages the analytics of rational choice from the level of the individual economic action to the level of social processes at which the decisions of many individuals influence each other. On the basis of methodological individualism, the social effects of action cannot be considered adequately. That would only be adequate if the "data" on which individual actors base their plans were generally known objective facts and if this "data" was as accessible to a scientific observer (the economist) as the circumstances of the observed actors.[20]

In economic systems based on individual liberties, however, all the actors and second-order observers (including governments, legislators, and courts) are equally ignorant as to the effects of their decisions. The assumption of equilibrium theory, that actors have perfect knowledge of market conditions, eliminates the key question of how the social use of knowledge is possible when this knowledge is fragmentary and distributed among individual actors. "It is rather a problem of how to secure the best use of resources known to any of the members of society, for ends whose relative importance only these individuals know."[21] The social institution that enables individuals to use more knowledge than they individually have is the process of competition. Competition makes it possible to discover facts that may provide for the efficient use of resources.[22] If the most efficient allocation of resources were known in advance, "there would

19. For a brief account of these concepts, see JULES COLEMAN, MARKETS, MORALS, AND THE LAW 97–98 (1998).

20. Manfred E. Streit, *Cognition, Competition, and Catallaxy*, 4 CONST. POLIT. ECON. 223, 235 (1993).

21. Friedrich August von Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519, 520 (1945) ("it is a problem of the utilization of knowledge not given to anyone in its totality").

22. The price of the good communicates the relevant information for adjusting economic plans in reaction to the discovery of new facts concerning the use of a resource. The price transmits coded information about the scarcity of a resource society-wide and makes visible how others observe the market. It is significant of the misunderstanding of neoclassical theory to define the coded information of prices in a way that makes it possible to decode them with regard to explanatory, objective facts. This fails to recognize that actors only evaluate the coded signal from the perspective of their own circumstances and respond to it by market transactions. *Cf.* Streit, *supra* note 20, at 236 n.10.

be no need to rely on at times wasteful and erratic markets and competition."[23] Or, in the words of Hayek, "if we do not know the facts we hope to discover by means of competition, we can never ascertain how effective it has been in discovering those facts that might be discovered."[24] Thus, efficiency beyond the individual logic of choice becomes an irrelevant concept, whereas at the micro level rational choice is contingent upon the information provided by competition.[25]

By predicating a knowledge given in its totality, efficiency theory lacks an understanding of the epistemological function of competition and its legal requirements. To evaluate individual transactions in terms of wealth maximization, as well as some predetermined optimum, would ultimately mean to test a particular contract against a future state of the economic system that is as of yet unknown; the process would thus be confounded by its possible result. Legal analysis then pretends to anticipate the outcome of operations of another self-referential system despite the fact that they are not accessible before actual performance for the economic system, much less for the external observer.[26] In doing so, economic analysis misses the grammar of the social institution involved and thus the legal rules that are necessary to protect the environmental conditions for the operation of the economic system.

Two aspects then seem especially problematic. First, economic analysis of law does not analyze the epistemic institutions of the economic system adequately and therefore fails to develop an adequate model of economic rationality that could be considered in legal theory. Secondly, economic analysis of law just imports the (questionable) criteria for economic rationality into legal reasoning; because there is then no place for a specific legal rationality, economic analysis does not provide a method to accommodate its normative implications with non-economic legal purposes.[27] A rational model of law *vis-à-vis* the economic system would instead have to recognize that law impacts the possibilities of the economic system to generate knowledge that, in turn, informs decentralized autonomous transactions and thus ultimately influences the adaptability of the entire system. It would also have to work out how the law resolves conflicts between different social rationalities involved in a case.

Other than economic analysis, ordoliberal legal theory is aware of the constitutional dimension of private law for the economic system. As such, it provides a legal model of the interdependencies between law and the economy, conceiving of "the economic system as a system of liberty based on a legal order

23. ERNST-JOACHIM MESTMÄCKER, A LEGAL THEORY WITHOUT LAW 34 (2007).

24. Friedrich August von Hayek, *Competition as a Discovery Procedure*, *in* NEW STUDIES IN PHILOSOPHY, POLITICS, ECONOMICS AND THE HISTORY OF IDEAS 179, 180 (1978).

25. *See* Streit, *supra* note 20, at 236; MESTMÄCKER, *supra* note 23, at 34.

26. In the words of action theory, an inevitably uncertain chain of causation is inherent in the market system because the "data" of the different individuals on which they base their plans are *adjusted* to the objective facts of their environment, which include the actions of the other people. *See* FRIEDRICH AUGUST VON HAYEK, INDIVIDUALISM AND ECONOMIC ORDER 92–106 (1948).

