

# AFTER PRIVATIZATION? THE MANY AUTONOMIES OF PRIVATE LAW\*

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## I. A Perennial Oscillation?

What price efficiency? The last twenty years have seen an important shift in the pattern of public service provision throughout the countries of the OECD. Across a whole range of services—higher education, research and development, utilities, transport, telecommunications, the media, health and social services, security, and law enforcement—there has been a transfer of responsibility from the public to the private sector.<sup>1</sup> Pressures of globalization and technological changes combined with the neo-liberal policies of national governments, both conservative and progressive, have created a transnational wave of privatization. Political and legal resistance at a national level seems to be powerless against this overwhelming movement. The crucial question seems to be: after privatization, what now? What will market mechanisms do to the public interest aspects of these services which were previously protected—more or less successfully—by public law principles, democratic legitimation, fundamental rights, and *Rechtsstaat*? If they are not to be sacrificed on the altar of market efficiency, so the argument goes, then, paradoxically, privatization of public services will lead to a massive intrusion of public law principles into private law regimes. In the course of privatization, the private

For critical comments I would like to thank Julia Black, Hugh Collins, Oliver Gerstenberg, Colin Scon, and Lindsay Stirton.

<sup>1</sup> Privatization is understood here in a broad sense, including especially change of public ownership and introduction of market elements in governance structures. For a useful classification (privatization, contracting out, introduction of market-elements in the public sector) see M. Freedland, 'Government by Contract and Public Law', (1994) 76 *Public Law* 86-104.

law of advanced industrialized societies will need to pay a part of the price for the loss of the democratic and political dimensions and incorporate public law elements to a hitherto unknown degree.<sup>2</sup>

I would like to contest this emerging consensus on a new compensatory political justice. The social theory underlying this view is so reductive as to obscure many of the most important dimensions of these changes. The privatization phenomenon, accordingly, is observed only along one dimension, as a move in a perennial oscillation between the public and private sectors, swinging like a pendulum from the old *Polizeystaat* of the eighteenth century to nineteenth century liberal society, turning then forth to the modern welfare state and finally back to the future of the new private globalized regimes. As an alternative hypothesis, while agreeing that private law will indeed undergo a massive transformation after privatization, I shall make two alternative claims.

(1) The crucial problem is not how to compensate for the loss of the public interest in privatization. Rather, it is how to move out of the reductive public/private dichotomy itself and how to make private law responsive to a plurality of diverse 'private' autonomies in civil society.

(2) The adequate reaction to privatization is not to impose public law standards on private law, rather to transform private law itself into the constitutional law of diverse private governance regimes which will amount to its far-reaching fragmentation and hybridization.

## II. Deconstructing the Public/Private Divide

It has almost become a ritual these days to de-construct the private/public distinction. The problem is, nobody knows how to dis-place it, not to speak of how to re-place it? Social theorists

- This perspective is well elaborated with regard to common law principles of public utilities in M. Taggart, 'Public Utilities and Public Law', in P. Joseph (ed.), *Essays on the Constitution* (Wellington, 1995), 214-64 and with regard to the new regulation of privatized public services in T. Prosser, *Law and the Regulatory Process* (Oxford, 1997).

<sup>J</sup> For an influential argument see M.J. Horwitz, 'The History of the Public/Private Distinction' (1982) 130 *University of Pennsylvania Law Review* 1423.

have again and again analysed the breakdown of the boundary between State and society, but what they offer instead is a diffuse politicization of the entire society.<sup>4</sup> Similarly, the distinction between public law' and private law has been attacked by legal scholars, but has been substituted by the vague assertion that private law is pervasively political?' The privatization ideology has profited from this de(con)struction without re(dis)placement by presenting the old dichotomy as the only institutional choice available. Privatization is welcomed as an efficiency-enhancing movement from rigid governmental bureaucracies to dynamic markets.

In spite of all critique, the public/private distinction has over the centuries maintained a remarkable viability. This is due to its chameleon-like character which swiftly adapted in its long history to structural changes in society. It changed its appearance from *polis* versus *oikos* in the old European society<sup>6</sup> to State versus society of the bourgeois era<sup>7</sup> and survives in the contemporary distinction between the public and the private sector. In this formula two distinctions are successfully merged: political versus economic rationality on the one hand, and hierarchical organization versus market co-ordination on the other. Responsiveness, flexibility, and efficiency are, of course, associated with the second part of both distinctions.

