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# Law after the Welfare State: Formalism, Functionalism and the Ironic Turn of Reflexive Law

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### Law After the Welfare State: Formalism, Functionalism and the Ironic Turn of Reflexive Law

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**LAW AFTER THE WELFARE STATE: FORMALISM,  
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**Abstract:** This paper analyzes the contemporary emergence of neo-formalist and neo-functionalist approaches to law-making at a time when the state is seeking to reassert, reformulate and reconceptualize its regulatory competence, both domestically and transnationally. While the earlier turn to alternative regulation modes, conceptualized under the heading of “legal pluralism,” “responsive law,” or “reflexive law” in the 1970s and 1980s, had aimed at a more socially responsive, contextualized, and ultimately learning mode of legal intervention, the contemporary revival of functionalist jurisprudence and its reliance on “social norms” embraces a limitation model of legal regulation. After revisiting the Legal Realist critique of Formalism and the formulation of functionalist regulation as a progressive agenda, this paper compares the American and German experiences with the rise of the social interventionist state in order to ask where law stands “after the welfare state” at the outset of the twenty-first century.

Keywords: neo-formalism, neo-functionalist, law-making, legal regulation, rule of law, welfare state, responsive law, reflexive law

JEL classification: K10, K33, K40

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# **LAW AFTER THE WELFARE STATE: FORMALISM, FUNCTIONALISM AND THE IRONIC TURN OF REFLEXIVE LAW\***

Peer Zumbansen\*\*

## **I. THE DEMISE OF THE WELFARE STATE AND THE RISE OF THE GLOBAL KNOWLEDGE SOCIETY**

For some time now, scholars in law, the social sciences and economics have been debating the future of legal regulation in an increasingly denationalized world. The reasons for this inquiry emerge from a wide variety of places and backgrounds, and every discipline has been carving its own particular lens through which it perceives, traces and assesses the specific trajectories of institutional and conceptual change. A hallmark of

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these efforts is the growing interpenetration of disciplinary discourses, with “globalization studies” having emerged as either the crystallization or final diffusion point—whichever perspective one may wish to take. In the interim, writings and courses in “globalization and . . .” studies have become a more or less satisfactory label for these border-crossing inquiries into the driving forces of global regulatory changes, national path-dependencies and newly emerging norm-creating actors. Despite their political divisions, these studies, which have produced numerous guides to these phenomena from within very vibrant scholarly discourses,<sup>1</sup> suggest that there is no way back to a world *before* globalization.<sup>2</sup>

One way, then, of identifying the consequences of globalization has been to celebrate the “liberation” of commercial actors from government intervention by making effective use of jurisdictional forum-shopping, tax havens and radically decentralized business organization structures. Another one, arguably on the other end of the choice-continuum, would seek to radicalize globalization’s de-hierarchization trends<sup>3</sup> in search of realizing and nurturing civic and other bottom-up emancipatory powers, however uncomfortably and inevitably they remain situated between assertions of the global and the local.<sup>4</sup> Rejecting findings of unstoppable convergence across distinct political economies, globalization scholars point to the ever-recurring, well-known, nation-state-based distinctions and argumentative patterns: where proponents of globalization elevate the necessary containment of government regulation of market affairs as the defining feature of a globalized world, critics deconstruct such claims as “ideology.”<sup>5</sup>

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1. See, for example, the by now “classical” Globalization reader GOVERNING GLOBALIZATION: POWER, AUTHORITY AND GLOBAL GOVERNANCE (David Held & Anthony McGrew eds., 2002); THE HANDBOOK OF GLOBALISATION (Jonathan Michie ed., 2003); GOVERNANCE IN A GLOBALIZING WORLD (Joseph S. Nye & John D. Donahue eds., 2000); HERNANDO DE SOTO, THE MYSTERY OF CAPITAL WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE (2000); Jeffrey D. Sachs, *Twentieth-Century Political Economy: A Brief History of Global Capitalism*, 15 OXFORD REV. ECON. POL’Y 90 (1999); ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER (2004).

2. Martti Koskenniemi, *International Law in Europe: Between Tradition and Renewal*, 16 EUR. J. INT’L L. 113 (2005) (arguing how a deeply fragmented regulatory and conflicting global landscape is reflected in a highly contested discursive realm, necessitating hard political choices).

3. Gunther Teubner, *The King’s Many Bodies: The Self-Deconstruction of Law’s Hierarchy*, 31 LAW & SOC’Y REV. 763 (1997).

4. BOAVENTURA DE SOUSA SANTOS, TOWARD A NEW LEGAL COMMON SENSE: LAW, GLOBALIZATION, AND EMANCIPATION (2002); LAW AND GLOBALIZATION FROM BELOW. TOWARDS A COSMOPOLITAN LEGALITY (Boaventura de Sousa Santos & César A. Rodríguez-Garavito eds. 2005); CRITICAL BEINGS. LAW, NATION AND THE GLOBAL SUBJECT (Peter Fitzpatrick & Patricia Tuitt eds., 2004), in particular Peter Fitzpatrick, *Terminal Legality? Human Rights and Critical Being*, in CRITICAL BEINGS. LAW, NATION AND THE GLOBAL SUBJECT 119 (Peter Fitzpatrick & Patricia Tuitt eds. 2004), & Sundhya Pahuja, *Global Formations: IMF Conditionality and the South as Legal Subject*, in CRITICAL BEINGS. LAW, NATION AND THE GLOBAL SUBJECT 161 (Peter Fitzpatrick & Patricia Tuitt eds., 2004).

5. MANFRED B. STEGER, GLOBALIZATION A VERY SHORT INTRODUCTION 98 (2003), “Moreover, the claim that globalization is about the liberalization and global integration of markets solidifies as ‘fact’ what is actually a contingent political initiative.” *Id.*

The question remains, where to go from there? Karl Polanyi's concern with the "double movement" constituted by the emancipation of individual autonomy and the pursuit of public welfare, which he identified as the greatest challenge posed by the self-regulating market at the turn of the nineteenth/twentieth centuries,<sup>6</sup> is still on the agenda—or is it?

An answer to this question is anything but obvious. The fundamental institutional reference points of political and legal regulation throughout the West in the twentieth century have become thoroughly unanchored, and as we see a conceptual shift from "government to governance" in contemporary sociological and political analysis,<sup>7</sup> law—in this scenario—appears to have become a fragile project. After its rise through the Rule of Law, the Social Interventionist State and the Welfare State, its contemporary fate seems to be both sealed and indeterminate. Sealed with respect to the state's fading regulatory impact on border-crossing societal entities and activities, which have powerfully emancipated themselves from jurisdictional boundaries and confinements. Indeterminate, in turn, in at least two ways: the state might be reasserting itself either as unitary actor or through regulatory cooperation and concerted efforts against global threats such as environmental destruction or terrorism. Then, again, it might not.<sup>8</sup> The second avenue towards indeterminacy is paved with strong doubts as to the state's capacity to remain an influential institution in channeling and shaping political governance domestically. As the state becomes one of several actors in a dramatically de-hierarchized knowledge society, the state's *proprium*—political government, market regulation, administration, responsibility for social infrastructure, guarantor of institutional arrangements (education, health, safety) that during the Welfare State's era were created to complement a constantly expanding body of individual rights<sup>9</sup>—seems to have come undone. Alternatives to state-originating, "public" governance models abound, and proposals of "post-regulatory," "new," and "experimental" governance are

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6. KARL POLANYI, *THE GREAT TRANSFORMATION. THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME* (1944), re-published in 2001 with a Foreword by Joseph Stiglitz and an Introduction by Fred Block; for a new and fruitful assessment of Polanyi's thesis, see Jens Beckert, *The Great Transformation of Embeddedness. Karl Polanyi and the New Economic Sociology*, MAX-PLANCK-INSTITUT FÜR GESELLSCHAFTSFORSCHUNG/MAX-PLANCK-INSTITUTE FOR THE STUDY OF SOCIETIES, MPIFG DISCUSSION PAPER 07/1 (2007).

7. JAMES N. ROSENAU & ERNST-OTTO CZEMPIEL, *GOVERNANCE WITHOUT GOVERNMENT: ORDER AND CHANGE IN WORLD GOVERNMENT* (1992); Saskia Sassen, *Globalization or denationalization?*, 10 *REV. INT'L POL. ECON.* 1 (2003).

8. For an overview of such options, see JACK GOLDSMITH & ERIC POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005); ROBERT E. SCOTT & PAUL B. STEPHAN, *THE LIMITS OF LEVIATHAN. CONTRACT THEORY AND THE ENFORCEMENT OF INTERNATIONAL LAW* (2006); Andrew T. Guzman & Timothy L. Meyer, *Customary International Law in the 21st Century*, in *PROGRESS IN INTERNATIONAL LAW* (Russell Miller & Rebecca Bratspies eds., 2008); ANDREW T. GUZMAN, *HOW INTERNATIONAL LAW WORKS A RATIONAL CHOICE THEORY* (2008).

9. CASS SUNSTEIN, *AFTER THE RIGHTS REVOLUTION. RECONCEIVING OF THE REGULATORY STATE* (1990), in particular chapter 1.



offered both in *competition* to separation-of-powers and hierarchy-defined models<sup>10</sup> and in *descriptive* fashion to depict, more adequately,<sup>11</sup> the complex structures of today's intersection of politics and economics.

Much of the current mapping work of the knowledge society that is being done in the social sciences<sup>12</sup> and law<sup>13</sup> unfolds in parallel with incredibly fruitful economics research, predominantly within “New Institutional Economics”—both inside<sup>14</sup> and outside<sup>15</sup> of its disciplinary confines. As these interdisciplinary findings are beginning to be translated back towards a more challenging reassessment of respective doctrinal and conceptual starting points,<sup>16</sup> the erosion of distinctions such as public/private, economics/politics or state/market is mirrored by a renewed, radical push for applied, objective sciences. Perhaps because said distinctions become regarded as representative idiosyncrasies of a century bogged down in the struggle over competing political economy utopias, some of today's analytical assessments and policy prescriptions read strangely simple and straightforward.<sup>17</sup> Yet, as is well known, the

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10. Gunther Teubner, *After Legal Instrumentalism? Strategic Models of Post-regulatory Law*, in *DILEMMAS OF LAW IN THE WELFARE STATE* 299 (Gunther Teubner ed., 1986); Colin Scott, *Regulation in the Age of Governance: The Rise of the Post Regulatory State*, in *THE POLITICS OF REGULATION: INSTITUTIONS AND REGULATORY REFORMS FOR THE AGE OF GOVERNANCE* 145 (Jacint Jordana & David Levi-Faur eds., 2004); Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998); to see the elaboration specifically in the case of EU governance read Charles F. Sabel & Jonathan Zeitlin, *Learning from Difference: The New Architecture of Experimentalist Governance in the EU*, 14 EUR. L.J. 271 (2008).

11. Dick Pels, *Mixing Metaphors: Politics or Economics of Knowledge?*, in *SOCIETY AND KNOWLEDGE. CONTEMPORARY PERSPECTIVES IN THE SOCIOLOGY OF KNOWLEDGE AND SCIENCE* 269 (Nico Stehr & Volker Meja eds., 2d Rev. Ed. 2005), “A vigorous ‘economics of politics’ is currently flanked by an equally vigorous ‘politics of economics.’” *Id.* at 270.

12. HELMUT WILLKE, *SMART GOVERNANCE. GOVERNING THE GLOBAL KNOWLEDGE SOCIETY* (2007); ROBERT HASSAN, *THE CHRONOSCOPIC SOCIETY. GLOBALIZATION, TIME AND KNOWLEDGE IN THE NETWORK ECONOMY* (2003); NICO STEHR, *WISSEN UND WIRTSCHAFTEN. DIE GESELLSCHAFTLICHEN GRUNDLAGEN DER MODERNEN ÖKONOMIE* (2001).

13. KARL-HEINZ LADEUR, *POSTMODERNE RECHTSTHEORIE* (2d ed. 2001); KARL-HEINZ LADEUR, *DAS UMWELTRECHT DER WISSENSGESELLSCHAFT* (1995); KARL-HEINZ LADEUR, *DER STAAT GEGEN DIE GESELLSCHAFT* (2006).

14. See DOUGLASS C. NORTH, *INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE* (1990) and the insightful counterpoints developed by Paul A. David, *Why Are Institutions the ‘Carriers of History’?: Path Dependence and the Evolution of Conventions, Organizations and Institutions*, 5 *STRUCTURAL CHANGE AND ECONOMIC DYNAMICS* 205 (1994); Paul A. David, *Path Dependence and varieties of learning in the evolution of technological practice*, in *TECHNOLOGICAL INNOVATION AS AN EVOLUTIONARY PROCESS* 118 (John Ziman ed., 2000).

15. In sociology: Jens Beckert, *The Great Transformation of Embeddedness. Karl Polanyi and the New Economic Sociology*, MAX-PLANCK-INSTITUT FÜR GESELLSCHAFTSFORSCHUNG/MAX-PLANCK-INSTITUTE FOR THE STUDY OF SOCIETIES, MPIFG DISCUSSION PAPER 07/1 (2007); in law: Erich Schanze, *International Standards. Functions and Links to Law*, in: *LAW AND LEGALIZATION IN TRANSNATIONAL RELATIONS* 166 (Christian Brüttsch & Dirk Lehmkuhl eds., 2007).

16. Galf-Peter Calliess & Peer Zumbansen, *Law, the State and Evolutionary Theory: Introduction*, 9 *GERMAN L.J.* 389 (2008); Marc Amstutz, *Global (Non-)Law: The Perspective of Evolutionary Jurisprudence*, 9 *GERMAN L.J.* 465 (2008); see the Symposium Issue on “LAW, THE STATE AND EVOLUTIONARY THEORY,” published in 9 *GERMAN L.J.* 389-546 (2008), available at [www.germanlawjournal.com](http://www.germanlawjournal.com).

17. RICHARD EPSTEIN, *SIMPLE RULES FOR A COMPLEX WORLD* (1995); THOMAS L. FRIEDMAN,

devil is in the details, and these details lie in the ever-more complex structure of today's invariably interdependent societies. As we seek to rescue the larger questions around societal organization from the twentieth into the twenty-first century against the background of concepts, instruments and tools that are dramatically losing their explanatory power, the consequences for disciplines such as law, economics, sociology or political science have for some time now<sup>18</sup> started to unfold,<sup>19</sup> both in research and teaching.<sup>20</sup>

This paper raises the question of the fate of law in the arrangements of twenty-first century post-regulatory regimes. It does so with the single mandate of contrasting the manifold implications and involvements of law in societal organization during the last century with its precarious and endangered place in today's domestic and transnational settings. Choosing formalism and functionalism as the central methodological tenets in present-day contentions of law's place in the regulation of societal affairs, this paper seeks to illuminate the background and prospects of this development by revisiting the functionalist critique of legal formalism at the turn of the nineteenth to the twentieth century onward until the demise of normative functionalism in the retreating welfare-state of the late twentieth century (II). The next section compares the critique of welfare state "juridification" by both conservatives and progressives as it emerged in Western European legal thought in the 1970s and 1980s with the emergence of legal pluralism and "extra-legal activism" in the United States at that time, tracing the rise of responsive and reflexive law (III) before addressing the current return of formalism and functionalism in the area of contract law (IV). Section V concludes.