27. This is the central theme in MESTMÄCKER, *supra* note 23. *See, e.g.*, *id.* at 13, 14, 17, 21.

that provides for and guarantees the constituent economic liberties as individual rights."[28] It comes to understand that private law makes sure that individual transactions are related to the common good in and through social institutions. By adjudicating rights in accordance with the requirements of social institutions, private law accounts for the rationality of decentralized orders, such as the market economy.[29] However, ordoliberal legal theory fails to fully reflect on the social environment of the law as well because it restricts law's constitutional analysis to the economic system. In that respect, it falls short of the level of reflexivity that can be achieved with the help of the "impartial spectator" proclaimed by Adam Smith, a concept regularly invoked by ordoliberal thought itself. This moral device can be viewed as an obligation for those who are called upon for normative judgment "to address what is left out."[30] As has been suggested, the concept does lean toward an "open impartiality"—in contrast to the somehow "closed impartiality" of social contract tradition, with its confinement to the views of the parties to the social contract in a sovereign state—requiring that the encounter of public reasoning about justice go beyond boundaries of a state or a region.[31] The pertinence of other societies' perspectives to broaden parochial investigation of relevant normative principles is surely one dimension in which normative reasoning has to be opened up. However, the imperative to take on different perspectives on a normative question does not stop at the level of individuals. The demands of impartiality carry further and urge us to reflect comprehensively on the effects of action in all of its different social dimensions.[32]

III

THE JUSTICE OF RELATIONALITY: ADDING REFERENCE

Legal reasoning must carefully identify all social references involved in a given case. Only when jurisprudence comes to recognize the full range of relations between rights and social orders does it actually observe the law as a system within an environment and enable the system as such to operate rationally. Only when the law takes into account all of the environmental references of a contract may it achieve a kind of "relational justice" that determines the relations between different social normativities in a responsible way. Relational justice takes seriously the independent normative claims of the social systems affected and their relatedness in a shared social environment. This way, the law is

28. *See* MESTMÄCKER, *supra* note 23, at 22–23 (concluding that "[p]rivate law rules (contract, property, torts) are, however, not merely the instruments of self interest. They *simultaneously* make individual liberty compatible with the liberty of others under a general rule.") (emphasis added).

29. *See* ERNST-JOACHIM MESTMÄCKER, INTRODUCTION TO BÖHM, WETTBEWERB UND MONOPOLKAMPF 9 (2010) (1933).

30. Amartya Sen, *Uses and Abuses of Adam Smith*, 43 HIST. POLIT. ECON. 257, 267–68 (2011).

31. *Id.* at 268–69.

32. *See id.* at 266 (explaining that Smith in no way limited his analysis to the operation of the market but extended it to non-market institutions and recognized the need for institutional diversity); *see also infra* Part III.B.

able to make explicit the public dimension of legal institutions that consists in their multi-systemic relevance or, in other words, their "poly-contexturality."[33]

At the heart of a relational concept of justice resides the suggestion to take seriously the multiplicity of social references of legal rights. This requires legal analysis to make two moves within its own mode of observation: (1) to recognize the social dimension of individual rights as such; and (2) to extend analysis to all social systems involved in the exercise of rights.

A. The Social Dimension of Individual Rights

Acknowledging the social dimension of legal rights is not an end in itself. Individual rights are an important means by which the complexity of personal consciousness becomes available for social systems and their differentiation. Because these emergent social orders in turn determine the actual conditions for exercising individual autonomy, the social effects of rights present a normative problem for the law.

The underlying reason for this nexus is that rights impact the services that human consciousness and social systems provide for one another. In fact, communication and consciousness must be understood as each other's necessary environment. The development and innovative capacity of systems can be explained only if these are viewed as systems in an environment that in turn is constituted by the complexity of other (social and individual consciousness) systems. The knowledge of a social system depends on the extent to which it can co-opt distributed knowledge and observational capacity of individual consciousness for its own purpose and for the creation of system knowledge—what may be called the problem of "knowledge sharing."[34] One form in which individual capacities can be co-opted for social systems is through the granting of individual rights to persons. Property rights, for example, assign to particular individuals the authority to select, for specific goods, any use from a non-prohibited class of uses.[35] As selection authority is then moved to the local implicit knowledge of the individual, the result is a "collocation of knowledge and

33. Depending on the observing system, any event is perceived differently within the contextures of different social systems and is afforded different meaning. The result then is a "polycontextural" construction of reality. *See* Niklas Luhmann, *The Paradox of System Differentiation and the Evolution of Society*, *in* DIFFERENTIATION THEORY AND SOCIAL CHANGE: COMPARATIVE AND HISTORICAL PERSPECTIVES, 409, 421 (Jeffrey C. Alexander & Paul Colomy eds., 1990) ("Whatever happens happens doubly or multiply, viz., in a system and in the environment of other systems. Therefore every structurally relevant event triggers different causal processes depending on whether the events that are connected with it are organized as the reaction of a system to itself or as the reaction of many different systems to a change in their environment."). Luhmann's premise that every contexture operates on a binary logic, whereas a co-existence of contextures or systems could only be grasped with the help of a multi-valued logic, is based on Gotthard Günther, *Life as Poly-Contexturality*, *in* 2 BEITRÄGE ZUR GRUNDLEGUNG EINER OPERATIONSFÄHIGEN DIALEKTIK 273 (Felix Meiner ed., 1979).

34. On the problem of knowledge sharing, *see also* Dan Wielsch, *Occupy the Law: Societal Crafting of Intellectual Property Regimes*, 20 IND. J. GLOBAL LEG. STUD. (forthcoming 2013).

