
Peer Zumbansen
Osgoode Hall Law School,

Follow this and additional works at: https://www.repository.law.indiana.edu/ijgls

Part of the Contracts Commons, Government Contracts Commons, and the International Law Commons

Recommended Citation

This Symposium is brought to you for free and open access by the Maurer Law Journals at Digital Repository @ Maurer Law. It has been accepted for inclusion in Indiana Journal of Global Legal Studies by an authorized editor of Digital Repository @ Maurer Law. For more information, please contact kdcogswe@indiana.edu.
Introduction

Private Ordering in a Globalizing World:
Still Searching for the Basis of Contract†

PEER ZUMBANSEN*

THE UBIQUITOUS RETURN TO CONTRACT

Contractual governance ranks high on the agenda of contemporary law and policy debate. Contracts as concepts¹, tools² or frameworks³ of societal ordering and self-regulation occupy a central place in fields ranging from individual business agreements to complex, cross-border commercial relations, from standard form contract arrangements to hybrid contractual regimes in public service delivery. Contract is dead,⁴ long live contract!⁵ The debates over the rise and fall and rise of free-

† This paper serves as an introduction to the symposium papers first presented at the 2nd Comparative Research in Law and Political Economy Conference at Osgoode Hall in November 2006. Thanks to all participants for a fabulous conference and to participants in Osgoode Hall’s Legal Theory Reading Seminar for their willingness to discuss these issues throughout the year. Thanks in particular to Joanne Rappaport, Zane Roth and Fenner Stewart for helping organize the event. Finally, thanks to the editors of the Indiana Journal of Global Legal Studies for offering to publish this Symposium issue and for their diligent work in preparing the Symposium’s contributions for publication.

* Jur. Exam (Frankfurt); Licence en droit (Paris X); L.L.M. (Harvard); Dr. iur. (Frankfurt); Habilitation (Frankfurt). Canada Research Chair in the Transnational and Comparative Law of Corporate Governance, Osgoode Hall Law School, York University, Toronto. Associate Dean (Research, Graduate Studies and Institutional Relations), Director, CLPE Comparative Research in Law & Political Economy Network, www.comparativeresearch.net. Email: Pzumbansen@osgoode.yorku.ca.


edom of contract are legendary\textsuperscript{6} and endless,\textsuperscript{7} and symposia abound.\textsuperscript{8} There are many reasons for the attention presently given to contractual governance. They are so plentiful, in fact, that it is hard to imagine how to incorporate them into first-year teaching materials in such a way that students are at least alerted to the wide-ranging assessments and contestations that surround contractual agreements and contract law. Yet, given the centrality of contractual bargaining in the dominant areas of legal practice, it seems desirable already to introduce first-year law students not only to historical and more contemporary struggles over “freedom of contract” – mostly circling around notions of duress, unconscionability, bargaining power and consumer protection – but also to the most recent phenomena of the “turn to contract,” be it in private,\textsuperscript{9} public,\textsuperscript{10} or even international law.\textsuperscript{11} These current debates deserve particular attention in light of the larger trends they are mirroring. Far from being mere ivory-tower incantations of allegedly internal questions limited to doctrines and rules of contract law, the unceasing discussions over the scope and limits, advantages and disadvantages of contract, contract law and contract adjudication are reflective of deeper changes in our understanding of legal regulation. Whether it is the current attack on contract adjudication in the United States\textsuperscript{12} and on consumer protection laws in Germany\textsuperscript{13} and Europe,\textsuperscript{14} or the plea for a largely

\begin{footnotesize}
\textsuperscript{9} See Scott, supra note 5.
\textsuperscript{10} See Freeman, supra note 2.
\textsuperscript{14} For a guide to the debate, see Gralf-Peter Calliess, The Limits of Eclecticism in Consumer Law: National Struggles and the Hope for a Coherent European Contract Law: A Comment on the
uninhibited regime of contractual self-regulation for transition economies, the signs clearly point to a turning away from welfarist intervention into contractual arrangements.