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THE WORLD IS FLAT (2005).

18. Sally Engle Merry, *Legal Pluralism*, 22 *LAW & SOC'Y REV.* 869 (1988); Boaventura de Sousa Santos, *Law: A Map of Misreading. Toward a Postmodern Conception of Law*, 14 *LAW & SOC'Y REV.* 279 (1987); but see Gunther Teubner, *The Two Faces of Janus: Rethinking Legal Pluralism*, 13 *CARDOZO L. REV.* 1443 (1992).

19. See, for a series of very informative and insightful roadmaps into this new territory, Paul Schiff Berman, *From International Law to Law and Globalization*, 43 *COLUM. J. TRANSNAT'L L.* 485 (2005); Paul Schiff Berman, *A Pluralist Approach to International Law*, 32 *YALE J. INT'L L.* 301 (2007); Paul Schiff Berman, *Global Legal Pluralism*, 80 *S. CAL. L. REV.* 1155 (2007).

20. Harry W. Arthurs, *Globalization of the Mind: Canadian Elites and the Restructuring of Legal Fields*, 12 *CAN. J. L. & SOC'Y* 219 (1997); Craig Scott, *A Core Curriculum for the Transnational Legal Education of JD and LLB Students: Surveying the Approach of the International, Comparative and Transnational Law Program at Osgoode Hall Law School*, 23 *PENN ST. INT'L L. REV.* 757 (2005); Anita Bernstein, On Nourishing the Curriculum with a transnational law lagniappe, New York Law School. Public Law and Legal Theory Research Paper Series 06/07, available at <http://ssrn.com/abstract=987347>; Mathias Reimann, *From the Law of Nations to Transnational Law: Why We Need a New Basic Course for the International Curriculum*, 22 *PENN STATE INT'L L. REV.* 397 (2004); Catherine Valcke, *Global Law Teaching*, 54 *J. LEGAL EDUC.* 160 (2004).

## II. LAW'S PRECARIOUS POSITION IN THE POST-REGULATORY STATE

### A. FORMALISM AND FUNCTIONALISM AS METHODOLOGICAL GROUND RULES

Throughout the last century, the modes of legal regulation were continuously contested, challenged and differentiated as the arms of the state began to reach ever deeper into the spheres of societal activity. In contrast, the current formalist legal discourse suggests a deep skepticism towards the concept of “order through law” altogether. This renaissance of legal formalism occurs at a time of profound changes in societal governance. It is this context of social change that gives the current legal theory assessments such crucial weight and impact. As the shift “from government to governance” points to an irreversible transformation from hierarchically organized political regulation to a heterarchy of conflicting and competing regulatory models, the fate of law itself, previously deeply implicated in the formulation of political governance, is becoming highly precarious. What is problematic in the neo-formalist focus on the ‘here and now’ is the loss of historical reference points, by which contemporary contentions could be re-embedded or contrasted with preceding experiences in legal regulation. As today’s turn to private ordering arguably occurs in response to the dramatic challenges for legal regulation domestically and transnationally, its present triumph comes at the price of making invisible, the deeply dialectic nature of law in its eternal coexistence with alternative forms of social regulation that have marked law during the twentieth century.

Today’s neo-formalist attack on legal regulation is complemented by a neo-functionalist prioritization of private ordering over “state intervention.” Neo-functionalism defines the role of law and the state through the single mandate of facilitating individual autonomy. Whereas much of the twentieth century was characterized by the central role of the state and by the creation of policy-driven legal norms and judicial opinions that fueled an ambitious program of *social engineering through law*, present contentions of functionalism emphasize the values of market freedom and competition as endangered by state intervention.

With unacknowledged irony, this substitution of a functionalist protection of the interests of society through law with a large-scale retreat of the state in the name of individual freedom and the “demands of the market” employs the very theoretical tools that progressive lawyers in the United States and in Europe promoted during the 1970s and 1980s as responses to the regulatory crisis of the welfare state. Those progressive

scholars had turned to alternative modes of legal regulation seeking to translate law's generality into contextual, learning forms of socio-legal regulation. Their hope had been thereby to save the political ambitions of the welfare state, while continuing the socio-political debate over the substance and direction of political intervention. In contrast, today's neo-formalism and neo-functionalism threatens to cut the ties between current quest to answer the challenges of globalization and the previous struggles over law and politics. Its proponents characterize legal regulation as inappropriately policy-driven and as undue infringement of the societal actors' capacity to regulate their own affairs autonomously.

Contract law provides one example. If today's neo-formalists criticize contract law as paternalistic, cost-producing and competition-stifling, they posit that contractual bargains would, if left alone, be more efficient and productive.<sup>21</sup> This assessment is a-historical in that it bears no connection with decades of negotiation over the optimal degree of protection afforded to the interests of contracting parties in a fast-evolving mass-consumer society. The cloud of neo-formalist contentions that judges are allegedly incompetent in their dealings with complex contractual arrangements<sup>22</sup> makes this multidimensional, complex nature of contractual governance disappear.<sup>23</sup>

Touching here<sup>24</sup> on one of these fields—contract law—the paper analyzes the contemporary emergence of neo-formalist and neo-functional approaches to law-making in light of the proliferation of indirect forms of regulation. The core tenet of the paper is that while the earlier turn to alternative regulation modes, whether conceptualized under the heading of “legal pluralism,”<sup>25</sup> “responsive law,”<sup>26</sup> or “reflexive law,”<sup>27</sup>

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21. ERIC A. POSNER, *LAW AND SOCIAL NORMS* (2000); Robert E. Scott, *The Case for Formalism in Relational Contract*, 94 NW. U. L. REV. 847 (2000); Robert E. Scott & George G. Triantis, *Anticipating Litigation in Contract Design*, 115 YALE L. J. 814 (2006).

22. POSNER, *LAW AND SOCIAL NORMS* (n. 21), at 152 “Courts have trouble understanding the simplest of business relationships.”

23. See Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L. Q. 8 (1927); Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553 (1932); for a masterful reconstruction of contract law discourse in the United States, see ROY KREITNER, *CALCULATING PROMISES. THE EMERGENCE OF MODERN AMERICAN CONTRACT DOCTRINE* (2007); for a recent reminiscence within the German private law academy, see the book review by Fritz Rittner of FRITZ VON HIPPEL, *DAS PROBLEM DER RECHTSGESCHÄFTLICHEN PRIVATAUTONOMIE* (1936) in 62 JURISTENZEITUNG 1043 (2007) (reading von Hippel's book as an important defence of private autonomy of relevance in present times, that Rittner sees characterized by a(nother) takeover of private autonomy through politics).

24. For a discussion of a neo-functional approach to corporate law regulation, see Peer Zumbansen, *Varieties of Capitalism and the Learning Firm. Corporate Governance and Labor in the Context of Contemporary Developments in European and German Company Law*, 8 EUR. BUS. ORG. L. REV. 467 (2007), <http://ssrn.com/abstract=993910>; for administrative law, see Peer Zumbansen, *Quod Omnes Tangit: Globalization, Welfare Regimes and Entitlements*, in *THE WELFARE STATE, GLOBALIZATION, AND INTERNATIONAL LAW* 135 (Eyal Benvenisti & Georg Nolte eds., 2003).

25. For an excellent presentation and discussion, see Sally Falk Moore, *Law and Social Change: The Semi-Autonomous Field as an Appropriate Subject of Study*, 7 LAW & SOC'Y REV. 719 (1973); John Griffiths, *What is Legal Pluralism?*, 24 J. OF LEGAL PLURALISM & UNOFFICIAL L. 1 (1986); Sally Engle

in the 1970s and 1980s, had aimed at a more socially responsive, contextualized, and ultimately *learning* mode of legal intervention, the contemporary revival of functionalist jurisprudence embraces a limitation model of legal regulation, the rationale of which is captured by references to “efficiency” and “market demands.” By treating market demands and private interests as self-explanatory givens and by shifting the burden for “intervention” into market activities to policy-makers and judges, the current turn to private ordering effectively takes politics out of the equation.<sup>28</sup> With that, the neo-formalist and neo-functionalist critique of the welfare state’s ambitious programs of legal regulation ignores the degree to which the welfare state itself always represented only one of many different possible institutional evolutionary steps in market regulation and in an ongoing societal debate over the best form of governing society.<sup>29</sup> To be sure, by not integrating the emergence, justification and contestation of the welfare state into the present promotion of individual rights against governmental paternalism, neo-formalists and neo-functionalists isolate their assertions about market-ordering from a wider political debate in which institutions such as the rule of law, the social or welfare state, private autonomy, property rights and democracy should rightly be seen not as means by themselves, but as mere institutional milestones and labels in a continuing normative evolution of social ordering.<sup>30</sup>

## B. FORMALISM AND FUNCTIONALISM: THEN AND NOW

The battle between law and politics is nothing new; it marks the legal debates throughout the twentieth century. In continental Europe, mainly Germany and France, this narrative sequences a development of the relation between law and the state from the *Rule of Law*<sup>31</sup> through an

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Merry, *Legal Pluralism*, 22 LAW & SOC’Y REV. 869 (1988); Gunther Teubner, ‘Global Bukowina’: *Legal Pluralism in the World Society*, in GLOBAL LAW WITHOUT A STATE 3 (Gunther Teubner ed., 1997).

26. PHILIPPE NONET & PHILIP SELZNICK, LAW AND SOCIETY IN TRANSITION: TOWARD RESPONSIVE LAW (1978).

27. Gunther Teubner, *Substantive and Reflexive Elements in Modern Law*, 17 LAW & SOC’Y REV. 239 (1983); Rudolf Wiethölter, *Proceduralization of the Category of Law*, in CRITICAL LEGAL THOUGHT: AN AMERICAN-GERMAN DEBATE 501 (Christian Joerges & David Trubek eds., 1985).

28. See, e.g., MICHAEL J. TREBILCOCK, THE LIMITS OF FREEDOM OF CONTRACT 163 (1993).

29. NIKLAS LUHMANN, POLITICAL THEORY IN THE WELFARE STATE (John Bednarz Jr., trans., 1981) (1990).

30. Charles A. Reich, *The New Property*, 73 YALE L. J. 733 (1964); Charles A. Reich, *Beyond The New Property: An Ecological View of Due Process*, 56 BROOK. L. REV. 731 (1990); Roy Kreitner, *Frameworks of Cooperation: Competing, Conflicting, and Joined Interests in Contract and its Surroundings*, 6 THEORETICAL INQUIRIES IN LAW 59 (2005); Peer Zumbansen, *The Law of Society: Governance Through Contract*, 14 IND. J. GLOBAL LEGAL STUD. 191 (2007).

31. Dieter Grimm, *Der Wandel der Staatsaufgaben und die Krise des Rechtsstaats*, in WACHSENDE STAATSAUFGABEN - SINKENDE STEUERUNGSFÄHIGKEIT DES RECHTS 291 (Grimm ed., 1991).

*Interventionist*,<sup>32</sup> *Social state*<sup>33</sup> through to the *welfare state*<sup>34</sup> before depicting a growing tension between transformations of the state into an *Enabling*, or *Moderating state*<sup>35</sup> on the one hand, and new concepts of society (*Risk*,<sup>36</sup> *Knowledge*,<sup>37</sup> *Information*,<sup>38</sup> *Network Society*<sup>39</sup>) on the other. In England, the debate was predominantly focused on preserving a formal core of law<sup>40</sup> against its moralization or politicization.<sup>41</sup> By contrast, in the United States, the narrative still traces the content, validity and promises of the “Realist”<sup>42</sup> (later the “Social”) challenge to nineteenth century “classical legal thought”<sup>43</sup> that eventually led to a fierce struggle over “rights”<sup>44</sup> and to the frustrated reaction in the form of extra-legal activism.<sup>45</sup> Next occurs the powerful rise of law and economics<sup>46</sup> and the contestation by legal pluralism and critical legal studies,<sup>47</sup> later opening up

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32. Michael Stolleis, *Die Entstehung des Interventionsstaates und das öffentliche Recht*, 11 ZNR 129 (1989).

33. Giandomenico Majone, *The European Community Between Social Policy and Social Regulation*, 31 J. OF COMMON MARKET STUD. 153 (1993).

34. FRANCOIS EWALD, *L'ETAT PROVIDENCE* (1986); NIKLAS LUHMANN, *POLITICAL THEORY IN THE WELFARE STATE* (John Bednarz Jr. trans., 1981) (1990).

35. Gunnar Folke Schuppert, *Zur notwendigen Neubestimmung der Staatsaufsicht im verantwortungsteilenden Verwaltungsstaat*, in *JENSEITS VON PRIVATISIERUNG UND “SCHLANKEM” STAAT* 299 (Schuppert ed., 1999); for a discussion of this sequence of descriptions of the state, see Peer Zumbansen, *Quod Omnes Tangit: Globalization, Welfare Regimes and Entitlements*, in *THE WELFARE STATE, GLOBALIZATION, AND INTERNATIONAL LAW* 135 (Eyal Benvenisti & Georg Nolte eds., 2003).

36. Ulrich Beck, *From Industrial Society to Risk Society: Questions of Survival, Social Structure and Ecological Enlightenment*, 9 THEORY, CULTURE & SOC'Y 97 (1992).

37. PETER BURKE, *A SOCIAL HISTORY OF KNOWLEDGE: FROM GUTENBERG TO DIDEROT* (2000).

38. Karl-Heinz Ladeur, *The Changing Role of the Private in Public Governance. The Erosion of Hierarchy and the Rise of a New Administrative Law of Cooperation. A Comparative Approach.*, EUI WORKING PAPER LAW NO. 2002/9 1 (2002).

39. MANUEL CASTELLS, *THE RISE OF THE NETWORK SOCIETY, THE INFORMATION AGE: ECONOMY, SOCIETY AND CULTURE*, Vol. I. (2d ed. 2000).

40. H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958).

41. H.L.A. Hart, *American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream*, 11 GA. L. REV. 969 (1977).

42. Compare Joseph W. Singer, *Legal Realism Now*, 76 CAL. L. REV. 465 (1988) with Brian Leiter, *Rethinking Legal Pluralism: Toward a Naturalized Jurisprudence*, 76 TEX. L. REV. 267 (1997); see Lon Fuller, *Fidelity to Law - A Reply to Professor Hart*, 71 HARV. L. REV. 629 (1958); Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057 (1975).

43. Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908); but see later the reorientation of Dean Pound in Roscoe Pound, *The Call for a 'Realist' Jurisprudence*, 44 HARV. L. REV. 706 (1931), and the reply by Karl Llewellyn, *Some Realism about Realism*, 44 HARV. L. REV. 1222 (1931).