Not only is it argued here that the public/private distinction is an over-simplified account of contemporary society'. More controversially, I argue that any idea of a fusion of the public and private spheres is equally inadequate. *As an alternative conceptualization, it is proposed that the public/private divide should be replaced by*

<sup>4</sup> J. Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society* (Cambridge, 1992); considerable refinements appear in J. Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge, Mass., 1996). ch. S, sect. III.

<sup>5</sup> K. Engie, 'After the Collapse of the Public/Private Distinction: Strategizing Women's Rights', in D. G. Dallmeyer (ed.), *Reconceiving Reality: Women and International Law* (Washington, DC, 1993). F. Olsen, 'Constitutional Law: Feminist Critique of the Public/Private Distinction' (1993) 10 *Constitutional Commentary* 319.

<sup>6</sup> P. Spahn, 'Oikos und Polis: Beobachtungen zum Prozeß der Polisbildung bei Hesiod, Solon und Aischylos' (1980) 231 *Historische Zeitschrift* 529.

<sup>7</sup> M. Riedel, 'Gesellschaft, bürgerliche' (1975) 2 *Geschichtliche Grundbegriffe* 719.

*polycontexturality*.<sup>8</sup> What does this mean? How can yet another continental neo-logism be of any help to our understanding? The claim is this: contemporary social practices can no longer be analysed by a single binary distinction; the fragmentation of society into a multitude of social sectors requires a multitude of perspectives of self-description. Consequently, the simple distinction of State/society which translates into law as public law v. private law needs to be substituted by a multiplicity of social perspectives which are simultaneously reflected in the law.<sup>9</sup> A dialectical *Aufhebung* of the distinction can serve to maintain and even to strengthen law's responsiveness to the public/private divide if this divide is understood as the difference between political and economic rationality. But at the same time the dualism needs to be broken up and replaced by the multiplicity of social perspectives, which then needs to be translated into law. The simple dualism private law v. public law, which reflects the dualism of political v. economic rationality, cannot grasp the peculiarities of social fragmentation. Is a research project public or private in its character? Surely there is more to a doctor-patient relationship than a market transaction regulated by some governmental policies.

Neither public law, as the law of the political process, nor private law, the law of economic processes, has the capacity to develop adequate legal structures in relation to the many institutional

<sup>8</sup> This concept has been coined by G. Gotthard, 'Life as Poly-Contexturality' in G. Gunther (ed.), *Beiträge zur Grundlegung einer operationsfähigen Dialektik I* (Hamburg, 1976), 283, and has become one of the central elements of autopoietic social and legal theory; see e.g. N. Luhmann, 'The Coding of the Legal System', in A. Febbrajo and G. Teubner (eds.), *State, Law, and Economy as Autopoietic Systems: Regulation and Autonomy in a New Perspective* (Milan, 1992), 145, and G. Teubner, 'The King's Many Bodies: The Self-deconstruction of Law's Hierarchy', in D. Patterson and A. Somek (eds.), *The Indeterminacy of Social Integration* (Oxford, 1997).

<sup>9</sup> For a similar argument in different theory contexts, see R. Friedland and R. Alford 'Bringing Society Back In: Symbols, Practices, and Institutional Contradictions', in W. Powell and P. DiMaggio (eds.), *The New Institutionalism* (Chicago, Ill., 1992), 232; B. de Sousa Santos, *Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition* (New York, 1992), 416 ff; O. Gerstenberg, *Bürgerrecht und deliberative Demokratie: Elemente einer pluralistischen Verfassungstheorie* (Frankfurt, 1997); Thomas Wilhelmsson, 'Private Law 2000: Small Stories on Moralin' Through Liability', in T. Wilhelmsson and S. Hurri (eds.), *Prom Dissonance to Sense: Welfare State-expectations, Privatisation and Private Law* (Aldershot, 1995).

contextures of civil society.<sup>10</sup> But, at the same time, neither is there a new fusion of private and public law as suggested by such seductive slogans as ‘private life is public’ or ‘everything is politics’. Rather, private law needs to re-inforce its elective affinity to the contemporary’ plurality of discourses—not only its affinity’ to the economy as it is predominantly understood today, but also private law’s close relations with the many contexts of intimacy, health, education, science, religion, art, and media. This would lead to a thorough-going reflection within private law of the distinctive *Eigenlogics* of these various realms of discourse—a reflection which would encompass their internal rationality’ as well as their inherent normativity.