35. For this definition of property rights, see Armen A. Alchian, *Some Economics of Property Rights*, 30 IL POLITICO 816, 818 (1965).

decision rights" that optimally activates individual capacities (knowledge, experience, and skills) in selecting the use of scarce goods.[36]

Of course, individuals benefit as well. With the help of individual rights, the autonomy of persons is recognized and protected. From the perspective of the law, a specific part of its environment is assigned a status that is principally not subject to legal reconstruction and further scrutiny. Through freedom of contract, for example, the law provides individuals with the necessary reliability of expectations for the pursuit of autonomous plans in their interaction with others.

In both respects, it seems reasonable to suggest that rights constitute part of the environmental conditions for autonomous operations of various systems of meaning production. Shifting law's attention to the environmental conditions for autonomy implies expanding the traditional understanding of individuals as the sole social substratum of rights. Legal analysis must certainly evaluate the autonomy of the individual and its normative claims, but it must also reflect on the constituent social conditions for this autonomy.

This approach, which considers the relatedness and interdependence of personal and social autonomies, has already been applied to some private-law institutions. Family law has developed a notion of this when it reconceives of people simultaneously as individuals and as persons deeply involved in relationships of interdependency with varying degrees of intimacy.[37] Similarly, intellectual property law may profit from being reconstructed on the two-tiered basis of the relation between communication and consciousness. Creation and allocation of individual rights in communication artifacts requires communication and consciousness to be understood as environments that are mutually dependent on each other.[38] Contrary to increasing "propertization" of knowledge and contrary to interpreting intellectual property law as mono-functionally serving the economic rationale, such a relational approach in intellectual property law stresses the cumulativity of knowledge as well as the need to share basic knowledge resources. It submits that protection of legal rights and the freedom of development are co-equal principles.

B. The Public Dimension: Explicating Social Multi-Referentiality

Considering the entirety of social references of legal rights relevant in a given conflict is not a matter of discretion for legal method. Justice requires the law to be impartial. In the light of the prevalent subject-centered notion of legal philosophy, impartiality implies that existing "configurations" of rights and duties must be equally justified toward everybody. Drawing on the formula *ius suum cuique tribuendi*, justice is said to require consideration of the rights of *all*

36. Michael Jensen & William Meckling, *Specific and General Knowledge, and Organizational Structure*, 8 J. APPL. CORP. FIN. 4, 5 (1995).

37. *See* Martha Minow & Mary Lyndon Shanley, *Relational Rights and Responsibilities: Revisioning the Family in Liberal Political Theory and Law*, 11 HYPATIA 4, 23 (1996).

38. *Cf.* Wielsch, *supra* note 34.

persons affected by some action.[39] This imperative of omnilateral justification is even reinforced—and removed from the authority of legislators and judges—when it is argued that every autonomous person has a moral "right to justification," that is, a right to be recognized as an agent who can demand acceptable reasons for any social structure that claims to be binding upon him or her.[40] To be sure, this concept of justice is still grounded in the idea that society is made up by the coexistence of individuals in freedom.

However, this focus on the Kantian concept of freedom seems to be too narrow because it neglects the importance of social systems for the autonomy of individuals. As mentioned, social structures (such as institutions and social systems) provide the environmental conditions for the autonomy of actors. Correspondingly, in a more comprehensive account of justice, the law would also have to care for the coexistence of social systems. If law begins to care not just for the adjudication of rights, but also for the conditions required for these rights to become effective, then the task is two-tiered. First, the rights claimed by the parties must be linked to the social autonomies they presuppose. Second, the law must consider the relations between these social systems and take into account that they mutually form environments for each other. In this respect, law subscribes to a kind of "societal constitutionalism" that is concerned with constituting the autonomy of social systems as well as protecting the integrity of the environment from the system's autonomy.[41] It recognizes that the preservation of certain environmental conditions is essential for the operations of the system.[42] A relational legal analysis would also have to consider such "systemic reciprocities." This does not mean to discard law's reference to individual autonomy.[43] Rather, the idea is to add perspective to let the law know where the true seat of social coercion is to be found. The main concern is then to guide the law in the mission of impartial justification.

1. Social Normativity

This way of legal reasoning builds on the idea that social institutions and systems imply a normativity of their own. For legal and moral theories that buy

39. *See* Gregory Vlastos, *Justice and Equality*, *in* THEORIES OF RIGHTS 41, 60 (Jeremy Waldron ed., 1984) ("[A]n action is *just* if, and only if, it is prescribed exclusively by regard for the rights of all whom it affects substantially.").

40. On the basic moral right to justification, see Rainer Forst, *The Justification of Human Rights and the Basic Right to Justification: A Reflexive Approach*, 120 ETHICS 711, 719 (2010).

41. *See* GUNTHER TEUBNER, CONSTITUTIONAL FRAGMENTS 75 (2012); Riccardo Prandini, *The Morphogenesis of Constitutionalism*, *in* The TWILIGHT OF CONSTITUTIONALISM? 309, 326 (Petra Dobner & Martin Loughlin eds., 2010).

42. The interdependency of systems is rooted in a reciprocal relation between the systems. For instance, it results from the demands that competition as an economic principle puts on the law (for example, to provide with individual rights), and from the demands that the law makes for implementing the principle of competition (such as to prohibit restraint of competition).