44. Elizabeth V. Mensch, *Freedom of Contract as Ideology*, 33 STAN. L. REV. 753 (1981).

45. Orly Lobel, *The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics*, 120 HARV. L. REV. 937 (2007).

46. GUIDO CALABRESI, *THE COST OF ACCIDENTS A LEGAL AND ECONOMIC ANALYSIS* (1970); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (1973); for a “semi-outsider’s” history, see Anita Bernstein, *Whatever happened to Law and Economics?*, 64 MD. L. REV. 303 (2005).

47. Marc Galanter, *Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974); John Griffiths, *What is Legal Pluralism?*, 24 J. OF LEGAL PLURALISM AND UNOFFICIAL L. 1 (1986); HARRY W. ARTHURS, *WITHOUT THE LAW: ADMINISTRATIVE JUSTICE AND LEGAL PLURALISM IN NINETEENTH CENTURY ENGLAND* (1988).

into a babel of voices of multiple, competing and conflicting societal interests.<sup>48</sup> The battle over law and politics gains its concrete contours within a specific socio-economic, cultural, and political context.<sup>49</sup> The relevance of comparing different contexts has recently been noted by scholars, who have taken it upon themselves to depict larger trends and trajectories in the development of legal thought, writing from both a historical and comparative perspective.<sup>50</sup> The importance of such barometric and comparative assessments lies in their tentative and explorative nature. Given the tremendous unruliness of doctrinal categories and of social science models and categories with which we have been trying to identify the core of law in an age of governance,<sup>51</sup> it is of great merit to push for a historical, comparative and interdisciplinary research program, precisely because we are at an important moment for the reassessment of the role of law.

Neo-formalism and neo-functionalism as the angles from which to assess the current regulatory landscape shed a brighter light on the role of law within the continuing politics of privatization. By focusing on neo-formalism and neo-functionalism, one gains a clearer view of how arguments of “necessity,” of “objectivity” and “naturalness” prepare the ground for a functionalist interpretation and application of legal norms in contexts that are clearly characterized by fundamental shifts from public to private regulation.<sup>52</sup> The presently renewed attack on contract adjudication and governmental “intervention” wrongly depicts a market existing without a government at the very outset.<sup>53</sup> This depiction of the market and the state as separate worlds enters into a troubling alliance with policy recommendations, which promote the privatization of public services and are often fuelled by arguments of efficiency and cost reduction.<sup>54</sup> Whether

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48. For an excellent overview, see Günter Frankenberg, *Down by Law: Irony, Seriousness, and Reason*, 83 NW. U. L. REV. 360 (1988), and Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850-2000*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT* 19 (David Trubek & Alvaro Santos eds., 2006).

49. Allan C. Hutchinson, *Michael and Me: A Postmodern Friendship*, 33 OSGOODE HALL L.J. 237, 242 (1995) “Judges, policy-makers, economists, lawyers, and citizens are forever situated in a socio-economic context that influences them as they strive to influence it.” *Id.*

50. See Paul Schiff Berman, *From International Law to Law and Globalization*, 43 COLUM. J. TRANSNAT’L L. 485 (2005); Ralf Michaels & Nils Jansen, *Private Law Beyond the State? Europeanization, Globalization, Privatization*, 54 AM. J. COMP. L. 843 (2006).

51. Rudolf Wiethölter, *Social Science Models in Economic Law*, in *CONTRACT AND ORGANISATION. LEGAL ANALYSIS IN THE LIGHT OF ECONOMIC AND SOCIAL THEORY* 52 (Terence Daintith & Gunther Teubner eds., 1986); Rudolf Wiethölter, *Materialization and Proceduralization in Modern Law*, in *DILEMMAS OF LAW IN THE WELFARE STATE* 221 (Gunther Teubner ed., 1986).

52. Alfred C. Aman Jr., *Administrative Law for a New Century*, in *THE PROVINCE OF ADMINISTRATIVE LAW* 90 (Michael Taggart ed., 1997).

53. See Frank H. Knight, *Some Fallacies in the Interpretation of Social Cost*, 38 Q. J. of Econ. 582, 606 (1924). “The system as a whole is dependent on an outside organization, an authoritarian state, made up also of ignorant and frail human beings, to provide a setting in which it can operate at all.” *Id.*

54. For a critique, see Alfred C. Aman Jr., *The Limits of Globalization and the Future of Administrative Law: From Government to Governance*, 8 IND. J. GLOB. LEGAL STUD. 379 (2001).

or not, and in which forms, private actors assume formerly public regulatory functions, is not simply a sociological issue. It represents the outcome of political choices and of other socio-economic developments, unfolding at both the national and transnational level.<sup>55</sup> The allegedly available “fresh start” for societal self-regulation without state interference stands in stark contrast to the observation already made decades ago - that when market actors are enabled and empowered to exercise their private autonomy they are exercising this freedom based on a public choice.<sup>56</sup>

The law of contract, then, through judges, sheriffs, or marshals puts the sovereign power of the state at the disposal of one party to be exercised over the other party. [. . .] The law of contract may be viewed as a subsidiary branch of public law, as a body of rules according to which the sovereign power of the state will be exercised as between the parties to a more or less voluntary transaction.<sup>57</sup>

As contractual governance has come, since the 1970s and 1980s, to form an ever-more important part of large-scale privatization and delegation politics,<sup>58</sup> policies of privatizing formerly public services and competences by delegating power to lower levels are often implemented without a comprehensive normative assessment of the merits and goals of such delegation.<sup>59</sup> But, the empowerment of market actors often results from a complex combination of historically evolved patterns of individualism,<sup>60</sup> decentralized government<sup>61</sup> and regulatory competition.<sup>62</sup> The promise of private autonomy and individual freedom, which is being

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55. This led Philip Jessup to his capturing three dramas about constellations within and beyond the nation state that involve parallel questions of democracy and participation. See PHILIP C. JESSUP, *TRANSNATIONAL LAW* 16-34 (1956).

56. Morris R. Cohen, *Property and Sovereignty*, 13 *CORNELL L. Q.* 8 (1927).

57. Morris R. Cohen, *The Basis of Contract*, 46 *HARV. L. REV.* 553, 586 (1932).

58. IAN HARDEN, *THE CONTRACTING STATE* (1992); Jody Freeman, *The Contracting State*, 28 *FLA. ST. U.L. REV.* 155, 171 (2000): “. . .the contract becomes a framework and a set of default rules that will help direct future gap filling.”

59. John Willis, *Three Approaches to Administrative Law: The Judicial, the Conceptual, and the Functional*, 1 *U. TORONTO L.J.* 53, 76 (1935). “. . . power to make regulations and questions of principle should not, in general, be granted to a department; for a department, not being responsible to the electorate for its policy, is unlikely to give sufficient consideration to the question whether or not the regulations are sufficiently in accordance with public opinion to command general obedience.” *Id.*

60. See, R.H. TAWNEY, *THE ACQUISITIVE SOCIETY* (1920). See also Frank H. Knight, *Some Fallacies in the Interpretation of Social Cost*, 38 *Q. J. ECON.* 582, 605 (1924). “Human beings are not ‘individuals’, to begin with; a large majority of them are not even legally competent to contract. The values of life are not, in the main, reducible to satisfactions obtained from the consumption of exchangeable goods and services.” *Id.* See also ROY KREITNER, *CALCULATING PROMISES. THE EMERGENCE OF MODERN AMERICAN CONTRACT DOCTRINE*, 227-78 (2007). “Late nineteenth-century contract law took shape in the conflicts that were the culmination of this process of imagining the individual subject. That vision of contract, and that imagination of the subject, in turn govern the way Americans think about contract even today.” *Id.* Gerald Frug, *The Ideology of Bureaucracy in American Law*, 97 *HARV. L. REV.* 1277, 1368 (1983) (describing the “market” as a “battleground where opposing forces can fight over the kind of policeman assigned to oversee the bureaucracy.”).

61. See Gerald Frug, *The City as a Legal Concept*, 93 *HARV. L. REV.* 1057 (1980).

62. Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 *J. POL. ECON.* 416 (1956).



carved out within this context can only be understood against the background of this historically grown and continuously evolving polycontextural architecture.<sup>63</sup> In other words, private autonomy neither arises from nor exists in a normative or structural vacuum.

## 1. PROMISES OF FORMALIST LAW

Ever since Max Weber described legal evolution as occurring on a trajectory from religious (charismatic) through traditional to rational, formal authority,<sup>64</sup> legal scholars have been conceptualizing new challenges to legal regulation against this evolutionary background.<sup>65</sup> It is particularly the historical, socio-economic context of Weber's writing that proves so important for today's assessment of his contribution. Weber's discussion of formal law occurred precisely at a time when law's allegedly *formal* qualities had come under close scrutiny from an arising political legal theory that targeted the role of judges in "applying the law"<sup>66</sup> by resorting to a heaven of pure legal concepts.<sup>67</sup> Weber's analysis of formal law was complemented by keen observations of the institutional changes that characterized the new relations between state and market, changes that in their complexity had become the focus of emerging sociological thought and conceptualization<sup>68</sup> and which soon prompted more explorations of turn-of-the-century's industrialization and the emerging hegemony of the market.<sup>69</sup>

Formal, in contrast to substantive rationality, would claim that the law

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63. Paul R. Verkuil, *The Nondelegable Duty to Govern*, in GOVERNANCE BY DESIGN (Freeman & Minow eds. forthcoming); Gunther Teubner, *State Policies in Private Law? A Comment on Hanoch Dagan, The Limited Autonomy of Private Law* 56 AM. J. COMP. L. 835 (2008) "[T]he public/private distinction is an oversimplified account of contemporary society. [. . .] Contemporary social practices can no longer be analyzed by a single binary distinction, neither in the social sciences nor in the law; the fragmentation of society into a multitude of social segments requires a multitude of perspectives of self-description." *Id.*

64. MAX WEBER, ON LAW IN ECONOMY AND SOCIETY (transl. from the German *Wirtschaft und Gesellschaft*, 2d ed., 1925, by Edward Shils and Max Rheinstein, edited/annotated by Max Rheinstein) (1967).

65. See, for example, the masterful depiction by David Trubek, *Max Weber on Law and the Rise of Capitalism*, WISC. L. REV. 720 (1972); for another brilliant, recent reconstruction, see Duncan Kennedy, *The Disenchantment of Logically Formal Legal Rationality, or Max Weber's Sociology in the Genealogy of the Contemporary Mode of Western Legal Thought*, 55 HASTINGS L. J. 1031 (2004).

66. Oliver Wendell Holmes Jr., *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

67. Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 809 (1935).

68. See Emile Durkheim's preface to the second edition of his *THE DIVISION OF LABOR IN SOCIETY* [1893] (W.D. Halls, transl., 1984), where he depicts a society consisting only of individuals as a "veritable sociological monstrosity," which he sees transformed by a "progressive weaken[ing]" of territorial or communal ties and the rise of mediating entities. *Id.* at *liv*.

69. KARL POLANYI, *THE GREAT TRANSFORMATION. THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME* (1944).

is “inherently certain and predictable.”<sup>70</sup> Formalism, enshrined for example in the proposition of the “rule of law,” could be directed against arbitrary power.<sup>71</sup> Taken as such, it would mean to resist a “social agenda”<sup>72</sup> and “judicial activism”<sup>73</sup> in the name of the letter of the law.<sup>74</sup> Formalism would come to stand at the center of the magical, yet fragile, construction of a “rule of law”, presupposing the law’s capacity to negotiate and thereby to translate, according to defined procedural rules, the different contestations and political manifestations of diverging interests in society into a reliable and predictable catalogue of “state action.”<sup>75</sup> Yet, as the functions of government continued to expand, such translatory practice<sup>76</sup> would always carry with it the danger that law would lose its center, its foothold and autonomy.<sup>77</sup> As formalism claimed that the law could be understood from within, primarily by extrapolating a logical structure of a confined set of norms from a small set of higher-order<sup>78</sup> principles, the need to recognize one or the other substantive bases for the edifice of formal law became just too apparent. Lawyers, writing at a time of extreme socio-economic and legal crisis, saw clearly that the association of a system of law with a particular system of political government posed dramatic challenges for any understanding of law in

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70. Duncan Kennedy, *Legal Formality*, 2 J. LEGAL STUD. 351, 364 (1973).

71. Allan C. Hutchinson & Patrick Monahan, *Democracy and the Rule of Law*, in THE RULE OF LAW: IDEAL OR IDEOLOGY 97, 99 (Allan Hutchinson & Patrick Monahan eds., 1987). “At times, the Rule of Law has been used to legitimize and galvanize a challenge to entrenched power; at others, the ruling elite has relied upon it to sanction its power and resistance to would-be usurpers.” *Id.*

72. For a brilliant analysis, see Ugo Mattei & Fernanda Nicola, A ‘Social Dimension’ in European Private Law? *The Call for Setting a Progressive Agenda*, 41 NEW ENG. L. REV. 1 (2006).

73. For a critique, see DUNCAN KENNEDY, CRITIQUE OF ADJUDICATION FIN DE SIÈCLE (1997); see Duncan Kennedy, *Toward a Critical Phenomenology of Judging*, in THE RULE OF LAW: IDEAL OR IDEOLOGY 141 (Allan Hutchinson & Patrick Monahan eds., 1987).

74. See Brian Leiter, *Positivism, Formalism, Realism*, 99 COLUM. L. REV. 1138 (1999), at 1145-46, enumerating the following three criteria of formalism: “(1) law is rationally determinate, (2) judging is mechanical, [ . . . ] (3) legal reasoning is *autonomous*, since the class of legal reasons suffices to justify a unique outcome; no recourse to non-legal reasons is required.” See also Cass Sunstein, *Must Formalism Be Defended Empirically?*, 66 U. CHI. L. REV. 636, 639 (1999). “Formalism therefore entails an interpretive method that relies on the text of the relevant law and that excludes or minimizes extratextual sources of law.” *Id.*

75. Duncan Kennedy, *Legal Formality*, 2 J. LEGAL STUD. 351, 367-68 (1973).

76. For a comprehensive discussion of the concept of translation in this context, see JAMES BOYD WHITE, JUSTICE AS TRANSLATION (1990).