The point of strengthening these various relations is simultaneously to de-politicize private law and to de-economize it, to distance it not only from the public sector but also from the private sector. It has become commonplace today to stress the difference of an efficiency-driven private law’ from the regulatory policies of the welfare state and to stress the autonomy and decentralized rule production of the former from central legislative intentions of the latter. But it is much less understood that private law cannot be identified simply with juridification of economic action. Indeed, this has been the great historical error of private law doctrine: contract law is increasingly reduced to the law of market transactions; the law’ of private associations has been boiled down to the law of business organizations. We have increasingly come to view property law only as the basis for market operations and to shape tort law as the set of policies and rules that internalize economic externalities and eradicate third party’ effects.<sup>11</sup> These are understandable errors, of course. Legal doctrine had to adapt to the double Great Transformation of our century, the victorious imperialism of both the economic and the political systems which have divided the social world between

<sup>10</sup> This extremely vague concept will be used here in a more precise systemic sense, comprising all those social communications that are not part of the political or the economic system. This is similar to Habermas’ use of the concept. However, it includes not only diffuse (life-world) communication but—in deference to Habermas—communication in any other social system. Cf. also J. Cohen and A. Arato, *Civil Society and Political Theory* (Cambridge, Mass., 1992), ch. 3.

<sup>11</sup> ‘Private law has become the domain of property and economic relations’: K. F. Röhl, *Adlgemeine Rechtslehre* (Köln, 1995), -434.

them into two spheres of influence. On the one side economic action developed totalizing tendencies in its society-wide expansion and transformed non-commercial social relations, e.g. the relationships of the classical professions to their clients, into profit-oriented economic relations. Private law followed this ongoing commercialization of the social world, sometimes reluctantly, always obediently. On the other side there was the apparently unstoppable growth of the welfare state, transforming social activities into public sector services. Accordingly, private law abdicated its responsibilities for the legal regulation of these social activities in favour of public law principles. And this error has been the common starting point for the great influential ideologies, liberalism and Marxism, in their countless variations and combinations, including social democracy and New Labour. For both ideologies, private law is identical with the law of the economy—witness the slogans of the German debate ‘*Privatrechtsgesellschaft*’ (private law society) of the ordo-liberals versus ‘*Privatrecht als Wirtschaftsrecht*’ (private law as the law of the economy) of the political interventionists. This disagreement was only about whether private law should reflect economic efficiency or governmental policies, principles of economic autonomy or of political intervention. *Tertium non datur*. Both political ideologies have assisted in creating legal institutions which stress, albeit in different forms, the interplay of the political and the economic sectors, but at the same time—and this is my central point today—they have neglected or instrumentalized other sectors of civil society.

A non-reductive concept, however, would identify private law in many social spaces wherever spontaneous norm-formation is the source of law. The astonishing pluralism of new forms of voluntarily chosen intimacy relations and the abundance of new contracts about intimate partnerships provide an example of non-economic private law in civil society. Spontaneous rule-making processes in civic movements and in non-profit private organizations are another. Traditional legal doctrine is quite right when it identifies ‘private autonomy’ as the centre of private law, but in its obsessive drive toward the doctrinal unity of private law<sup>12</sup> it

<sup>12</sup> E.g. E.J. Weinrib, *The Idea of Private Law* (Cambridge, Mass., 1995); Wolteana Zöllner, *Die Privatrechtsgesellschaft im Gesetzes- und Richterstaat* (Kolm 1996).

misses the crucial point—the discursive pluralization of contemporary society into many private autonomies. The main challenge for private law theorizing today, it seems to me, is to rethink the one (*de facto*, economic) autonomy of the free individual into the many autonomies of different social worlds—the autonomy of intimate life, health care, education, research, religion, art, the media—to which private law needs to be responsive. The core function of private law is to juridify diverse processes of decentralized spontaneous norm-formation in civil society which are fundamentally different from processes of political regulation by the central authority of the State. Private law's job in this broader sense is to constitutionalize spaces of social autonomy, not only economic forms of action but in particular non-economic forms of contracting and other modes of consensual action, idiosyncratic private ordering, standardization, normalization, codes of practice, formal organization and loosely organized networks in different contextures of civil society.<sup>13</sup>

If there is one lesson that private law could learn from contemporary social theory, then it is the lesson that social autonomy, i.e. the capacity for self-regulation of a social field, is not confined to the market mechanism of the economy but is realized via different forms in many other social worlds of meaning. While there is broad consensus among competing social theories about this pluralization of social worlds, arguments about how to identify the social fragments, how to draw the boundaries between them, how to characterize their specific rationality and their proper normativity, and how to design legal-political institutions that are responsive to their *Eigenlogics* are all highly controversial.. And a crucial question for private law is how, for its own purposes, it should identify and, even more important, how it can adequately constitutionalize different private autonomies in responding to this discourse plurality.