43. Proponents of a relational account of rights also regard the new perspective as additive. *See* SINGER, *supra* note 15, at 135 (noting that focusing on rights as relationships requires judging the interests of the parties, but it also involves understanding and shaping social relations by adopting rules of law that either mirror or promote viable and defensible social relationships).

into constructivist rationalism and thus assume that normativity is based on contract or agreement, this implication may seem dubious. Yet alternative accounts of law and society indeed conceive of legal rules as being based on societal conventions. Hume, for instance, argues that legal rules, just as moral beliefs, constitute neither innate ideas nor conclusions of reason but an outcome of practical experience, of artifacts, and of standards.[44] Outside of the social contract model, rules may not be reduced to the execution of an already existing social order construed by the individual. Rather, they are the expression of the evolution of conventions and social order. The main idea of Hume's critique of the social contract is that "the essence of society is not the law but rather the institution."[45] In this sense, social normativity precedes the law. Characteristic of such an institutional account of law is the location of creative force in society.[46] This regulatory force is grounded in the fact that institutions (markets, corporations, networks, et cetera) decide on the extent of collectively generated knowledge (such as the richness of content) and the way it is used (through centralized or decentralized decisions). Institutions embody rules of knowledge sharing and are therefore of great relevance for the evolution of social systems that, in turn, affect individual autonomy.[47]

The type of knowledge to be shared through institutions is, however, generated according to the distinctions processed by social systems. As systems theory made clear, the main driving forces of social differentiation are social function systems that exclusively dispose of specific communicative media (such as power, money, and law) with society-wide impact. These systems are monopolies for the creation of political, economic, scientific, and religious meaning. The autonomy of their specific medium and the integrity of the specific discourse translate into normative claims of their own. These claims may be secured internally through a kind of internal morality.[48] Yet it has been worked out that the autonomy of systems is even secured in the form of sectoral constitutions

44. *See* DAVID HUME, A TREATISE OF HUMAN NATURE 496 (L.A. Selby-Bigge ed., 1896) ("[T]hose impressions, which give rise to this sense of justice are not natural to the mind of man, but arise from artifice and human conventions.").

45. *See* GILLES DELEUZE, EMPIRICISM AND SUBJECTIVITY 45 (1991); HUME, *supra* note 44, at 501 (describing the "establishment of the rule, concerning the stability of possession, be not only useful but even absolutely necessary to human society").

46. *See* MAURICE HAURIOU, AU SOURCES DU DROIT: LE POUVOIR, L'ORDRE ET LA LIBERTE 94 (1933) ("[I]l s'agit de savoir, où se trouve, dans la société, le pouvoir créateur; si ce sont les règles de droit qui créent les institutions ou si ce ne sont pas les institutions qui engendrent les règles de droit, grâce au pouvoir de gouvernement qu'elles contiennent.").

47. If the law must be assumed to process a model of normativity that is dependent on the cooperation of a whole network of cognitive and practical conventions and patterns of behavior, the consequence is a kind of epistemological turn in legal analysis: the social function of rights is then to be seen in the generation of generalizable experience as a positive externality to individual decision making. *See* Karl-Heinz Ladeur, *The Postmodern Condition of Law and Societal "Management of Rules,"* 27 ZEITSCHRIFT FÜR RECHTSSOZIOLOGIE 87, 92 (2006). In turn, the legitimacy of rights consists in the possibility for the individual to derive personal advantage of experience stored in iterations of artificially constituted relations. *Id.*

48. A well-known example is the analysis of the mores of science by Robert K. Merton, *The Normative Structure of Science*, *in* THE SOCIOLOGY OF SCIENCE 270 (Norman W. Storer ed., 1979) (1942).

that make use of "constitutive rules" to regulate the abstractions of communicative media within globally constituted function systems.[49] The law recognizes these different systemic normativities in various ways. In constitutional law, for instance, the general principle of equality is held not to be violated if a differential treatment of persons or situations is based on objective reasons that vary according to subject matter. This way, the legal system construes the criteria for treating like cases alike in accordance with the different social spheres or, in terms of the present theoretical approach, in accordance with the different social function systems. Constitutional justification thus distinguishes between different "spheres of justice."[50]

2. Impartiality Unleashed: Multiplication of Perspective

A social conflict may be caused by the collision of normative imperatives arising from different social autonomies, each of which may require a different course of action in the situation given. Provided the autonomies involved are protected through rights, the conflict can be treated as a legal dispute. Legal analysis must then elucidate all the relevant social references of rights and must consider the different sources of normative meaning on principally equal footing. This extension of the scope of legal analysis to different social normativities is supported by an account of impartiality provided by the moral and legal theory of Adam Smith.

Essentially, Smith's concept of the "impartial spectator" can be interpreted as a model that requests observers to perform a change of perspective in order to ensure the appropriateness of moral decisions.[51] Although Smith places human nature in the center of his moral theory and is focused on the relations between individuals, he nonetheless makes two significant moves that may serve

49. *See* TEUBNER, *supra* note 41, at 75–76 (using Searle's distinction between constitutive and regulative norms for a theory of sector-specific constitutions in society). *See also* John R. Searle, *Social Ontology: Some Basic Principles*, 6 ANTHROPOLOGICAL THEORY 12 (2006).