The complexity of the economic, political, cultural and geographic environment in which these changes of the regulatory landscape are occurring is only insufficiently captured through allusions to "globalization." We are today already benefiting from a host of instructive and insightful assessments of the changes, which are reshaping the relations between state and society, leading to a redefinition of traditional concepts of actors and norms, and of the meaning and concept of "government" and democratic rule. While historical contract law studies regularly concerned themselves with the context in which rules and principles were emerging — in other words, the political economy of governance by contract — the view prevailing in today's assaults on welfarist contract law adjudication seems to be much more matter-of-fact, more concerned with the desired efficiency of contracting arrangements than with issues of distributive justice tied to such exchanges. In this light, contract lawyers are challenged to reassess the field, to assert what the law of contract is, or should be, addressing. The manifold appear-


19. See Oliver E. Williamson, The Modern Corporation: Origins, Evolution, Attributes, 19 J. Econ. Lit. 1537 (1981); see also critiques by Mark Granovetter, Economic Action and Social Structure: The Problem of Embeddedness, 91 A.M. J. Soc. 481, 493-95, 505 (1985); David Campbell, Relational Contract and the Nature of Private Ordering: A Comment on Vincent-Jones, 14 Ind. J. Global Legal Stud. 279, 288-89 (2007) ("Arguably, the main misuse of the concept of contract in economic contracts is the implication that these contracts create incentives for efficiency by normally imposing financial parameters that are binding, which plays on the connotations of sanctity in private contract.").

ances of contractual governance in today's commercial relations, public service delivery and international relations invite a critical perspective on the regulatory nature of these arrangements and of the role that (contract) law can play in this context, if any.

**Law and the Political Economy of Private Ordering**

The papers collected in this issue of the *Indiana Journal of Global Legal Studies* were first presented at an international conference, held in November 2006 in Toronto under the auspices of the interdisciplinary CLPE Comparative Research in Law & Political Economy Network of Osgoode Hall Law School. True to the Network's interdisciplinary program, bringing together scholars from law, economics, sociology, history and political science, the conference explored the current trends in public and private contractual governance. The conference's theme itself, "Governing Contracts," invited an exploration of the dual perspective that informs contemporary reflections on contractual governance. While "governance through contract" appears to be emerging as the dominant scheme of legal regulation "after the welfare state," both public and private, its alter ego, "governance of contract," in contrast, seems to be relegated to another epoch by current proponents of a new, "liberated" freedom of contract. With an emphasis on autonomy and freedom from state intervention, contracting parties are believed to be better able to operate through self-chosen rules than by being subjected to standards that are not of their making and that reside in the discretion of the presiding judge. As a result, whether it be in the context of domestic economic exchanges or within the ambiguous sphere of "state-making," the current view on governance through contract disconnects the ideology of individual autonomy and self-governance from the political economy of state transformation, driven by politics of austerity and the shifting of public to private responsibility. This leads to an ef-


24. For an excellent, if depressing, assessment, see Richard Sennett, *The Culture of the New Capitalism* (2006). See also Günter Frankenber, Udo Di Fabro's *Die Kultur der Freiheit* and Richard Sennett's *The Culture of the New Capitalism*, 7 German L. J. 721 (2006) (book review); Campbell, *supra* note 19, at 286-87 ("But it is now, in my opinion, so obvious as no longer to need arguing, that the state has not retreated at all. The form of state intervention has been changed, with the concept of
fective insulation of any future assessment of "regulating contracts" from questions regarding where contracts should fit within the larger regulatory framework of public and private regulation. Such questions appear to be removed from a legal discourse proper and, instead, delegated to political science or philosophy. Within this context of an increasing de-legalization and technicization of contract on the one hand, and the proliferation of contractual governance in almost all sectors of societal life on the other, the following papers explore various contexts and frameworks of "governing contracts," ranging from the contestable contractualization of public service delivery, to a re-conceptualization of contractual governance in its relation to and tension with democratic self-rule, to an exploration of modes and ways of generating, translating and realizing societal knowledge in the context of an increasingly knowledge-dependent state. It is this last aspect in particular that suggests we take a closer look at the ubiquitous references to a "retreating" state. Recent studies of changing welfare-state regimes suggest, indeed, not a reduction of state activity, but a dramatic transformation of the modes in which governmental action is structured, altogether leading to a substantial ex-