77. H.L.A. Hart, *American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream*, 11 GA. L. REV. 969 (1977).

78. See Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L. J. 949, 955 (1988). “The rationality, immanence, and normativity that characterize [formalism] are not disjointed attributes contingently combined, but mutually connected aspects of a single complex.” *Id.* See also *id.* at 1012-13 for an enumeration of the elements of his definition of formalism. In the same vein, defending formalism against the critique of being non-political, is Frederick Schauer, *Formalism*, 97 YALE L. J. 509, 510 (1988): “I do not argue that formalism is always good or that legal systems ought often or even ever be formalistic. Nevertheless, I do want to urge a rethinking of the contemporary aversion to formalism. For even if what can be said for formalism is not in the end persuasive, the issues should be before us for inspection, rather than blocked by a discourse of epithets.”

and of itself.<sup>79</sup> Elaborations of the functions of the state in the context of a rapidly rising industrial society, accompanied by societal hardship and political contestation, exposed legal formalism to a sweeping challenge in the name of different values and interests. The more the state and its emanations through legislative, administrative and judicial acts would change, the more this would have a fundamental impact on law itself.<sup>80</sup> With formal law turning functional, the covers of formalism's foundations were irrevocably drawn away.<sup>81</sup>

## 2. ASPIRATIONS OF FUNCTIONALISM

*“Therefore the idea of the social man is the only possible starting point of juridical doctrine.”<sup>82</sup>*

Functionalism could be merely the (younger) sibling of formalism, its necessary complementary and correcting feature. Formalist law would have to be functional in order to survive challenges arising from societal differentiation, political contestation, secularization and economic growth. As such, functionalism may also be understood as an outright challenge to the formalist claim to self-restriction. Functionalism would then be a fitting formula for law's ability to survive, mainly by remaining adaptable and responsive. Functionalism in law describes the way in which the flexibilization and modernization of formal law, in reaction to an increasingly complex social environment, made up of competing interests, claims and contestations, takes place if law is to retain a steering function in the trials of society. Functionalism, thus understood, therefore designates the degree to which the law answers to requirements, customs, and necessities emerging from social practice or crystallizing out of public policy deliberations. The important feature here is that a functionalist approach in any legal area, from administrative to contract to corporate law, is based on the premise that regulation is in fact possible. What functionalism itself does not answer is who the author of regulation should be.

Where functionalism understands law as a means to achieve particular social, political or economic ends,<sup>83</sup> this could speak in favor of

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79. See, e.g., Léon Duguit, *The Law and the State*, 31 HARV. L. REV. 1, 5-6 (1917).

80. LÉON DUGUIT, *LES TRANSFORMATIONS DU DROIT PUBLIC* [1913], troisième tirage (1925), XI. “Toute étude scientifique du droit n'a-t-elle pas nécessairement pour objet l'évolution des institutions juridiques? Étudier les transformations du droit public, n'est-ce pas étudier tout simplement le droit public? Assurément.” *Id.*

81. Martin Loughlin, *The Functionalist Style in Public Law*, 55 U. TORONTO L.J. 361, 362-63 (2005).

82. Léon Duguit, *The Law and the State*, 31 HARV. L. REV. 1, 24 (1917).

83. Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12 (1910). This is only one of

governmental “intervention” or against it, either stressing the ‘embeddedness’ of individual freedom or underlining the merits of unfettered private autonomy.<sup>84</sup> The institutional consequences as well as the normative underpinnings of functionalism are not, at first, so easy to see. The functionalism that responded to legal formalism’s abstract sovereignty over a deeply divided, violently emerging market society embraced the idea that generally there was, or could be, a societal consensus on the desirability of the goals pursued. Given that law was to navigate in deeply troubled waters, it was also clear that conflicts would inevitably arise with regard to the concrete strategies and instruments to pursue those goals.<sup>85</sup> Not surprisingly, legal and social theory scholars spilled considerable amounts of ink over the optimal conceptualization of an adequate regulatory approach to a fast-changing society, characterized by the increasing emergence of conflict zones and conflicting social interests.<sup>86</sup> Scholars of contract law<sup>87</sup> began to explore the constitutionalizing potential of private law to inform models of “private government,” unfailingly recognizing the political nature of private law regulation.<sup>88</sup> Corporate Law scholars and economists explored the troubling position of the ‘modern corporation’ between private and public law, between investors’ private property interests and the larger societal interests in the sustained economic performance of the corporation.<sup>89</sup> Echoing corporate lawyers’ trouble with delineating the optimal forms of regulating business, administrative law scholars found themselves between the firing lines of the state and the market in a fast-evolving mixed

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several possible concepts of functionalism; see Ralf Michaels, *The Functional Method of Comparative Law*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW 339, 343 *et seq.*, especially 351 (Mathias Reimann & Reinhard Zimmermann eds., 2007).

84. A.V. DICEY, LECTURES ON THE RELATION BETWEEN LAW & PUBLIC OPINION IN ENGLAND DURING THE NINETEENTH CENTURY 174 (1905). “Legislative utilitarianism is nothing else than systematized individualism, and individualism has always found its natural home in England.” *Id.* That, however, Dicey found to be endangered by and in need of protection against: “democratic despotism.” *Id.* at 304-05. “The legislative tendency was the constant extension and improvement of the mechanism of government.” *Id.*

85. Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 821 (1935) (highlighting that critics of legal formalism, “legal magic and word jugglery” were struggling to reach a consensus of what the next step after the rejection of formalism should be).

86. Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCIEN. Q. 470 (1923); Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553 (1932); JEROME FRANK, LAW AND THE MODERN MIND (1930); KARL LLEWELLYN, THE BRAMBLE BUSH [1930] (1952).

87. Karl N. Llewellyn, *What Price Contract? - An Essay in Perspective*, 40 YALE L. J. 704 (1930).

88. Karl N. Llewellyn, *The Constitution as Institution*, 34 COLUM. L. REV. 1 (1934).

89. ADOLF A. BERLE/GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1932); for a concise assessment of Berle and Means’ historical contribution and their subsequent appropriation for a shareholder primacy justification of corporate (de-)regulation, see Dalia Tsuk, *From Pluralism to Individualism: Berle and Means and 20th Century American Legal Thought*, 30 LAW & SOC. INQUIRY 179 (2005); see also William W. Bratton & Michael L. Wachter, *Shareholder Primacy’s Corporatist Origins: Adolf Berle and The Modern Corporation*, available at <http://ssrn.com/abstract=1021273> (2007).

economy of intersecting private and public actors.<sup>90</sup> In the United States as in Western Europe, administrative lawyers were soon awakening to their highly politicized role in operating a constitutional polity through the stormy seas of pre-war, interwar and post-war economies and ideological contestations of democratic government.<sup>91</sup> Central to all these scholarly endeavors was the role of scientific progress and the role of experts in finding the best legal solution.<sup>92</sup> A major challenge for legal functionalism, largely unmet, was the degree to which a government that was activist, responding to crises and delivering public services, could succeed in promoting democratic representation in the elaboration and execution of its ambitious policies.<sup>93</sup> Paving the way for the early twenty-first century's arrival of neo-functionalism, the technocratic functionalism of the expanding twentieth century welfare state had widened, not bridged, the gap between the state and its citizens in complex, differentiated, multicultural and transnational societies.

[A]s the ideals of the Functional Society came only to be partly realized in the twentieth-century welfare state, the functionalist style in public law tended to preserve itself more as a disposition than as the exposition of an alternative social philosophy. And once this happened, the more positivistic aspects of functionalism (power vs. power) gained the upper hand, and the underlying idealist dimensions were suppressed.<sup>94</sup>

Carl Schmitt and Ernst Forsthoff, in German constitutional and administrative law, are the most eloquent representatives for this turn of functionalism.<sup>95</sup>

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90. See only JAMES W. LANDIS, *THE ADMINISTRATIVE PROCESS* (1938).

91. Harold Laski, *The Pluralistic State*, 28 *PHIL. REV.* 562 (1919); JAMES T. KLOPPENBERG, *UNCERTAIN VICTORY: SOCIAL DEMOCRACY IN EUROPEAN AND AMERICAN THOUGHT 1870-1920* (1986); DANIEL T. RODGERS, *ATLANTIC CROSSINGS. SOCIAL POLITICS IN A PROGRESSIVE AGE* (1998); MICHAEL STOLLEIS, *A HISTORY OF PUBLIC LAW IN GERMANY 1914-1945* (Thomas Dunlop transl., 2004).

92. See only Oliver Wendell Holmes Jr., *The Path of the Law*, 10 *HARV. L. REV.* 457 (1897), and JAMES W. LANDIS, *THE ADMINISTRATIVE PROCESS* (1938).

93. Martin Loughlin, *The Functionalist Style in Public Law*, 55 *U. TORONTO L.J.* 361, 387 (2005).

94. *Id.* at 402.

95. Carl Schmitt, *Staatsethik und pluralistischer Staat (1930)*, ders., *Positionen und Begriffe im Kampf mit Weimar - Genf - Versailles - 1923-1939* 133 (1988); Ernst Forsthoff, *The Administration as Provider of Services (transl. from Der Staat der Daseinsvorsorge, 1938)*, in *WEIMAR. A JURISPRUDENCE IN CRISIS* 326 (Jacobson & Schlink eds., 2000).

### III. THE CHALLENGES OF SOCIO-ECONOMIC REGULATION IN THE TWENTIETH CENTURY

As the debates over the politics of legal regulation continued,<sup>96</sup> later developments, depicted by labels such as globalization, global economic competition and deterritorialization,<sup>97</sup> dramatically accentuated the normative assumptions underlying the seemingly neutral ideals of expert rule and scientific government. As political governments around the world sought to address regulatory challenges arising from cross-border developments, the hitherto pursued public programs of social policy came to be seen as resting on increasingly shaky ground. As globalization began to unfold within the fragile architecture of domestic legal and political systems, the challenges to both the regulatory concepts and instruments of the social engineers and the political hopes in the self-ordering capacities of a democratic society became frighteningly clear. As the time horizon, against which scholars and policy makers would commit their inquiry to the project of “making basic changes [. . .] necessary if we are to maintain the productive capability of the market economy while assuring our capacity to maintain a productive and healthy environment,”<sup>98</sup> was rapidly shrinking, functionalism took on an ever more *reactive and responsive* mode of adaptation. The mounting pressures on political governments to master the socio-economic and legal challenges arising from a fast-globalizing world of increasingly interdependent trade relations were amplified by deep-running societal concerns with questions of political participation, representation and redistribution. Thirty years after the end of World War II, Western industrialized nations found themselves under immense pressure to translate high-flying political agendas into workable regulatory instruments, which were increasingly met with apathy, alienation and implementation obstacles.<sup>99</sup>

The challenges of globalization to domestic state-originating welfare programs—that had in their growth during the twentieth century involved dramatic increases in redistribution, juridification and infrastructure

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96. See, e.g., Ian R. Macneil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law*, 72 NW. U. L. REV. 854 (1978); IAN R. MACNEIL, *THE NEW SOCIAL CONTRACT. AN INQUIRY INTO MODERN CONTRACTUAL RELATIONS* (1980); ADOLF A. BERLE, *THE 20TH CENTURY CAPITALIST REVOLUTION* (1954); RALPH NADER/MARK GREEN & JOEL SELIGMAN, *CORPORATE POWER IN AMERICA* (1974); DANIEL BELL, *THE COMING OF POST-INDUSTRIAL SOCIETY. A VENTURE IN SOCIAL FORECASTING [1973]* (1999); Richard B. Stewart, *Regulation, Innovation, and Administrative Law: A Conceptual Framework*, 69 CAL. L. REV. 1256 (1981).

97. Saskia Sassen, *Globalization or denationalization?*, 10 REV. INT'L POL. ECON. 1 (2003); Ralf Michaels, *Territorial Jurisdiction after Territoriality*, in *GLOBALISATION AND JURISDICTION* 105 (Piet Jan Slot & Mielle Bulterman eds., 2004).

98. Richard B. Stewart, *Regulation, Innovation, and Administrative Law: A Conceptual Framework*, 69 CAL. L. REV. 1256, 1377 (1981).

99. JÜRGEN HABERMAS, *LEGITIMATION CRISIS* (1975).

provision—had a very domestic face. In fact, the arising critique of the welfare state’s negative effects on societal self-regulation operated with little reference to “globalization.” As the next section will show, the rise of welfare state critique and the emergence of alternative modes of legal regulation had its origins within the particular regulatory histories of expanding forms of state intervention. Globalization, in turn, further accentuated and fueled a transformation of public governance that was already beginning to unfold from within the cores of western welfare states.

### A. THE EMERGENCE OF RESPONSIVE/REFLEXIVE LAW

The disillusionment both with the propagation of “rights” as a means to address social inequality and with the allegedly “neutral” principles underlying legal process and adjudication<sup>100</sup> eventually prepared the grounds for a growing discontent with law as a sound instrument of social change.<sup>101</sup> In response, scholars on both sides of the Atlantic began to relativize law’s sovereignty. Feeling the weight of overly zealous and inadequate forms of “juridification”<sup>102</sup> and facing the costs of a structurally and normatively exhausted welfare state,<sup>103</sup> law’s autonomy began to be seen as relative. Scholars saw law as one among several modes of political regulation, certainly not as the only or even the most promising one. Some rejoiced, because they had already long been hostile to the state’s continued attempts to regulate economic relations.<sup>104</sup> Others, however, reacted to the continued expansion of rationalist, bureaucratic regulation into the ‘life-world’ with grave concerns over the viability of informal, culturally grounded understandings as the basis for societal self-regulation and cohesion.<sup>105</sup>

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100. Albert M. Wechsler, *Toward Neutral Principles in Constitutional Law*, 73 HARV. L. REV. 1 (1959).

101. Orly Lobel, *The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics*, 120 HARV. L. REV. 937, 942-48 (2007) (describing the emergence of extra-legal activism in response to the disillusionment with “rights”).

102. Gunther Teubner, *Juridification - Concepts, Aspects, Limits, Solutions*, in JURIDIFICATION OF SOCIAL SPHERES 3 (Gunther Teubner ed., 1987).

103. Jürgen Habermas, *The New Obscurity: The Crisis of the Welfare State and the Exhaustion of Utopian Energies [1985]*, in THE NEW CONSERVATISM. CULTURAL CRITICISM AND THE HISTORIANS’ DEBATE [ed. and transl. by Shierry Weber Nicholsen] 48 (Habermas Ed. 1989).

104. See the remarkable 1976 foreword by Hayek to his republished work, THE ROAD TO SERFDOM [1944], iii, at viii: “If few people in the Western world now want to remake society from the bottom according to some ideal blueprint, a great many still believe in measures, which though not designed completely to remodel the economy, in their aggregate effect may well unintentionally produce this result.”

105. JÜRGEN HABERMAS, THEORIE DES KOMMUNIKATIVEN HANDELNS, vol. 2 (1982) [THEORY OF COMMUNICATIVE ACTION, VOL. 2: LIFEWORLD AND SYSTEM: A CRITIQUE OF FUNCTIONALIST REASON (1985)].