One group of theories explores the bewildering diversity of conflicting rationalities. Theories of discourse plurality' *a la Erangatse* celebrate *le differend* between conflicting *genres* of hermetically closed language games based on different grammars

<sup>13</sup> For a similar perspective, especially in tom law, see Wilhelmsson, n. 9 above.

and life practices.<sup>14</sup> The more sober Anglo-American New Institutionalism distinguishes a plurality of governance regimes that produce specific routines, normative patterns, and institutional requirements and analyses the resulting politics of inter-institutional conflicts.<sup>15</sup> German neo-romantic autopoiesis imagines a rich plurality of self-producing contextures in which specific operations, codes, and programmes emerge and shape the rich tapestry of the many social worlds, but wholly without a prestabilized harmony.<sup>16</sup> Private law urgently needs to redirect the rather confused debate about its conceptual and normative unity and to focus attention on how to calibrate its conflict-resolving doctrines and procedures to the politics of collision between different discourses, institutions, and systems.<sup>17</sup>

Yet another group of theories attempt to draw normative consequences from this discursive pluralization. Critical theory takes for granted a plurality of different life-world discourses with different logics of argumentation and develops normative arguments for their compatibilization.<sup>18</sup> Post-modern social and legal theory discusses a plurality of structural places, of autonomous sites of power, knowledge, and law production, making a case for local micropolitics.<sup>19</sup> Theories of directly deliberative polyarchy observe the emergence of hybrid public-private governance regimes which operate autonomously as problem-solving units and which, if suitably institutionalized, will generate new forms of deliberative co-ordination and social learning.<sup>20</sup> Communitarian

<sup>14</sup> J.-F. Lyotard, *The Different!: Phrases in Dispute* (Manchester, 1987); J.-F. Lyotard, *Lessons on the Analytic of the Sublime* (Palo Alto, Cal., 1994), ch. 5.

<sup>15</sup> Most explicitly, see n. 9 above, and Powell and Di Maggio, (eds.) *The New Institutionalism in Organizational Analysis* (Chicago, Ill., 1991); W. R. Scon, *Institutions and Organizations* (Thousand Oaks, Cal., 1995).

<sup>16</sup> N. Luhmann, 'The Paradox of System Differentiation', in J. C. Alexander and P. Colomy (eds.), *Differentiation Theory and Social Change* (New York, 1990), 409-40; N. Luhmann, 'The Differentiation of Society', in N. Luhmann (ed.) *The Differentiation of Society* (New York, 1982), 229-54.

<sup>17</sup> G. Teubner, 'De collisione discursuum: Communicative Rationalities and the Law' (1996) 14 *Cardozo Law Review* (forthcoming); G. Teubner, 'Altera Pars Audiatur: Law in the Collision of Discourses', in R. Rawlings (ed.), *Law, Society and Economy* (Oxford, 1997), 149.

<sup>18</sup> See Habermas (1996) n. 4 above, ch. 4.

<sup>19</sup> See Santos, n. 9 above, 416-55; Z. Bauman, *Postmodern Ethics* (London, 1993).

<sup>20</sup> J. Cohen, 'Procedure and Substance in Deliberative Democracy', in S. Benhabib (eds.), *Democracy and Difference: Contesting the Boundaries of the Political* (Princeton, NJ, 1996); see also Gerstenberg, n. 9 above, 345 ff.



theories distinguish between different "spheres of justice" which institutionalize diverse moral ideas about equality. They postulate that political legal institutions need to abandon their universalist ambitions and draw upon this particularistic norm formation.<sup>21</sup> Since private law is intimately linked to spontaneous norm production, private law theory should make use especially of those theories that stress the aspect of spontaneous self-organization, autonomous setting of boundaries, and the emergence of genuine forms of normativity within social fields.

There is, however, one crucial normative consequence to be drawn from the pluralism of private autonomies. The remarkable responsiveness private law has in the past developed toward economic markets by elaborating complex commercial contracts, business organizations, economic property rights, and business standards, may serve today as the great historical model for its relation to other autonomous discourses in civil society. The precarious balance between self-regulation and intervention, which private law has maintained in its relation to economic markets, needs to be institutionalized in other sectors of civil society. Private law's respect of the autonomy of the market sector needs to be expanded to other autonomous spaces. As Rudolf Wiethölter, probably the most sensitive observer of these developments, puts it:

Taking autonomy seriously means to rely on self-determination and at the same time on inevitable externalization (outside control). It should be understood not as hetero-determination, but as a potential outside support in a situation of impossible self-help, similar to therapeutical help and to supportive structures outside of the law."