50. *See* MICHAEL WALZER, SPHERES OF JUSTICE (1983). Walzer calls for a theory of "complex equality" since social conventions would assign different kinds of resources and opportunities to different "spheres," each of which is governed by its own distinct principles of justice. "In any differentiated society, justice will make for harmony only if it first makes for separation." *Id.* at 319. This pluralistic theory of justice, of course, falls victim to criticism by those who purport a unitary account according to which all the different values involved must be made to fit together consistently to justify a decision with distributive effects. *See, e.g.*, RONALD DWORKIN, *To Each His Own*, *in* A MATTER OF PRINCIPLE 214–20 (1986). In contrast, a sociological jurisprudence shares Walzer's focus on the differentiated spheres that construct the social meaning of goods and distributive criteria, but would, on the one side, call for a generalization of the idea that different social contexts produce different principles of justice beyond the question of distribution, and, on the other hand, offers itself a much elaborated explanation of how meaning is produced in society. *See* Gunther Teubner, *Self-Subversive Justice: Contingency or Transcendence Formula of Law?*, 72 MOD. L. REV. 1, 6–7 (2009).

51. *See* ADAM SMITH, THE THEORY OF MORAL SENTIMENTS 112 (D.D. Raphael & A.L. Macfie eds., 1976) (Moral criticism prompts us "to examine our own passions and conduct, and to consider how these must appear to [other people], by considering how they would appear to us if in their situation. We suppose ourselves the spectators of our own behaviour, and endeavour to imagine what effect it would, in this light, produce upon us. This is the only looking-glass by which we can, in some measure, with the eyes of other people, scrutinize the propriety of our own conduct."). *See also id.* at 262–64.

as the starting point for further abstractions. In contrast to Hume, he conceives of sympathy, the central mechanism to relate with others, as being triggered not by the character of the agents involved but rather by the particular situation and the entire context. Moral judgment is, in his view, not concerned with character as such, but with character on the basis of its expression in action; it is a judgment in terms of concrete situational propriety of conduct.[52] Moreover, and most importantly, the impartial spectator is not to be thought of as a concrete person. In fact, the figure of the impartial spectator is rather a model of observation. As such, the function of the impartial spectator can be performed by any meaning-processing entity capable of observations. It requires observation to engage in a change of perspective and to look at the situation from any other point of view.[53] To observe a situation in "candid and impartial light" does not mean to adopt an observation-independent point of view, nor does it mean to figure out the interest of society as if it were the interest of a single person.[54] Instead, it ultimately means that judgment has to take on all perspectives involved.

Relational legal analysis takes up this notion of impartiality originating from the multiplication of perspective. Keeping in mind that the law is called upon to decide the conflicts between different claims of autonomy, this multi-perspectivity constitutes the internal morality of the law itself: to add reference and to decide the conflict with due regard to all sources of normative meaning.

The idea of impartiality predicated here is best characterized in an applicative sense as distinguished from the usual universal-reciprocal understanding.[55] Impartiality, in the applicative sense, calls for the complete and appropriate consideration of all the features of a situation in which a norm is to be applied.[56]

---

52. *See* KNUD HAAKONSSON, THE SCIENCE OF A LEGISLATOR 69–70 (1981).

53. Smith develops the impartiality of judgment by deliberately widening the set of sympathetic spectators until the position of a spectator is resolved into "every indifferent by-stander" and "every impartial spectator." *See* SMITH, *supra* note 51, at 22–23, 69. Smith argues that "[w]e must view [opposite interests], neither from our own place nor yet from his, neither with our own eyes nor yet with his, but from the place and with the eyes of a third person, who has no particular connexion with either, and who judges with impartiality between us." *See id*., at 135.

54. This is the misunderstanding in JOHN RAWLS, A THEORY OF JUSTICE 27 (1973). *See* MESTMÄCKER, *supra* note 23, at 23.

55. On this distinction, *see* KLAUS GÜNTHER, THE SENSE OF APPROPRIATENESS 37–38 (Kenneth Baynes ed., John Farrell trans., State Univ. of N.Y. Press 1993) (1957). As Günther argues, what is relevant to justification is only the norm itself and the question of whether it is in the interest of all that everyone follows the rule. In addition, we "need yet another principle which obligates us to examine *in every individual situation* whether the requirement of the rule, namely, that it be followed in every situation to which it is applicable, is *legitimate* too." *Id*. at 37. So, in the end, impartiality of (moral and legal) judgment must be understood as a process in which we have yet to form the appropriate norm. *Id*. at 38.

56. *Id.* at 111. For Smith, the sense of appropriateness is part of the model of the impartial spectator because "that there may be some correspondence of sentiments between the spectator and the person principally concerned, the spectator must, first of all, endeavour, as much as he can, to put himself in the situation of the other, and to bring home to himself every little circumstance . . . . He must . . . strive to render as perfect as possible, that imaginary change of situation." *See* SMITH, *supra* note 51, at 21. Since Smith's model of moral judgment does not aim at universalization but rather at de-

Since features of a situation are not per se relevant, but first acquire this status in the light of interpretations through which various normativities claim validity—different normative worlds arrive at different interpretations of the same situation—the requirement of impartiality in the applicative sense means that these different interpretations of a situation must be addressed. The complete description of the situation is subjected to a kind of "normative exhaustion," which puts forward all sources of normative meaning.