## 1. RESPONSIVE LAW

In a small volume, published in 1978, Philippe Nonet and Philip Selznick carved out a political theory of legal regulation, in the center of which they placed the concept of “responsive law.”<sup>106</sup> They aptly characterized the contemporary U.S. society as torn by competing views on an ideal social order and placed the search for law at the center of this larger battle: “Whatever the labels, and whatever the ideological affinities, these perspectives are being tested today as legal institutions adapt to changing attitudes and expectations, to social cleavage and disaffection.”<sup>107</sup> Building on Weber’s depiction of the rational quality of modern law, Nonet and Selznick recognized the increasing differentiation of law into specialized areas of social ordering. As Weber had seen the system of law to be depending in large part on the emergence of a professional body of legal experts, Nonet and Selznick identified how expert rule would promote a separation of law and politics and, increasingly, a “narrow conception of the role of law.”<sup>108</sup> As this model of law removed legal regulation and regulators “from the ambit of political controversy and conflict,”<sup>109</sup> “strains, opportunities, and expectations” continued to arise that would lead to a conflict-laden re-approximation of law and politics.<sup>110</sup> The paradox of rational government lay in the fact that the more legal experts asserted the objective nature of their actions, the more these actions met with critique and resistance. Responsive law, then, would emerge against the background of a long-standing skepticism towards the autonomy and rationality of law.<sup>111</sup> Front and center to a post-autonomous, responsive model of law would be a form of legal regulation that “perceives social pressures as sources of knowledge and opportunities for self-correction.”<sup>112</sup> Responsive law’s self-liberation from formalism, however, moved a now explicitly “purposive law” (dangerously) close to policy.<sup>113</sup> The resulting difficulties would prove immense:

When accountability is to more general ends, dedication to rules is no longer enough to shield officials from criticism. But to generalize responsibilities is to run the risk of diluting them. General ends tend to be impotent, that is, so abstract and vague that they offer neither guidance in

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106. PHILIPPE NONET/PHILIP SELZNICK, LAW AND SOCIETY IN TRANSITION. TOWARD RESPONSIVE LAW (1978).

107. *Id.* at 7.

108. *Id.* at 59.

109. *Id.* at 70.

110. *Id.* at 71.

111. *Id.* at 73; “The quest for responsive law had been a continuing preoccupation of modern legal theory.” *Id.*

112. *Id.* at 77.

113. *Id.* at 82-83.



decision nor clear standards of evaluation.<sup>114</sup>

Read against the promises of formalism studied above, the functionalist aspirations of responsive law put law and lawyers under immense pressure. Responding to the insulation of technocratic legal rule from societal negotiations of values and interests asking the law to “foster civility” through an “ethic of responsibility,”<sup>115</sup> responsive law must apparently rely on a problematic inner core in order not to be fully consumed by societal forces. This core is formed in a combination of process (participation) and substance (civility). At the time of their writing, Nonet and Selznick proved perfectly attuned to the particular challenges arising from complex governance modes in a system of multilayered and interdependent social organizations. Their promotion of “post-bureaucratic organization”<sup>116</sup> reflected their valuable interdisciplinary search into the emerging complexities of the knowledge society.<sup>117</sup> Both the procedural and the substantive sides of the reflexive law recipe to address regulatory challenges in a divided society, however, prove to be extremely ambitious, perhaps too ambitious. Towards the end of their book, the authors don’t hold back: “Responsive law presupposes a society that has the political capacity to face its problems, establish its priorities, and make the necessary commitments.”<sup>118</sup> Here the bias of the program becomes strikingly apparent. Against the background of the trajectory of legal development from the nineteenth to the twentieth century, the authors put forward a model of substantive legal regulation that pays a high price to bridge the gap between law and politics, between government and society. Recognizing that any reincarnation of top-down regulation, regardless of the normative justification that is offered, would further widen the legitimacy gap in times of regulatory complexity and political apathy, Nonet and Selznick suggest that citizens ought to take law into their own hands in order to reach consensus as to the direction of social order. This, however, results in a powerful redirection of law to its formalist mode, operating in a heaven of pure legal concepts.<sup>119</sup> How else ought we to understand the authors’ expressed hope that society come together and identify “its problems,” “its priorities,” and “its commitments”? The reason for the growing regulatory challenges to modern law was and continues to be the rising complexity of society. To address a multiplicity of values, interests and rationalities with a dedication to democratic governance ultimately to result in consensus,

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114. *Id.* at 83.

115. *Id.* at 90-91.

116. *Id.* at 99, with reference to Chester Barnard and Peter Drucker.

117. *Id.* at 100. “Participatory decision making as a source of knowledge, a vehicle of communication, and a foundation for consent.” *Id.*

118. *Id.* at 113.

119. Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 809 (1935).

idealizes the forces of cohesion in a society that is actually deeply complex and fragmented. Therein lies, to be sure, the great danger for law, for political, in particular democratic theory and for any grand-scale social theory. Therein lays, however, at the same time, great hope to better identify the potential of law to play a distinct role in the complex array of voices and forces.

## 2. REFLEXIVE LAW

Meanwhile, legal theoreticians in Western Europe posited a re-conceptualization of regulatory law by emphasizing the necessity of law's reflexivity, its capacity to respond to the changing conditions of regulatory implementation<sup>120</sup> and the proceduralization of law.<sup>121</sup> Reflexive law promoted the opening of the law to the different, varied and competing rationalities of a society highly differentiated along functional lines.<sup>122</sup> As the project of reflexive law became formulated in the context of an exhausted welfare state's regulatory capacities, the nature of law's involvement in societal processes was still at the heart of a critical inquiry into the role, function and status of law.<sup>123</sup> With reflexive law emerging out of the eggshells of a fast-decaying welfare state, it was conceived in light of a long generation of negative and positive civil rights, of a strong interconnection between deliberation over social policy on the one hand and of the cross-fertilization of administrative and constitutional law on the other.

To be sure, the rise of reflexive law did not occur without contestation. Reactions, many of them negative, were swift and far-reaching. Niklas Luhmann observed that, if the concept of reflexive law implicitly or explicitly defended law's claim to "comprehensive regulation,"<sup>124</sup> reflexive law unduly and somewhat prematurely relativized

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120. Gunther Teubner, *Substantive and Reflexive Elements in Modern Law*, 17 LAW & SOC'Y REV. 239 (1983); Karl-Heinz Ladeur, "Abwägung" - ein neues Rechtsparadigma? Von der Einheit der Rechtsordnung zur Pluralität der Rechtsdiskurse, 69 ARSP 463 (1983); Rudolf Wiethölter, *Materialization and Proceduralization in Modern Law*, in DILEMMAS OF LAW IN THE WELFARE STATE 221 (Gunther Teubner ed., 1986).

121. Rudolf Wiethölter, *Proceduralization of the Category of Law*, in CRITICAL LEGAL THOUGHT: AN AMERICAN-GERMAN DEBATE 501 (Christian Joerges & David Trubek eds., 1985).

122. Gunther Teubner, *Substantive and Reflexive Elements in Modern Law*, 17 LAW & SOC'Y REV. 239 (1983); Niklas Luhmann, *Operational Closure and Structural Coupling: The Differentiation of the Legal System*, 13 CARDOZO L. REV. 1419 (1992).

123. Gunther Teubner, *Autopoiesis in Law and Society: A Rejoinder to Blankenburg*, 18 LAW & SOC'Y REV. 201 (1984); William E. Scheuerman, *Reflexive Law and the Challenges of Globalization*, 8, 4 J. POL. PHIL. 1 (2000); "Like substantive law, it is guided by the aim of subjecting social and economic activities to broader regulatory purposes. Yet it hopes to do so without dictating specific outcomes and thereby contributing to the rigidity and ineffectiveness of some existing forms of regulatory law." *Id.*

124. GUNTHER TEUBNER, LAW AS AN AUTOPOEITIC SYSTEM 94 (1993).

the concept of system autonomy in a functionally differentiated society.<sup>125</sup> Others felt that positing law as an “autopoietic,” i.e., autonomous, self-referentially reproducing, social system<sup>126</sup> constituted a betrayal of law’s emancipatory political powers as a force of social transformation.<sup>127</sup> Arguing from the perspective of democratic theory,<sup>128</sup> the turn of law onto itself as autopoietic law was seen as bolstering wide-spread privatization and deregulation, which in turn would diminish the emancipatory forces of law.<sup>129</sup> Another critique took issue with reflexive law’s connection to the concept of autopoietic law, which described law as operationally closed (self-reproducing) and cognitively open (towards its environment),<sup>130</sup> and markedly pointed out the specific challenges for political (legal) theory arising from this description.<sup>131</sup>

Reflexive law theorists, in response, acknowledged the merits of a critique of legal formalism and its potential to look beyond the letter of the law. But, other than the Legal Realists, proponents of reflexive law sought to reach beyond an understanding of law that would describe its function in the resolution of conflicts between “right” and “left,”<sup>132</sup> or between market regulation and freedom of contract.<sup>133</sup> The theory of autopoietic

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125. Niklas Luhmann, *Some Problems with Reflexive Law*, in STATE, LAW AND ECONOMY AS AUTOPOIETIC SYSTEMS 389-412 (Gunther Teubner & Alberto Febbrajo eds., 1992).

126. See GUNTHER TEUBNER, *LAW AS AN AUTOPOIETIC SYSTEM* (1993).

127. Erhard Blankenburg, *The Poverty of Evolutionism: a Critique of Teubner’s Case for ‘Reflexive Law,’* 18 LAW & SOC’Y REV. 273 (1984); Hubert Rottleuthner, *The Limits of Law: The Myth of a Regulatory Crisis*, 17 INT’L J. SOC. L. 273 (1989).

128. Ingeborg Maus, *Perspektiven “reflexiven Rechts” im Kontext gegenwärtiger Deregulierungstendenzen*, 19 Kritische Justiz 390, 396-97 (1986) (highlighting the dangers for regulatory capture of reflexive law when legislative acts are mostly general and indeterminate).

129. This critique paralleled and echoed in many of its political it not its theoretical aspirations developments in the United States: Marc Galanter, *Why the ‘Haves’ Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95 (1974); Gerald Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1277, 1377 (1983) (highlighting the importance and great variances of context that influence the modes of bureaucratic organization).

130. Niklas Luhmann, *The Unity of the Legal System*, in AUTOPOIETIC LAW: A NEW APPROACH TO LAW AND SOCIETY 12, 15 (Gunther Teubner ed., 1988); Niklas Luhmann, *Law as a Social System*, 83 NW. U. L. REV. 136, 138 (1989); “Formulations such as the statement that there are connections ‘between’ law and society’ (which presupposes that law is something outside of society) especially must be avoided.” *Id.*

131. Joachim Nocke, *Autopoiesis - Rechtssoziologie in seltsamen Schleifen*, 19 Kritische Justiz 363, 380 (1986) (arguing that autopoietic law resembles mid-nineteenth century concept-jurisprudence – *Begriffsjurisprudenz* – that already Rudolf von Ihering and Felix Cohen had considered as out-of-sync with societal differentiation). See Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. R. 809, 809-10 (1935).

132. Teubner’s response: “Self-organization is at odds with the traditional political co-ordinates of the simple left-right model.” GUNTHER TEUBNER, *LAW AS AN AUTOPOIETIC SYSTEM* 64-65 (1993). *But see* Joachim Nocke, *Autopoiesis - Rechtssoziologie in seltsamen Schleifen*, 19 KJ 363, 384 (1986). “Hier wird keine vorschnelle ‘Ideologiekritik’ mehr geübt – schon der Begriff nimmt sich in der verchromten Sprachwelt der Systemtheorie aus wie eine ehrwürdige Antiquität, die von den hier Tätigen freilich eher wie eine peinliche Hinterlassenschaft gemieden wird. Hier will keiner mehr irgend jemandem ans Leder.” *Id.*

133. Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); Morton J. Horwitz, *The Historical Foundations of Modern Contract Law*, 87 HARV. L. REV. 917

law, which lay at the basis of the concept of reflexive law, posited the self-referential nature of the societal subsystems, including law.<sup>134</sup> This led to an understanding of society as a social system made up of subsystems of particularly structured modes of communications. Each subsystem, then, would form the environment for another system, leading to a diversified communication of societal (system) rationalities.<sup>135</sup> The reflexive law theorists rejected a bi-polar view regarding re-distributive outcomes or progressive versus conservative political agendas. Instead, they suggested that although the law was placed at a unique place from which it would constantly receive manifold communications, influences and pressures from different parts of society, its evolution depended on its ability to maintain this intricate relationship to its environment.<sup>136</sup> Its self-reproduction depended on its constant exposure to the forces of society, while reconstructing these signals in its own language or code. Instead of promoting the idea of an a-political law, the concept of reflexive law radicalized and expanded the older critique of legal formalism and made law receptive to the full spectrum of societal rationalities.

On the other side of the Atlantic, the American development became determined by an intricate and challenging combination of activist rejections of law as an instrument of the status-quo upholding power on the one hand and the differentiation of procedural rights on the other. The work of Charles A. Reich,<sup>137</sup> Marc Galanter,<sup>138</sup> David Trubek,<sup>139</sup> Duncan Kennedy,<sup>140</sup> Gerald Frug,<sup>141</sup> and Richard Stewart<sup>142</sup> can be seen as illustrative of this complex combination of societal activism and conscious embrace of legal regulation. The continued elaboration<sup>143</sup> and contestation

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(1974).

134. Niklas Luhmann, *Law as a Social System*, 83 NW. U. L. REV. 136 (1989).

135. GUNTHER TEUBNER, *LAW AS AN AUTOPOEITIC SYSTEM* 64-65 (1993).

136. Gunther Teubner/Helmut Willke, *Kontext und Autonomie: Gesellschaftliche Selbststeuerung durch reflexives Recht*, 5 ZEITSCHRIFT FÜR RECHTSZOLOGIE 4, 14 (1984) (describing reflexion as a process of self-regulation through which a social system thematizes and adjusts its own identity in the awareness of other social systems operating in its environment in order to provide a useful environment for these other social systems).

137. Charles A. Reich, *The New Property*, 73 YALE L. J. 733 (1964).

138. Marc Galanter, *Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974).

139. David Trubek, *Toward a Social Theory of Law: An Essay on the Study of Law and Development*, 82 YALE L. J. 1, 1 (1972). "Since the implicit, a priori conclusions about the role of law are no longer valid, we must turn to specific efforts to understand the relationships among the legal, social, economic, and political orders." *Id.*

140. Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563 (1982).

141. Gerald Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1277 (1983).

142. Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669 (1975).

143. Richard B. Stewart, *The Discontents of Legalism: Interest Group Relations in Administrative Regulation*, 1985 WIS. L. REV. 655 (1985); Charles A. Reich, *Beyond The New Property: An Ecological*

of these approaches<sup>144</sup> eventually prepared the field for assessments of law and regulatory governance,<sup>145</sup> which address the serious challenges of identifying the politics in a transnational regulatory environment,<sup>146</sup> shaped by both public and private law,<sup>147</sup> official and unofficial, soft and hard norms.<sup>148</sup>

As demonstrated, concepts of “responsive” or “reflexive” law had emerged at the intersection between a turn *to* or *away from* law as a means of social regulation. Both responsive and reflexive law had sought a way out of the dilemmas which had been identified by both progressive and conservative critics of regulation and “juridification.”<sup>149</sup> In light of the growing awareness that legal regulation would have to deal simultaneously with an increasingly complex society riddled with conflicting interests and identities on the one hand, and with a dramatically expanding scope of governmental regulation of areas of society previously seen as remote, self-reliant and “private” on the other, legal theory had to conceptualize a new model of law adequate to this challenge. Responsive/reflexive law offered just that. In an ingenious and very ambitious way, responsive/reflexive legal theorists suggested an understanding of legal regulation as a process that could not be initiated from a central, elevated place of sovereignty in terms of power and knowledge. Instead, law would have to be understood as inherently caught up in the conflict-ridden processes of a functionally differentiated society.<sup>150</sup> Despite the difference in degree to which scholars in the respective camps were willing to accept the sociological description of a post-bureaucratic society<sup>151</sup> or a functionally differentiated society,<sup>152</sup>

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*View of Due Process*, 56 BROOK. L. REV. 731 (1990).