'contract' being at the heart of the change. The 'new public management' seeks to marshall an economic efficiency; it identifies with the conduct of private sector business to public purposes by basing public sector activity on 'contracts.' The retreat of the state actually has been a process of the maintenance or even the expansion of the public sector. This expansion has taken place under the guise of 'contract,' so that now the larger part of public expenditure is described as being 'quasi-contractual' or 'hybrid.' Obfuscation about the size, extent, and nature of public intervention is at the heart of the 'third way' followed by contemporary government.


Revisiting and revitalizing the analysis of relational contracting (as contrasted to "classical," "discrete" contracting), some authors in this issue argue that the ideological landscape has changed since relational contract emerged as a powerful counter to the then already neo-liberal conception of contract. They identify the challenge of contemporary contractual governance to lie in a better understanding of the structural conditions of a transformed welfare state, conditions that shape the freedom of each and every contract in its roots. Without such a clearer view, the manifold expressions of "client" and "consumer driven" services, etc., are too easily aligned with likewise optimistic descriptions of emerging new forms of decentralized governance, which are in danger of making invisible the particular politically, culturally, economically and historically shaped interests at stake.

Assessments of the "social models" of contract regimes and regulatory frameworks for contracts oriented around the political economy and legislative histories of particular nation-states are poignantly positioned alongside conceptions of an emerging new law of contract in a dramatically de-territorialized sphere of economic interaction. The latter builds partly on historical narratives.

31. Peter Vincent-Jones, The New Public Contracting: Regulation, Responsiveness, Relationality (2006); see also Campbell, supra note 19, at 286-94 (arguing that the contractualization of state activity ought to be seen not as a coherent shift in the mode of public governance — as so described by Vincent-Jones — but rather as an expression of a problematic expansion of state activity).


34. Campbell, supra note 19; Zumbansen, supra note 26.


of medieval forms of commercial (self-) regulation, and offers an intriguing view on current trends of de-legalization of contract law. This work contributes to the presently pursued explorations of a law "outside," "without," or "beyond" the state. It is of particular interest in the current debate over law beyond the state that we are witnessing an important merging of perspectives, literatures and viewpoints from both public and private law, domestic and international. Such an intradisciplinary discussion, which is otherwise rare among contract and international legal scholars, lies at the heart of the following papers. Whether there can be a law beyond the state raises fundamental questions that seem to be formulated (and answered) from within a legal paradigm that presupposes the existence of law. In contrast, a legal pluralist approach would maintain a fundamental skepticism towards the legalization of social relations in order to better trace the structures and dynamics of "emerging legal certainty. While the former approach appears to hold on to and to struggle with the relevance and "experience with the state," the latter seeks to unfold the "political" at a certain


41. See Michaels, supra note 39, at 462 (discussion of Bernstein).

42. Among the most radical proposals to rethink the state-focused orientation of the global order is certainly Philip C. Jessup, Transnational Law (1956); more recent elaborations of post-national or global constitutionalism include Habermas, supra note 17; Andreas Fischer-Lescano, Die Emergenz der Globalverfassung, Zeitschrift für ausländisches öffentliches Recht und Völkerrecht [ZöRV] (2003); Andreas Fischer-Lescano & Gunther Teubner, Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law, 25 Mich. J. Int'l L. 999 (2004). For an intermediate position, see Armin von Bogdandy, Constitutionalism in International Law: Comment on a Proposal from Germany, 47 Harv. Int'l L.J. 223, 240 (2006).