Jurisprudence can acknowledge this in various ways and has done so in the past. For instance, German interest jurisprudence ("*Interessenjurisprudenz")*—and similar American legal realism—directed the study of law to focus on the social objectives it is intended to achieve and it reconstructed the *quaestio iuris* as a conflict of interests.[57] "Interest" in this context must be understood as a legal concept, just as rights are. Law can thus switch on its own programs and mediate interests through rights, showing a way out of the irresolvable clash between different interests as such. Yet, the crucial move is that law treats interests as exogenous to the law, as pertaining to politics proper, for example. Through the reference to interests, the legal system refers to the environment; it does not ordain interests but is guided by what the parties themselves formulate as their interests.[58] If legal argumentation thereby combines self-reference and hetero-reference, it opens up law for learning *vis-à-vis* the environment because law can now control its decisions by its own picture of the political environment—by the legal reenactment of politics as it were.[59] Since the driving force of social evolution are not singular interests but interests as shaped by the rationalities of socials systems, legal analysis must include references to system autonomies in its internal pictures of the environment. Legal analysis would have to become aware that one of the major problems in today's society exists in the relations between social systems. Conflict is inevitable where systems lack stop rules for the excessive growth of their particular sub-rationality—for example, the maximization of the society-wide impact of their communicative media—that collides with other sub-rationalities or even with the system's self-reproduction.[60] Therefore, a kind of "societal constitutionalism" is needed that urges function systems to develop internal (self-) limitations in analogy to the political system (separation of powers, rule of law, and fundamental rights). In the context of such a constitutionalization of social systems—a process that usu-

relativization—at changing of perspectives and transcending partiality—he has no difficulty in integrating this applicative dimension from the outset.

57. For a comparative view on American legal realism and German interest jurisprudence, see Kristoffel Grechenig & Martin Gelter, *The Transatlantic Divergence in Legal Thought: American Law and Economics vs. German Doctrinalism*, 31 HASTINGS INT'L & COMP. L. REV. 295 (2008).

58. *See* Luhmann, *supra* note 17, at 297.

59. For a short account of how law perceives its environment in the light of interest jurisprudence, *see* EMILIOS CHRISTODOULIDIS, LAW AND REFLEXIVE POLITICS 156–57 (2001).

60. Growth gets pathologic and turns into destruction if it collides with other social dynamics. Teubner, *supra* note 41, at 81. Teubner identifies, in addition to the two mentioned types of collisions, a third one: the collision with a comprehensive rationality of world society (by assuming that the subsystems, from their decentralized perspective, were able to reflect on a macro-rationality). *See id.*

ally needs a lot of social energy—law plays a crucial role, because it makes normatively binding a special type of reflexivity that is essential for the strategy of the decentralized mastery of differentiation, namely the observation of itself as a system within an environment. The legal instrument by which this kind of reflexivity is enforced is the development of "ecological integrity rules," which are rules that protect the integrity of system-specific knowledge sharing processes from being subjected to the expansive rationality of other systems.[61] Whereas social systems other than the law may or may not wind up to qualified rationality in the sense that they reflect on their environmental effects by themselves, the very idea of the law is to add on perspective and to observe the multiplicity of relations between systems and their environments.[62] Law acquires its own rationality—its justice—only by engaging with the rationality of other systems. The decisions of law are being specialized in bringing in those constructions of meaning, those autonomies, and those conditions of autonomy that have been neglected in the course of a conflict. This way, law is able to develop rules that make autonomous claims compatible with each other.

IV
THE REFERENCES OF CONTRACT

A. Freedom of Contract: Normative Relating of Autonomy

Contracts structure interaction systems that, in turn, constitute a common social reference for participating actors. As previously mentioned, the result is the stabilization of a specific normativity that is indifferent to everything else in the social environment, including the consequences of the contract on individuals and businesses not party to it.[63]

The basic idea of private law is that society can afford these instances of idiosyncratic observation because it is only indirectly that actions of individuals are related to the common good. Individuals are free to pursue personal preferences and interests within the rules of private law. These rules do not directly impose constraints on the parties by replacing the normative program of the contract, as drafted by the parties, with public norms, because this would amount to discarding the cooption of individual observation capacity for social purpose. Historically, the guiding principle of private autonomy, rather, is the idea of achieving order through social institutions; as long as the contract in question is concluded by the parties being informed with the help of competitive markets, the law usually does not interfere with the normative program agreed upon by the parties. In principle, the only prerequisite for acknowledg-

61. For example, by acknowledging the enforceability of open licensing models the law protects knowledge-sharing in arts and science from being enslaved by the expansive logic of the economy. *See* Wielsch, *supra* note 34.

62. In most cases there will only be two social systems involved: one that is overly expansive relative to another one whose integrity of knowledge-sharing is at risk.