144. Charles A. Reich, *The Liberty Impact of the New Property*, 31 WM. & MARY L. REV. 295 (1990).

145. At the forefront is the emergence of “global administrative law”: Nico Krisch, Benedict Kingsbury, & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 LAW AND CONTEMP. PROBS. 15 (2005).

146. Alfred C. Aman Jr., *The Limits of Globalization and the Future of Administrative Law: From Government to Governance*, 8 IND. J. GLOBAL LEGAL STUD. 379 (2001).

147. For administrative law, see Peter Vincent-Jones, *The New Public Contracting: Public versus Private Ordering?*, 14 IND. J. GLOBAL LEGAL STUD. 259 (2007); for environmental law, see Jody Freeman & Daniel A. Farber, *Modular Environmental Regulation*, 54 DUKE L.J. 795 (2005); for corporate and labor, see Peer Zumbansen, *The Parallel Worlds of Corporate Governance and Labor Law*, 13 IND. J. GLOBAL LEGAL STUD. 261 (2006).

148. For a comprehensive overview of the landscape, see Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342 (2004).

149. See Gunther Teubner, *Juridification - Concepts, Aspects, Limits, Solutions*, in JURIDIFICATION OF SOCIAL SPHERES 3 (Gunther Teubner ed., 1987).

150. Niklas Luhmann, *Law as a Social System*, 83 NW. U. L. REV. 136 (1989).

151. PHILIPPE NONET/PHILIP SELZNICK, LAW AND SOCIETY IN TRANSITION. TOWARD RESPONSIVE LAW (1978).

152. Niklas Luhmann, *The Unity of the Legal System*, in AUTOPOIETIC LAW: A NEW APPROACH TO LAW AND SOCIETY 12 (Gunther Teubner ed., 1988); Gunther Teubner, *Substantive and Reflexive Elements in Modern Law*, 17 LAW & SOC'Y REV. 239 (1983).

responsive/reflexive law theorists posited that law would have to be tentative, experimental, and learning. Such a conception had far-reaching consequences for a conceptualization and application of law in an environment that had become increasingly complex since the early days of the rise of the interventionist state.<sup>153</sup>

The striking characteristic of responsive/reflexive law was that it did not confine itself to the suggestion of subjecting all legal decision-making to sophisticated processes of deliberation and negotiation. The proceduralization of law<sup>154</sup> did not stop at the formal level, where it certainly led to a far-reaching reliance on procedure as a means to strengthen the law's sensitivity to "voice" over "exit."<sup>155</sup> What would instead become central to the concept of reflexive law was its intricate (and contested) connection between formal and substantive aspects of legal regulation.<sup>156</sup> While the formal aspects concerned the opening up of the legal decision-making process to a process of societal deliberations ("voice"), the substantive side of reflexive law could not have been conceived in a more radical fashion. Giving up any hope to ground a viable legal judgment on principle based on rational consideration, on faith, or on specific political views, reflexive law theorists argued that the responses of law to a specific context would inevitably emerge as a result of never-ending processes of specialized rationality collisions.<sup>157</sup>

In this way, reflexive law took seriously the longstanding contention of law's perennial indeterminacy,<sup>158</sup> but it went further than that. While the critique of legal formalism as an ideology and a mask to cover up political motives and economic rationalities<sup>159</sup> asserted the possibility of

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153. For an account of the U.S. American debate and, in particular, of the legacy of James Landis, see MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870-1960*, 213-72 (1992); for an account of the German development, see MICHAEL STOLLEIS, *A HISTORY OF PUBLIC LAW IN GERMANY 1914-1945* (Thomas Dunlop transl.) 35-44, 198-234 (2004). For a succinct and rather troubling analysis of present-day efforts, particularly those undertaken by a number of U.S. Supreme Court Justices, to reinstate the autonomy of administrative expertise against outside political pressure from the White House, see Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, Harvard Working Paper Series available at SSRN: <http://ssrn.com/abstract=1008906> (2007).

154. See Rudolf Wiethölter, *Materialization and Proceduralization in Modern Law*, in *DILEMMAS OF LAW IN THE WELFARE STATE* 221 (Gunther Teubner ed., 1986).

155. See for the concepts of exit and voice, ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY. RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* (1970).

156. Rudolf Wiethölter, *Materialization and Proceduralization in Modern Law*, in *DILEMMAS OF LAW IN THE WELFARE STATE* 221 (Gunther Teubner ed., 1986).

157. Gunther Teubner, *State Policies in Private Law? A Comment on Hanoch Dagan* 56 AM. J. COMP. L. 835 (2008), Ms. 2 "[T]he distinction of state/society which translates into law as public law vs. private law [. . .] will have to be substituted by a multiplicity of social perspectives which need to be simultaneously reflected in the law." *Id.*

158. Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); Duncan Kennedy, *The Critique of Rights in Critical Legal Studies*, in *LEFT LEGALISM/LEFT CRITIQUE* 178 (Wendy Brown & Janet Halley eds., 2002).

159. Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923); Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law*, with

identifying a specific political concept or regulatory idea, which could be taken as the basis of a legal decision (the “social” or “material” challenge to formal law),<sup>160</sup> reflexive law came to reject such mono-causalities of, say, politics, or the economy, as explaining legal decision-making. Once it was found impossible to determine the content of the law without uncovering the values, ideas and interests that had found their way into a norm, it became clear that the law, being operationally closed and cognitively open, had to be seen as standing in a very particular relationship with those social spheres, which are themselves determined by rationalities other than those that governed law and legal thinking. It is here that the reflexive law theorists moved beyond the critique of the indeterminacy of law developed by the legal realists and critical legal studies and radicalized the idea of law’s indeterminacy to reconstruct law as one rationality among others in society. As a result, society itself ceased to be conceivable as a unified, overseeable and identifiable entity against which it is possible to uncover the ideological basis of law.<sup>161</sup> Such a model of society makes it impossible for lawyers to identify *one* single, decisive motive behind a legal argument. Instead, the task of lawyers would be to recognize the many ways in which the law is in fact *responsive to* and *reflexive of* the many different societal rationalities, which the law was charged to “translate” or to “reformulate” into its own language, using the legal code.<sup>162</sup> Law, in this understanding, is to be conceived as both distinct—when considering its own rationality and ways of “thinking” and “speaking”—and simultaneously immersed in society’s ongoing process of differentiation, conflict and experimentation. “A reflexive orientation does not ask whether there are social problems to which the law must be responsive. Instead it seeks to identify opportunity structures that allow legal regulation to cope with social problems without, at the same time, irreversibly destroying patterns of social life.”<sup>163</sup>

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*Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563 (1982).

160. See Gunther Teubner, *Autopoiesis in Law and Society: A Rejoinder to Blankenburg*, 18 LAW & SOC’Y REV. 201 (1984).

161. Niklas Luhmann, *The World Society as a Social System*, 8 INT’L J. GEN. SYS. 131 (1982).

162. GUNTHER TEUBNER, LAW AS AN AUTOPOEITIC SYSTEM 19 (1993). “The system reconstructs its own operations in such a way as to inform its future development in a system-specific way.” *Id.*

163. Gunther Teubner, *Substantive and Reflexive Elements in Modern Law*, 17 LAW & SOC’Y REV. 239, 274 (1983).

## B. FACES IN THE MIRROR

*“One can reject the imperialist claims of the criterion of efficiency and at the same time use economic knowledge in order to understand what happens when the logic of legal structures and that of economic structures impinge on each other.”*<sup>164</sup>

It is important to keep this background in mind, when assessing contemporary developments. Today’s combination of neo-formalism and neo-functionalism occurs “after the welfare state” and in denial of it. It portrays law’s primary role as serving society’s needs to govern itself and thereby blinds us to the historically grown embeddedness of private ordering in a sophisticated legal-pluralist framework. What today’s functionalism suggests is a smooth ride in social self-regulation from which the law should, for the most part, be excluded or at least be kept at a distance. It thereby obscures the deeply conflictual and hybrid nature of legal regulation of which scholars throughout the twentieth century had always been so conscious. Whereas historically formalism and functionalism related to each other by way of conceptual and political contestation, it seems today that both formalism and functionalism have joined ideologically in that both present law as a politically neutralized tool of expert management. This turns the earlier, historical turn of lawyers to science and expertise<sup>165</sup> on its head. The neutralization of law has consequences: on the one hand, law is expected today to function in its traditional mode where “true” legal expertise is required, for example in the protection of property interests through the formal application of allegedly “clear” legal norms.<sup>166</sup> On the other hand, law should be reflexive, meaning facilitative, indirectly intervening, empowering, where external expertise—mostly of “market,” but also of the “scientific” kind—is believed to be better equipped to facilitate social ordering. This combination is ideological because both of these fields of expertise are considered a-political, when in fact in all these references to “law,” the “market,” and “experts,” the choice takes place within political, economic and other normative frameworks. Neo-formalism and neo-functionalism transform formalism and functionalism respectively. Formalism is no longer seen as aspiring to, or supported by, a specific or general logical coherence; instead, it becomes a fighting word against what is now

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164. GUNTHER TEUBNER, *LAW AS AN AUTOPOEITIC SYSTEM* 93 (1993).

165. JAMES W. LANDIS, *THE ADMINISTRATIVE PROCESS* (1938); John Willis, *Three Approaches to Administrative Law: The Judicial, the Conceptual, and the Functional*, 1 U. TORONTO L.J. 53 (1935).

166. Richard A. Posner, *Creating a Legal Framework for Economic Development*, 13 THE WORLD BANK RESEARCH OBSERVER 1 (1998).



deemed to be legal “intervention” into otherwise more efficient processes of social self-governance. Functionalism is no longer associated with the aspiration to achieve a specific goal and with the political debate out of which a consensus in support of that goal eventually arose; instead, all legal intervention is to take place or to be withheld in accord with, and in response to, the “needs” of a functional group. It is the particular context, the political climate and capacity to promote certain views that shapes the communication of such needs.

The current revival of both formalism and functionalism occurs according to a regulatory agenda and political outlook entirely different from that of the late nineteenth and early twentieth centuries. Two developments are of relevance here: one concerns the delay with which the changed social environment was methodologically assessed by administrative and, certainly, by constitutional law scholars.<sup>167</sup> The other one arises from the unresolved status of the political relevance of the rule of law or, in other words, the *role* of law in regulation. The urgency of questioning what lies behind this misalignment is further manifested by the manner in which progressive agendas are today again clashing with claims to technical expertise. What we see colliding are claims of bureaucratic discretion with those of judicial and democratic review and control as well as claims of individual autonomy with concerns over paternalistic public governance by the state.<sup>168</sup> The recurrence of the same oppositional patterns, which already characterized administrative law debates over one-hundred years ago,<sup>169</sup> prompts the question what the differences might be between the discussions then and those taking place now. What occupies the space between the rise of the Providential State of the early twentieth century<sup>170</sup> and the Enabling State of the early twenty-first? This unanswered question drives the powerful revival of formalism and functionalism in current regulatory theory and practice.<sup>171</sup>

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167. Ernst Forsthoff, *Daseinsvorsorge im Technischen Zeitalter* in: Festschrift für Elia Kyriopoulos 191 (Rechts- und Wirtschaftswissenschaftliche Fakultät ed., 1966), at 191; Michael Stolleis, A HISTORY OF PUBLIC LAW IN GERMANY 1914-1945 206 (Thomas Dunlop transl., 2004). “Administration had recourse to private law on a previously unheard-of scale and pushed into areas of the private sector, where it was confronted by all the implications of competition law, labour law, and tax law. The spectrum of administrative law doctrine shifted accordingly. But these changes did not have the political drama of a newly created constitution; instead they manifested themselves more as slow shifts whose significance was usually only recognized in retrospect.” *Id.*

168. Curtis Bridgeman, *Why Contracts Scholars Should Read Legal Philosophy: Positivism, Formalism, and the Specification of Rules in Contract Law*, CARDOZO L. REV. (forthcoming 2008).

169. See, John Willis, *Three Approaches to Administrative Law: The Judicial, the Conceptual, and the Functional*, 1 U. TORONTO L.J. 53 (1935).

170. FRANCOIS EWALD, *L’ETAT PROVIDENCE* (1986).

171. Kerry Rittich, *Functionalism and Formalism: Their Latest Incarnations in Contemporary Development and Governance Debates*, 55 U. TORONTO L.J. 853 (2005).

## 1. THE TURN TO MARKET

*“If the future already lay in history’s wallet, the social-political task was to call its impending forms into being.”<sup>172</sup>*

Across the divides of disciplinary subfields, a growing number of scholars are promoting the return to a strictly limited role of the law in favor of a market-based regime of self-regulation. The neo-formalists and neo-functionalists confess to a troubling loss of faith in adjudication<sup>173</sup> in the name of an approach to legal regulation that is allegedly more responsive to market demands and less prone to the much-contested attempts at social engineering by judges.<sup>174</sup> The renewed hostility towards judges is nourished by decades of policy-driven, substantivist judicial interpretation of legal rules.<sup>175</sup> The invocation of formalism now serves to tame, stifle and silence a judiciary, which is seen as “activist” and overzealous.<sup>176</sup>

The lack of sophistication of this analysis is striking. If it were really true that there can be an effective rule making and rule application, but that it should not be placed in the hands of overzealous judges, we could indeed be prompted to take the anti-judiciary affect seriously. Instead, the attack on judges becomes an attack on the law itself, which the neo-formalist reduces to a spiritless, technical body of rules, allegedly made by men and best placed in the hands of men—not of judges. This move against the judiciary and the law seeks to obscure the fundamental quality of rules, which are, in the moment that they are applied through a commonly established institutional set-up, always already “pieces in a larger compromise of interests” and as such not amenable to ad-hoc changes, whether in the name of “justice” or any other “spirit.”<sup>177</sup>

To be sure, the problem that motivates the critique of adjudication is not whether it is judges, parliaments or administrative agencies that are making rules. It is the idea that law is part of a larger normative

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172. DANIEL T. RODGERS, *ATLANTIC CROSSINGS. SOCIAL POLITICS IN A PROGRESSIVE AGE* 399 (1998).