43. See the contributions in the seminal collection Global Law Without A State (Gunther Teubner ed., 1997).

44. For a recent, differentiated positioning of law creation between state and non-state perspectives, see Ralf Michaels & Nils Jansen, Private Law Beyond the State? Europeanization, Globalization, Privatization, 54 Am. J. Comp. L. 843 (2006), in particular at 888-889.

45. Michaels, supra note 39, at 465.


48. See Michaels & Jansen, supra note 44, at 888: "Our experience with the state makes a simple return to a pre-state situation implausible, but in turn our experience with a pre-state situation may
distance from the state, thereby laying a particular emphasis on the emancipatory nature of law, cr1ystallizing in the struggle over "rights." The centrality of notions of private ordering in current deliberations over post-welfarist law, in which contractual governance plays the lead role, needs to be assessed against the background just described. Private ordering is not a natural occurrence, but unfolds within a complexly structured regulatory and political framework.

PERSPECTIVES

What follows from these brief introductory remarks is the insight that when discussing the public and private dimensions of contract law, and their intersections in a world of government delegation to societal actors, of cross-border contracts, and of emerging transnational governance regimes, any observer is standing on the shoulders of giants. We can see into the vast land, but we must also do our best to ascertain our own, emerging perspectives. As is becoming clear, a differentiation merely between public and private dimensions of contractual arrange-


49. See Marc Amstutz, Andreas Abegg & Vaios Karavas, Civil Society Constitutionalism: The Power of Contract Law, 14 IND. J. GLOBAL LEGAL STUD. 235, 236 (2007): "Contract law today has the further task of providing for the areas of social autonomy from which 'civil society' is built up...."


51. See Granovetter, supra note 19, at 505: "[...]

the main thrust of the 'new institutional economists' is to deflect the analysis of institutions from sociological, historical, and legal argumentation and show instead that they arise as the efficient solution to economic problems."

52. See David V. Snyder, Molecular Federalism and the Structures of Private Lawmaking, 14 IND. J. GLOBAL LEGAL STUD. 419 (2007); Campbell, supra note 19, at 280-81: "Even the simplest contract is not a relationship between two parties, but is their relationship mediated through a third party, the state, which gives effect only to socially understood and politically endorsed intentions. The free market expressive of the choices of individuals is, at its heart, a social institution." See also the very insightful observations by Jan M. Smits, Legal Culture as Mental Software, Or: How to Overcome National Legal Culture?, MAASTRICHT WORKING PAPERS, FACULTY OF LAW 2007-2 (2007), available at http://www.unimaas.nl.
ments is likely to be inadequate to capture the structural and normative complexity of contemporary forms of contractual governance. This explains the continued interest in alternative concepts of contract, including mixed, hybrid and network contracts. This present interest expresses the commitment of scholars around the world to question the boundaries between an allegedly internal and external view on contract. Contract scholarship has, in stark contrast to the astounding simplifications we find in contemporary pleas for a reformalization of contract governance, long been tracing the implications and effects of governance by and of contract within a regulatory economy. The distinction between public and private dimensions of contract was hardly ever convincing, if — at best — it was invoked to illustrate the intertwining of different, yet interrelated, aspects of societal ordering. The following papers, in different ways, testify to the thesis that contractual governance remains embedded in particular socio-economic, historical and cultural contexts. The nature of this embeddedness, however, is itself highly contested, and contemporary developments in contract, corporate, ad-

55. For a brilliant exposition of the thesis of a co-originality of public and private autonomy, see Jürgen Habermas, Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy 82 et seq. (William Rehg trans.) (1996).
ministrative and international law scholarship, to name but a few areas, mirror the breadth of analytical approaches to studying the changing structures of norm creation and norm enforcement. If globalization is argued to have led to a dramatic denationalization of regulatory fields and functions, this still begs the question how a territorial or substantive understanding of globalization impacts our study of the changing forms of government and the much-discussed shift to governance. Present and future assessments of contractual governance will likely seek further opportunities to develop this dialogue across disciplinary and doctrinal boundaries.