63. *See infra* Part II.A.

ing this individually crafted normative program is the procedural integrity of the discourse that sets up the terms. Contractual discourse must provide for the chance to introduce the perspectives of both participating actors. Essentially, contracting is about the creation of an emergent social system that is fueled by a diversity of perspectives.[64]

B. Standard Contracts and Private Law: Reintroducing Social Reference

In contrast, the standardization of contract terms re-formalizes the contract and makes it less specific to a particular social relation. If one party introduces boilerplate provisions, the counterparty can be said to submit itself to a "ready-made legal order."[65] The case for tolerating indifference of standards becomes more complicated. The assumption that the normativity of a given contract pays due regard to the autonomies of both participating actors is no longer valid. The specific difference, which the contract establishes, is structured by one of the parties alone so that the consequent indifference may extend not just to third persons but also to the counterparty itself. Though, of course, the contract remains a social system of interaction between two actors, its legal program is set unilaterally with the input just from the perspective of one party. The environmental reference of the contract may therefore be biased in favor of the autonomy of one party. As the procedural rationality of contracting—which provides for consideration of different perspectives—could not become effective, contract loses its character as an instrument for relating different normative claims. The presumption of relational justice inherent in contracts is suspended.[66]

From the point of view of relational legal analysis, private law, therefore, has reason to reintroduce the missing perspective into the contractual relation. Indeed, some national legal orders have enacted particular regulations regarding standard form contracts and subject them to a fairness test.[67] As it appears, the most stringent way for private law to conceive of this public instrument of control is to distinguish between standard contract terms, on the one hand, and contract, on the other hand, as two distinct categories that respond to different problems of social ordering. The latter aims at a consensual legal framework for a customized deal and the former imposes a preconditioned normative scheme for mass distribution of uniform products. In fact, standardized contracts can be regarded as a form of private regulation that must meet certain criteria of justification in order to be recognized as enforceable.[68] In the absence of a pre-

64. At the same time the perspectives involved limit the normative imperative of the contract. This is reflected in the doctrine of privity of contract.

65. As famously phrased by the German *Reichsgericht* in DEUTSCHES RECHT 1210, 1211 (1941).

66. Traditional doctrine, instead, is focused on the commutative justice of contract that is concerned with the relative equivalence of the benefits exchanged.

67. On differing assessments of the need for regulating standard-form contracts and the resulting different models in approaching the issue, *see* Thomas Wilhelmsson, *Various Approaches to Unfair Terms and Their Background Philosophies*, 14 JURIDICA INTERNATIONAL 51 (2008).

68. *See* Dan Wielsch, *Global Law's Toolbox: Private Regulation by Standards*, 60 AM. J. COMP. L. 1075, 1078–80 (2012).

contractual bargaining discourse, which could be reflective of different sources of legal meaning concerning contractual rights, the fairness test emulates the missing discourse as if it had happened: the counterparty is only subject to the standard terms if they stipulate rights and duties that would—at a minimum—result from actual discourse. A fairness test for standard contract terms thus operates as a public rule of recognition for a special type of private regulation that is prone to neglecting environmental reference.

Another instrument by which the law can make sure that social references of a contract are considered comprehensively are general clauses such as *bona fide* or good faith.[69] Historically, the function of good faith had been to make sure that any contract—including the ones individually negotiated—was in accordance with social morality.[70] However, under contemporary conditions of societal fragmentation into specialized discourses, recourse to morality must be replaced by recourse to the *idées directrices* of the institutions affected by contractual rights and the substantive demands of social systems. Unbounded priority of the individual consensus between parties to the contract cannot be insisted upon, whether one is dealing with matters of individual conscience, strict religious prohibitions, political freedoms, regulatory policies, or economic institutions.[71] As a result, good faith may have to complement contractual duties with social expectations produced by those spheres of legal meaning in order to provide for compliance of a given contract with the multitude of societal contexts it is part of. Because the contractual program is then construed in a way that takes account of social references initially missing, *bona fide* functions as a public rule of recognition for private normativity, too. Other general clauses of private law may operate in a similar way.[72]

C. Multi-Firm Standardization: Developing Public Rules of Recognition

A further level of challenge to reflection of the public dimension of contract is reached in cases of multi-firm contract standardization. This form of contractual regulation is likely to develop where state law is nonexistent, inflexible, or parochial. Private initiatives of standardization are closely coupled with the network of cognitive and practical conventions in different sectors of business and can therefore be highly responsive to the respective rationalities of interaction. Moreover, private standards can easily cross borders and become transnational because they only require freedom of contract to be promulgated. Espe-

69. On good faith in U.S. law, see E. ALLAN FARNSWORTH, CONTRACTS § 7.17 (4th ed. 2004).

70. *See* FRANZ WIEACKER, A HISTORY OF PRIVATE LAW IN EUROPE 377–78 (Tony Weir trans., Oxford Univ. Press 1995).

71. *See* Gunther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences*, 61 MOD. L. REV. 11, 23 (1998).

72. In common law that operates without general clauses, other sorts of legal norms have features that are characteristic of general clauses. *See* Simon Whittaker, *Theory and Practice of the 'General Clause' In English Law: General Norms and the Structuring of Judicial Discretion*, *in* GENERAL CLAUSES AND STANDARDS IN EUROPEAN CONTRACT LAW 57 (Stefan Grundmann & Denis Mazeaud eds., 2006).

cially under conditions of globalization, where legal relations have a variety of non-territorial affiliations—such that the imposition of community norms on a dispute with links to other communities would become presumptuous—and where private actors may even be in the position to evade national regulation—such that sovereignty would become simply ineffective—it can be in the interest of the state itself that transnational private regulation gains traction.[73]