173. See, on the one hand, Kerry Rittich, *Enchantments of Reason/Coercions in Law*, 57 U. MIAMI L. REV. 727 (2003), and on the other, Richard A. Posner, *The Law and Economics of Contract Interpretation*, 83 TEX. L. REV. 1581 (2005).

174. Robert E. Scott, *The Case for Formalism in Relational Contract*, 94 NW. U. L. REV. 847 (2000); Robert E. Scott, *The Death of Contract Law*, 54 U. TORONTO L.J. 369 (2004).

175. Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563 (1982); Claus-Wilhelm Canaris, *Wandlungen des Schuldvertragsrechts - Tendenzen zu seiner “Materialisierung”*, 200 ARCHIV DER CIVILISTISCHEN PRAXIS (ACP) 273 (2000).

176. For a powerful critique of such claims, here made in constitutional law, see Allan Hutchinson, *Judges and Politics: An Essay from Canada*, 24 J. LEGAL STUD. 275-93 (2004).

177. Duncan Kennedy, *Legal Formality*, 2 J. LEGAL STUD. 351, 383 (1973).

framework, the actual realization of which has been, mostly for historically contingent reasons,<sup>178</sup> placed within a particular institutional, complex political, socio-economic framework that is particularly troubling to the neo-formalists and neo-functionalists. It is for this reason that appeals to legislative action over judicial activism or, say the work of expert committees,<sup>179</sup> are mere smoke and mirrors. Even if the legislator demanded of the judge to act “formally,” it would still be the case that the judge must ask exactly the same question about this rule as about any other that comes to him (or her) from the legislature. Its enactment represented a compromise of interests based on some set of quite possibly conflicting expectations about how its application would affect the future distribution of satisfactions.<sup>180</sup>

This new confidence in a formalist understanding of law is accompanied by a powerful and highly influential defense of functionalist approaches to legal regulation. Judges and, for that matter, lawmakers, should “interfere” with societal processes of self-organization only where there is a legitimate basis for such intervention, which means that they should usually abstain. The critique of the role of judges is thus intimately tied to a radical critique of the state and of law as both an institution and instrument of social change. Whereas at the height of the turn-of-the-century Interventionist and emerging welfare state functionalism would encompass the administration’s use of law as an instrument of social change, often pushed forward against the resistance of a conservatively staffed judiciary,<sup>181</sup> today’s neo-functionalism seeks to domesticate both the state and the judiciary by emphasizing state institutions’ incompetence to properly order society. Instead, the neo-functionalism emphasizes society’s quasi-natural powers to self-regulate its affairs, without undue and ill-fitting intervention by public authorities.

## 2. CONCEPTUAL PATHS

Conceptually, form and function have always been two sides of the same coin. The appeal of formalism to coherence, authority and unity stands in an ambiguous relation to the aspiration of functionalism to substantive goals, ends-means correlations<sup>182</sup> and institutional

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178. Niklas Luhmann, *Verfassung als evolutionäre Errungenschaft*, 9 Rechtshistorisches Journal 176 (1990).

179. Paul Kirchhof, *Demokratie ohne parlamentarische Gesetzgebung?*, 54 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 1332 (2001).

180. Duncan Kennedy, *Legal Formality*, 2 J. LEGAL STUD. 351, 389 (1973).

181. JAMES W. LANDIS, *THE ADMINISTRATIVE PROCESS* (1938).

182. Max Weber, *The Nature of Social Action*, in WEBER. SELECTIONS IN TRANSLATION 7-32 (W.G.

instrumentalization. But the modesty of one—formalism—is the hubris of the other—functionalism. The functionalist's submission of legal instruments to substantive goals had to reckon with the normative grounds of formal guarantees, rights, and procedures. Recognizing that the grounds of legal unity and legal instrumentalism are inherently caught in a paradoxical relation,<sup>183</sup> formalists and functionalists saw how they were inextricably intertwined so that one approach could never exist without the other.

Against the background of rich historical and conceptual studies, comparative legal scholarship has only slowly begun to explore the parallels, disjunctures and overlaps between public and private regulatory law here and there. After conflict of laws scholars had already posited the need to embed their assessments in a deeper comparative understanding of the existing public/private regulatory cultures in different countries in the 1970s,<sup>184</sup> impulses today are coming from administrative law scholars on the one hand<sup>185</sup> and constitutionalization scholars on the other.<sup>186</sup> As these inquiries continue, one can—unsurprisingly—recognize a distinct renaissance of visions of social order without formal law elements lying at their base.<sup>187</sup> While not intended, this “new legal pluralism,” as pointed out by its discontents,<sup>188</sup> runs the risk of sailing hard on the winds of neo-

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Runciman ed., E. Matthews transl., 1978).

183. Niklas Luhmann, *The Third Question: The Creative Use of Paradoxes in Law and Legal History*, 15 J. LAW & SOC. 153 (1988); Gunther Teubner, *Dealing With Paradoxes: Luhmann, Wiethölter, Derrida*, in PARADOXES AND INCONSISTENCIES IN LAW 41 (Oren Perez & Gunther Teubner eds., 2006); Peer Zumbansen, *Book Review: Niklas Luhmann's Law as a Social System (2004)*, 15 SOC. & LEGAL STUD. 453 (2006).

184. CHRISTIAN JOERGES, ZUM FUNKTIONSWANDEL DES KOLLISIONSRECHTS. DIE 'GOVERNMENTAL INTEREST ANALYSIS' UND DIE 'KRISE DES INTERNATIONALEN PRIVATRECHTS' (1972); Rudolf Wiethölter, *Begriffs- oder Interessenjurisprudenz - falsche Fronten im IPR und Wirtschaftsverfassungsrecht*, in INTERNATIONALES PRIVATRECHT UND RECHTSVERGLEICHUNG IM AUSGANG DES 20. JAHRHUNDERTS 213 (Alexander Lüderitz & Jochen Schröder eds., 1977).

185. Carol Harlow, *European Administrative Law and the Global Challenge*, in THE EVOLUTION OF EU LAW 261 (Paul Craig & Grainne de Búrca eds., 1999); Carol Harlow, *Global Administrative Law: The Quest for Principles and Values*, 17 EUR. J. INT'L L. 187 (2006); Richard J. Stillman II, *Twenty-First Century United States Governance: Statecraft and the Peculiar Governing Paradox it Perpetuates*, 81 PUB. ADMIN. 19 (2003); Mark Bevir & R.A.W. Rhodes, *Searching for Civil Society: Changing Patterns of Governance in Britain*, 81 PUB. ADMIN. 41 (2003); Robert Elgie, *Governance Traditions and Narratives in Public Sector Reform in Contemporary France*, 81 PUB. ADMIN. 141 (2003); Werner Jann, *State, Administration and Governance in Germany: Competing Traditions and Dominant Narratives*, 81 PUB. ADMIN. 95 (2003).

186. See, e.g., Neil Walker, *The Idea of Constitutional Pluralism*, 65 MOD. L. REV. 317 (2002)

187. Paul Schiff Berman, *From International Law to Law and Globalization*, 43 COLUM. J. OF TRANSNAT'L L. 485 (2005); Oren Perez, *Normative Creativity and Global Legal Pluralism: Reflections on the Democratic Critique of Transnational Law*, 10 IND. J. GLOBAL LEGAL STUD. 25 (2003); Sally Engle Merry, *Anthropology, Law, and Transnational Processes*, 21 ANNUAL REVIEW OF ANTHROPOLOGY 357 (1992); Annelise Riles, *A New Agenda for the Cultural Study of Law: Taking on the Technicalities*, 53 BUFF. L. REV. 973 (2005).

188. Martti Koskenniemi, *Global Legal Pluralism: Multiple Regimes and Multiple Modes of Thought*, Presentation at Harvard Law School, 5 March 2005, available at: <http://www.helsinki.fi/eci/Publications/MKPluralism-Harvard-05d%5B1%5D.pdf>; Martti Koskenniemi,

liberal, deregulatory politics.<sup>189</sup>

It is against this background that we may gain a deeper, contextualized, understanding of the present dominance of functionalism in many fields of law and policy on both sides of the Atlantic. Certainly after 1989, there has been an ever more widely held view that we are witnessing a global convergence of modes of thinking about economic regulation and state governance. The “end of history,” so famously declared by Fukuyama in 1992,<sup>190</sup> eventually eclipsed the account by Michel Albert, that even in light of strong trends of convergence, differences between capitalist regimes would remain strong.<sup>191</sup> The pervasive power of the end of history thesis in law has put promoters of differentiated, historically informed assessments of the role of law as an instrument of social change on the defensive, while allowing for ubiquitous references to the law and the “rule of law” to occur in even the most complex regulatory contexts.<sup>192</sup>

### 3. *DEJA VU?* THE DISCURSIVE RETURN OF REFLEXIVE LAW

The current operation of formalist/functionalist concepts in legal regulation builds on regulatory experiences that unfolded in the last few decades and that are without direct parallels to the first waves of formalist thinking at the turn of the nineteenth/twentieth centuries. It is an important feature of the current legal regulatory discourse that its participants are arguing against the background of a complicated and sobering set of experiences with law.<sup>193</sup> From the impossibility of preventing outrageous crime<sup>194</sup> to law’s exhaustion throughout the ambitious progressive political attempts to consolidate “rights” as core assets in a liberal society,<sup>195</sup> law

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*The Fate of Public International Law: Between Technique and Politics*, 70 MOD. L. REV. 1 (2007).

189. Kerry Rittich, *Functionalism and Formalism: Their latest Incarnations in Contemporary Development and Governance Debates*, 55 U. TORONTO L.J. 853 (2005); Harry W. Arthurs, *The Administrative State Goes to Market (and Cries ‘Wee, Wee, Wee’ All the Way Home)*, 55 U. TORONTO L. J. 797 (2005).

190. FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* (1992).

191. MICHEL ALBERT, *CAPITALISME CONTRE CAPITALISME* (1991) [Engl. 1993]; Michel Albert, *The Future of Continental Socio-Economic Models*, MPIfG Working Paper 97/6, June 1997, available at <http://www.mpi-fg-koeln.mpg.de/pu/workpap/wp97-6/wp97-6.html> (last visited May 2, 2008).

192. David Kennedy, *Laws and Development*, in *LAW AND DEVELOPMENT: FACING COMPLEXITY IN THE 21ST CENTURY* 17, 20 (John Hatchard & Amanda Perry-Kessaris eds., 2003).

193. See already the famous debate between H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958), and Lon Fuller, *Fidelity to Law - A Reply to Professor Hart*, 71 HARV. L. REV. 629 (1958); see also Michael Bazylar, *WWW.SWISSBANKCLAIMS.COM: The Legality and Morality of the Holocaust-Era Settlement with the Swiss Banks*, 25 FORDHAM INT’L L. J. 64 (2001).

194. SAMANTHA POWER, *A PROBLEM FROM HELL: AMERICA AND THE AGE OF GENOCIDE* (2003).

195. David Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 4 WIS. L. REV. 1062 (1974).

has come to be conceptualized as playing a highly ambivalent role in a deregulatory, privatized environment.<sup>196</sup> The long-term consequences of the recent, admittedly moderate, experimentations with finding a ‘third way’ between socialism and capitalism are still matters of speculation.<sup>197</sup> Meanwhile, the law has become a problematic, at best ambivalent, and often seemingly unreliable player in the discursive set of contemporary politics.<sup>198</sup> Law’s memory becomes increasingly short-lived, and high stakes of political contestation, such as the fight over consumer protection rights,<sup>199</sup> are eventually leveled and comfortably integrated into mainstream legal discourse. It becomes ever more difficult to trace, let alone to teach, the reality of conflict over rights even in recent history.<sup>200</sup> Because of the hegemony of economic thinking in law,<sup>201</sup> law is caught in polarizing debates over efficiency vs. planning, private vs. public ordering, self-government vs. command/control, etc. Still, contemporary discussions about the merits and limits of privatization should always be taken as reflections on a long-standing struggle over social emancipation and contested forms of political government. Contractual governance is in the center of contemporary privatization and post-privatization discourses.<sup>202</sup>

#### IV. CONTRACT VERSUS CONTRACT LAW: THE FALSE PROMISE OF SOCIAL NORMS

The remainder of this paper is dedicated to a brief discussion of how

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196. Gunther Teubner, *After Privatisation? The Many Autonomies of Private Law*, in FROM DISSONANCE TO SENSE: WELFARE STATE EXPECTATIONS, PRIVATISATION AND PRIVATE LAW 51 (Thomas Wilhelmsson & Samuli Hurri eds., 1999).

197. ANTHONY GIDDENS, *THE THIRD WAY: THE RENEWAL OF SOCIAL DEMOCRACY* (1999); ANTHONY GIDDENS, *EUROPE IN THE GLOBAL AGE* (2006).

198. Jürgen Habermas, *Interpreting the Fall of a Monument*, 4 GERMAN L. J. 701 (2003).

199. See Iain Ramsay, *Consumer Law and the Search for Empowerment*, 19 CAN. BUS. L.J. 397 (1991); Iain Ramsay, *Consumer Law and Structures of Thought: A Comment*, 16 J. CONST. POL. 79 (1993); Andreas Maurer, *Consumer Protection and Social Models of Continental and Anglo-American Contract Law and the Transnational Outlook*, 14 IND. J. GLOBAL LEGAL STUD. (2007).

200. Geraint Howells & Thomas Wilhelmsson, *EC Consumer Law: Has it Come of Age?*, 28 EUR. L. REV. 370 (2003).

201. See, generally, CHRISTIAN LAVAL, *L’HOMME ÉCONOMIQUE. ESSAI SUR LES RACINES DU NÉOLIBÉRALISME* 183 (2007). “. . . la science économique se constitue comme discours de connaissance positive d’une réalité qui a ses propres lois et ne veut plus dépendre d’autres considérations de la morale et de la politique, rejetées comme étrangères au champ économique.” *Id.* Allan C. Hutchinson, *Michael and Me: A Postmodern Friendship*, 33 OSGOODE HALL L.J. 237, 252 (1995) “For all the hard work of the consumer lobby, the increasing domination of *homo economicus* is illustrated by the fact that public discourse has become hostage to economics and has begun to dance to, instead of call, the economic tune . . .” *Id.*

202. Gunther Teubner, *After Privatisation? The Many Autonomies of Private Law*, in FROM DISSONANCE TO SENSE: WELFARE STATE EXPECTATIONS, PRIVATISATION AND PRIVATE LAW 51 (Thomas Wilhelmsson & Samuli Hurri eds., 1999).

formalist/functionalist legal thinking has become crucial in a central area of contemporary regulatory debate. The neo-formalist and neo-functional turn of contractual governance reveals how variations of responsive/reflexive law have further accentuated the detachment of contract regulation from a larger political contestation of the goals of contractual governance. Yet, the response cannot simply be to aim at a re-politicization of contract law. Against the theoretical background of a functionally differentiated society, it is more adequate to understand contract law as a troubled site of intense regulatory experimentation and innovation. Contract law is a central example of “law after the welfare state,” because it represents a regulatory regime that is constituted and shaped by an ambiguous relationship between “state” and “society” in the institutional evolution from the Rule of law to the welfare state. In the neo-formalist and neo-functional reading, however, contractual governance is offered as a formidable solution to the paradox of formalist/functionalist law, which it manages in turn to eclipse in its entirety.