At the same time, multi-firm standard contract terms limit the discovery function of competitive markets in offering a variety of contractual regimes because they foreclose the possibility of modeling customized rules. Since the very idea of standardization consists of providing a uniform model for transactions in a certain market, it exerts a strong market regulatory function.[74] Even if the agreed upon terms of the contract are fair and reasonable in themselves, they may be undesirable because the standardization eliminates competition among reasonable terms.[75] Multi-firm standardization is thus able to determine the normativity of contract in whole sectors of economic transaction.[76] If markets are ruled out as external forces that put pressure on contractual normativity to be reflective of environmental concerns, there must be other mechanisms in place to make sure that the resulting private normative orders take into account a diversity of social references. Whether these private regimes provide for justificatory elements in this sense is checked by criteria set forth in public rules of recognition.[77]

As case studies of private regulatory regimes based on standard contract terms show, these criteria vary with the extension of the normative claim of the private rules, and they are particularly high if the regime affects third parties. Specifically, they require that affected interests are represented in the process of setting up the regime: that the sector-specific regime performs a public

73. In a globalized world, states may find it useful to "consider a broader set of governmental interests in being part of an interlocking world system of transnational regulation and multiple community affiliation." Paul S. Berman, *Towards a Cosmopolitan Vision of Conflict of Laws: Redefining Governmental Interests in a Global Era*, 153 U. PA. L. REV. 1819, 1852 (2005) (discussing an adequate vision of conflict of laws in a global world).

74. *See* HUGH COLLINS, REGULATING CONTRACTS 56 (1999).

75. *See* Mark R. Patterson, *Standardization of Standard-Form Contracts*, 52 WM. & MARY L. REV 327, 334 (2010).

76. The question is also whether courts are prepared to deal with complex global standards such as in the financial industry. Given the decentralized way of adjudicating cases before national courts, which does not allow for development of a settled body of law, and given that the market may have greater interest in the outcome of a case than the litigating parties do, the concern is that a wrong decision from a court can give rise to systemic consequences. This suggests not only searching for ways to inform courts with expert knowledge about the rationality of financial markets, but also establishing specialized dispute settlement in the global financial markets. *See* Jeffrey B. Golden, *The Courts, the Financial Crisis and Systemic Risk*, 4 CAP. MARKETS L. J. S141 (2009).

77. Any system of positive law must contain a test of validity or a rule must pass in order to be binding in that system. As Hart explained, this test or rule takes on the status of a special secondary rule—a rule of recognition. *See* H.L.A. HART, THE CONCEPT OF LAW 94 (Joseph Raz & Penelope Bullock eds., 2d ed. 1994). National legal systems have developed a subset of criteria by which they check whether a private normative order is rendered binding. For further details, see Wielsch, *supra* note 68, at 1095–1100.

function, that they eventually provide for a right to opt out of the regime, and that it is in compliance with essential public policy.[78] These criteria ensure that the private normativity in question is constituted by a plurality of social perspectives. Most notably, however, the rules of recognition themselves are subject to a process of justification because they may have to be accommodated within the augmented normativity originating in the private sphere. Private regulatory regimes and national law engage in a form of dialectical interaction.[79] Where the private lawmaking process is open and strives for balanced rules in a multitude of relationships, state law cannot just refer to the usual limitations of private autonomy and simply dismiss rules with effects beyond the stipulating parties.

V
RULES OF LAWMAKING

Developing new modes of justification for contractual normativity is necessary, especially under conditions of transnational private ordering in which the public dimension of contract cannot be channeled through the state and national constitutions. Only in the regulatory context of nation-states, the juridification of social spheres must comply with the higher norms of a constitution, and only here the impact of specialized legal regimes on the individual is moderated by coordination with other legal regimes that protect different values and different types of social interaction.

Still, phenomena of global law indicate that, even absent statist rules of recognition, norms of private global regimes can acquire the same binding force as state norms. Especially, private arbitral tribunals may also host the rule of law and provide the primary norms of a regulatory regime with reflexive second-order observation that subjects those norms to binding decisions on their legality, thereby producing secondary norms for the regime in question.

Therefore, public rules of recognition should not be identified with national legal orders. To be sure, rules of recognition evolve along sector-specific private legal regimes. However, this does not mean the rules of recognition are private, too. Irrespective of the forum of recognition, be it national courts or arbitral tribunals, privately created normative orders need to comply with some generic criteria in order to make their pervasive effects appear legitimate. The focus is on the substantial requirements of the "rule of lawmaking."

The idea of relational justice submits that such a rule essentially makes binding the consideration of all sources of normative meaning affected by the normativity to be qualified as law. The "publicness" of a public rule of recognition would then consist in the commitment of any regime hosting the

78. *See* Wielsch, *supra* note 68, at 1081–94.

79. On "dialectical" interaction of legal orders, see also Paul S. Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV 1155, 1176, 1199, 1201 (2007) (with a focus limited to formal state and international legal institutions, such as the engagement of domestic courts and the European Court of Human Rights in a series of interpretive mutual accommodation strategies).

rule of law to require multilateral justifiability from the social norms to be recognized. In particular, relational justice asks legal reasoning to take seriously the public dimension of contract as constituted by its polycontextural relevance in different spheres of autonomy. This way, legal theory provides law with a redefinition of justice under conditions of normative pluralism.