#### A. SOCIAL NORMS VERSUS LAW?

The present contestation of contract adjudication and the promotion of social norms as offering a more efficient regulatory framework than governance by contract law<sup>203</sup> is a representation *par excellence* of private law “after the welfare state.” This invocation of social self-regulation, which is primarily fuelled by a deep skepticism about the political regulation of commercial relations, is further accentuated in the context of an increasingly de-territorialized sphere of economic interaction.<sup>204</sup> To be sure, the reference to the transnational nature of commercial activity serves as a ground for turning against contract adjudication also on the domestic level. Another lesson of the twentieth century regulatory experience with reflexive law is—deliberately—cast aside: in order to fully understand the dynamics of regulatory politics on a larger scale, we need to carefully trace the contextual conditions under which we make legal arguments. In the reductionist form in which ‘traditionalists’ are contrasted with “transnationalists”<sup>205</sup> it is to be feared that the fight for recognition of the latter results in the undoing of the emancipation of the former.

In turn, the maneuvering room for courts adjudicating derailed contractual arrangements is shrinking as social norms are seen as

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203. See ERIC A. POSNER, *LAW AND SOCIAL NORMS* (2000).

204. Peer Zumbansen, *Piercing the Legal Veil: Commercial Arbitration and Transnational Law*, 8 EUR. L. J. 400 (2002).

205. KLAUS PETER BERGER, *THE CREEPING CODIFICATION OF THE LEX MERCATORIA* (1999), ch. 1.

providing a comparatively more efficient and cost-reducing regulatory tool.<sup>206</sup> The legal system recedes into the background from where contract parties merely perceive it as a threat, not as fundamentally structuring the arrangements to begin with. This approach to social norms breaks not only with the analysis of the political basis of both contractual arrangements and the market,<sup>207</sup> it also aims to disentangle contractual governance from the socio-economic, formal/informal context in which actors make choices. This marks the social norms theorists' deliberate departure from work on relational contract and "private government"<sup>208</sup> that had grown out of the legal realist critique of classical legal contract theory.<sup>209</sup> Earlier work by progressive lawyers had identified the growing difficulties of situating modern contractual governance in either the public (law) or private (law) realm, recognizing that both were two sides of the same coin of contractual governance.<sup>210</sup> In contrast, social norms scholars from law and economics (L&E) seek to redraw the demarcation lines between the market and the state. Their interest in social norms is not in the basis of norm-making as part of a larger exploration of sites of social will-formation, but instead reflects their intention to insulate phenomena of contemporary regulatory governance from more comprehensive assessments of the contexts in which governance modes are emerging.

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206. ERIC A. POSNER, *LAW AND SOCIAL NORMS* 148 (2000).

207. Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553 (1932); John P. Dawson, *Economic Duress - An Essay in Perspective*, 45 MICH. L. REV. 253 (1947).

208. Stewart Macaulay, *Non-contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963); Ian R. Macneil, *Relational Contract: What we do and what we do not know*, 3 WIS. L. REV. 483 (1985).

209. Karl Llewellyn, *What Price Contract? - An Essay in Perspective*, 40 YALE L. J. 704 (1930); Karl N. Llewellyn, *The Constitution as Institution*, 34 COLUM. L. REV. 1 (1934).

210. Lester M. Salamon, *The New Governance and the Tools of Public Action: An Introduction*, 28 FORDHAM URB. L.J. 1611 (2001); see already Carol Harlow, "Public" and "Private" Law: *Definition without Distinction*, 43 MOD. L. REV. 241, 249 (1980): "The intervention of a static "public/private" classification can only hinder this development by blinding us to obvious parallels and encouraging uneven growth."



## B. ECONOMICS VERSUS JUSTICE

*“A post-industrial society must discover ways to decentralize not only commodity production, but also significant ways of lawmaking.”<sup>211</sup>*

The recent “discovery” of social norms by L&E scholars<sup>212</sup> occurs in striking insulation not only from a longstanding and intense scholarly debate,<sup>213</sup> but also from a tremendously rich and troubled historical evolution of regulatory politics in the area of contract law. With little historical interest in such accounts, the L&E interest in norms is biased towards a particular, efficiency-oriented understanding of norms and regulation in present-day contestations of allegedly excessive state intervention. This approach, however, closes all doors on a more nuanced understanding of the forever fragile relationship between social norms and the legal form, one that stood at the centre of landmark work in the sociology of law.<sup>214</sup> It in fact makes a mockery of long-standing insights into the artificial nature of all legal propositions.<sup>215</sup> Instead of perceiving social norms as “living law” and as a platform for a more comprehensive

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211. Robert D. Cooter, *Against Legal Centrism. Review of Robert C. Ellickson, Order Without Law. How Neighbors Settle Disputes*, 81 CAL. L. REV. 417, at 418 (1993).

212. In particular see, ERIC A. POSNER, *LAW AND SOCIAL NORMS* (2000); Richard A. Posner, *Social Norms, Social Meaning, and the Economic Analysis of Law*, 27 J. LEGAL STUD. 553 (1998); see the critique by Robert C. Ellickson, *Law and Economics Discovers Social Norms*, 27 J. LEGAL STUD. 537 (1998).

213. For a brilliant introduction to the issues and the literature, see Sally Falk Moore, *Law and Social Change: The Semi-Autonomous Field as an Appropriate Subject of Study*, 7 LAW & SOC’Y REV. 719 (1973); Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS L. J. 814 (1986-1987); Gunther Teubner, *Juridification - Concepts, Aspects, Limits, Solutions, in JURIDIFICATION OF SOCIAL SPHERES 3* (Gunther Teubner ed. 1987); Gunther Teubner, *The King’s Many Bodies: The Self-Deconstruction of Law’s Hierarchy*, 31 LAW & SOC’Y REV. 763 (1997).

214. GEORGES GURVITCH, *SOCIOLOGY OF LAW* (ORIG. PUBLISHED IN FRENCH AS *PROBLÈMES DE LA SOCIOLOGIE DU DROIT*) (1947), 41: “The social reality of law is neither an immediate datum of intuition nor a content of sense perception, but is rather a construct of reason, moreover, detached from social reality as a total phenomenon.” Later, Gurvitch, offers this definition:

Law represents an attempt to realize in a given social environment the idea of justice (that is, a preliminary and essentially variable reconciliation of conflicting spiritual values embodied in a social structure), through multilateral imperative-attributive regulation based on a determined link between claims and duties; this regulation derives its validity from the normative facts which give a social guarantee of its effectiveness and can in certain cases execute its requirements by precise and external constraint, but does not necessarily presuppose it.

*Id.* at 47.

215. EUGEN EHRLICH, *FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW* (orig. published in German as *GRUNDLEGUNG DER SOZIOLOGIE DES RECHTS*, 1913) (1962), 486: “The reason why the dominant school of legal science so greatly prefers the legal proposition to all other legal phenomena as an object of investigation is that it tacitly assumes that the whole law is to be found in the legal propositions.”

exploration of present-day regulatory proposals against the background of the evolutionary trajectory of welfare and post-welfare state “regulatory cultures,”<sup>216</sup> today’s neo-formalists and neo-functionalists’ attack on law is more than a mere plea to recognize the (self-)regulatory capacity of social norms. It is, rather, the rejection of a critical assessment of how norms are being translated into law, how legal formation takes place in the context of highly differentiated and, thus, always contested spheres of social activity. What really lies behind the plea for social norms over law is not a genuine interest in norm-formation but a disregard for processes of negotiation and contestation. This explains the hesitant reception of legal sociology and the even greater reluctance towards legal pluralism in the otherwise wholehearted proclamation of the primacy of norms over law. While sociological and legal pluralist research on norms has for a long time failed to exert significant influence on norm-theory, perhaps because of the area’s preoccupation with groups as “operative agents” and L&E scholars’ respective focus on “methodological individualism,”<sup>217</sup> there are a few signs for change.<sup>218</sup> Clearly, the demand for a fuller appreciation of sociological and legal pluralist work in the ongoing exploration of the law after the welfare state is enormous, and one can reasonably expect that the sophistication of the research in increasingly combining domestic perspectives with careful studies of emerging transnational regulatory patterns will eventually influence the present work on norms.

The current introspection is important in the context of this paper not only because it illustrates the contentious relationship between formal and informal law, an understanding of which is central to present studies of contemporary law making developments in different areas of law.<sup>219</sup> The new interest in norms also underlines the precarious status of legal regulation per se. In an increasingly transnational regulatory environment,

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216. See Errol Meidinger, *Regulatory Culture: A Theoretical Outline*, 9 LAW & POLICY 355 (1986); Colin Scott, *New-ish Governance and the Legitimacy of the EU*, 3 CLPE COMPARATIVE RESEARCH IN LAW & POLITICAL ECONOMY RESEARCH PAPER (2007), available at <http://ssrn.com/abstract=1003824>.

217. Ellickson, *supra* note 212, at 542; see also Robert D. Cooter, *Against Legal Centrism. Review of Robert C. Ellickson, Order Without Law. How Neighbors Settle Disputes*, 81 CAL. L. REV. 417 (1993), at 426. “Of course, sociology is not an unqualified improvement over abstract economic theory.” *Id.*

218. See the references in Ellickson, and notes 22-24. *Supra* note 217, at 543, (noting that towards the mid-1990s, norms had become the “hottest topic in the legal academy”); see also the Symposium on “Norms and Corporate Law,” published in the 1996 volume of the U. PA. L. REV.; see also the contributions in RULES AND NETWORKS. THE LEGAL CULTURE OF GLOBAL BUSINESS TRANSACTIONS (Richard P. Appelbaum et al. eds., 2001).

219. See, e.g., David V. Snyder, *Private Lawmaking*, 64 OHIO ST. L. J. 371 (2003); Simon Deakin, *The Many Futures of the Contract of Employment*, in LABOUR LAW IN AN ERA OF GLOBALIZATION. TRANSFORMATIVE PRACTICES & POSSIBILITIES 177 (Joanne Conaghan et al. eds., 2002); Graf-Peter Calliess, *Reflexive Transnational Law. The Privatisation of Civil Law and the Civilisation of Private Law*, 23 ZEITSCHRIFT FÜR RECHTSSOZIOLOGIE 185 (2002), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=531063](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=531063); Peer Zumbansen, *The Privatization of Corporate Law? Corporate Governance Codes and Commercial Self-Regulation*, JURIDIKUM 136 (2002b); Peer Zumbansen, *The Parallel Worlds of Corporate Governance and Labor Law*, 13 IND. J. OF GLOBAL STUD. 261 (2006).

contractual governance—traditionally torn between contentions of contract’s political nature and private autonomy—unfolds in a polycontextural sphere which renders any attempt to safely anchor contract law in this or that social theory, largely futile.<sup>220</sup>

## V. CONCLUSION

This paper has traced the rising prominence of formalism and functionalism in diverse areas of “post-welfare state” legal regulation as un-ironic recurrences of the twentieth century’s quest for law. Today, formalist, functionalist, responsive, reflexive and autopoietic law is everywhere. Lawyers can snatch up everything and make it their own—a matter of conversation, the subject of a lawsuit or an essential element of a social utopia, seen now through a lawyer’s eyes. But the real conceptual contribution of autopoietic law to the previously revisited historical narrative of formalist/functionalist law is one that is, strikingly, at the center of contemporary assessments of institutional development.<sup>221</sup> The concept of autopoietic law helps to carve out the particularity of the legal operation in distinction to any other form of societal communication, be it politics, religion, art or economics. Law’s particularity relies on its self-referentiality, its being thrown back onto its own mode of operation, its self-referential reproduction of its system’s content and form through its code, unique to law and at the basis of any aspiration to unity and cohesion.<sup>222</sup> The radicality of the concept is becomes apparent when we contrast the historical with the conceptual sketch. Whereas the former would “*find*” law to be, at least since Western modernity, invariably tied up with different emanations of the state,<sup>223</sup> autopoietic law detaches law from its—historically contingent—institutional affiliation, but understands law in its raw exposure to its social environment. In that sense, law in fact is everywhere, and it has no choice. The law’s presence in societal conflict is brought into even sharper relief when we see that its institutional constellation with the state is only one among endless possibilities of law’s exposure *to* and its role *in* society. Autopoietic law, then, radicalizes the particularity of law’s operation by emphasizing its self-referential code-

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220. For a comprehensive discussion, see GRAF-PETER CALLIESS/PEER ZUMBANSEN, *ROUGH CONSENSUS AND RUNNING CODE: A THEORY OF TRANSNATIONAL PRIVATE LAW* (forthcoming).

221. DOUGLASS C. NORTH, *INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE* (1990); Paul A. David, *Why Are Institutions the ‘Carriers of History’?: Path Dependence and the Evolution of Conventions, Organizations and Institutions*, 5 *STRUCTURAL CHANGE AND ECONOMIC DYNAMICS* 205 (1994).

222. Niklas Luhmann, *The Unity of the Legal System*, in *AUTOPOIETIC LAW: A NEW APPROACH TO LAW AND SOCIETY* 12 (Gunther Teubner ed., 1988).

223. Nils Jansen & Ralf Michaels, *Private Law and the State. Comparative Perceptions and Historical Observations*, 71 *RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT [RabelsZ]* 345 (2007).

driven quality on the one hand while laying bare law's openness, diffusion, vulnerability and fragility in societal processes on the other.

This gives an entirely new meaning to the formalism/functionalist narrative that we have seen to be central to law's trajectory in the twentieth century. Autopoietic law emphasizes how both the positivist and critical descriptions of formalism underestimate the closure of law's self-referential reproduction, which only operates through law-internal terminology. While the legal positivist pays a high price for law's inner coherence,<sup>224</sup> the critical legal scholar risks losing law as form by decrying it as camouflage for different emanations of power. In turn, autopoietic law radicalizes the functionalist's instrumentalization of law as a means of social engineering by leaving the driver's seat empty. Rejecting the idea that law, from any single "outside" point, could determine the outcome of social conflicts, autopoietic law stresses the way in which law is a mere, yet highly particular, form of communication. Building on the concept of a functionally differentiated society, the law can no longer be seen as performing a particularly determinative or representative function with regard to economic, political or other interests but itself can only perform a legal function. Instead of being removed from society, law is part of it, everywhere exposed to and in communication with it.

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224. By positing a *Grundnorm* at the basis of all law, Hans Kelsen, *The Pure Theory of Law and Analytical Jurisprudence*, 55 HARV. L. REV. 44 (1941); HANS KELSEN, GENERAL THEORY OF LAW AND STATE [1945] (Wedberg trans., 1961).