This, however, leaves open the crucial question: what are the conditions of possibility of law's responsiveness? Under what circumstances will private law develop a similar but different sensitivity toward spontaneous norm making in other social worlds like education, research, media, art, health? And particularly important

<sup>21</sup> M. Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (New York, 1984); P. Selznick (1992) *The Moral Commonwealth: Social Theory and the Promise of Community* (Berkeley, Cal., 1992), 229 ff.

<sup>22</sup> R. Wiethölter, 'Zum Fortbildungsrecht der (richterlichen) Rechtsfortbildung: Fragen eines lesenden Recht-Fertigungslehrers' (1988) 3 *Kritische Vierteljahreszeitschrift für Gesetzgebung und Rechtswissenschaft* 1-28 au 27 ri. (author's translation).

for the present situation: how does the contemporary trend toward their privatization influence the conditions of responsiveness?

### IH. Old and New Mismatches

Privatization itself appears in a quite different light if one abandons the private/public dichotomy in favour of the notion of poly-contextuality, if one realizes that the one private autonomy is in fact many private autonomies of spontaneous norm formation. What one then sees is more than the mere transfer of activities from the State to the market. Privatization does not, as usually understood, redefine the distribution between political and economic action. Rather it transforms the character of autonomous social systems—which I call activities—by changing the mechanisms of their structural coupling with other social systems—which I call regimes.<sup>23</sup> In contrast with a process in which genuinely political activities oriented toward the public interest are transformed into profit-oriented economic activities, one sees a set of distinctive and autonomous activities—e.g. research, education, health—each of them displaying their proper principles of rationality' and normativity, which in the process of privatization are undergoing changes in their institutional regimes. Thus, instead of a bipolar relation between economics and politics one has to think of privatisation in terms of a triangular relation between these two and the public service activities involved. The traditional view sees them as either political or economic in character. Only by overlooking the distinctive rationality of the third vertex, the activity (which may be facilitated or obstructed by different institutional or political regimes) does it become plausible to claim that it is privatization that unleashes the potential blocked by the old public regime. But at the same time new' blockages appear. Old mismatches between activities and regime are replaced by new\* mismatches.

What do these old and new mismatches look like? Before privatization, the specific rationalities of diverse social sectors were dealt with, to a varying degree in different countries, in the political arena by public law regimes. The broad qualification 'political' and 'administrative' was able to cover quite diverse logics of

<sup>23</sup> See Friedland and Alford, n. 9, 256.

action. However, this did not mean that politics had actually taken over those autonomous social sectors, transformed their rationality into power politics, and made them an integral part of the political system. While this might have been true for fascism and real socialism, which attempted totally to politicize diverse sectors of society, liberal-capitalist regimes adopted the different technique of expanding the public sector into civil society. The modern welfare state carefully avoided destroying the autonomy of diverse social rationalities, but created a relation of dependency by their tight structural coupling to the political-administrative system. Basically, this involved tolerating their operational autonomy, while channelling contacts with their social environment exclusively via the political system. The political system attempted to regulate their external contacts in such a way that their main sources of influence came from politics, while the direct irritation of other sectors of society was reduced, filtered, mediated, and controlled by the political process. Social problems were first translated into political issues, and only in this politicized form brought to the attention of the welfare state services.

But at the same time, the public sector itself changed its character. It responded to the immense diversity of welfare state activities by internal differentiation according to the pattern of centre/periphery. At the periphery it created special administrative fields and specialized agencies which enjoyed a certain insulation from the influence of the political centre.<sup>24</sup> Administrative law theory developed doctrines of public sector self-regulation, '*mittelbare Staatsverwaltung*', '*besondere Gewaltverhältnisse*', which respected the *Eigenlogics* of different sectors and shaped the public law accordingly.

The perennial problem of this tight structural coupling, however, has been a profound structural mismatch between social activities and their political-administrative regime.<sup>25</sup> Economists have incessantly analysed and criticized the costly mismatches of the interventionist State. In the deregulation debate they were able to demonstrate how political command and control regulation inadequately matched the internal logic of

~ Cf. Habermas, n. 4 above.

<sup>25</sup> For a critique of the shortcomings of nationalized industries in Britain see National Economic Development Office, *A Study of UK Nationalised Industries* (London, 1976).

social action and highlight the immense costs these mismatches produced.<sup>26</sup> Similarly, transaction cost economics have analysed the economic costs which were produced by frictions between social activities and their governance regimes.<sup>27</sup> The intrusion of political influence (in the narrow sense of the party-political power game) into the integrity of the 'civil service' was one of the primary motives for privatization. Political meddling with research, education, health, etc. was a central problem of the public regime. Another was the economic inefficiency and professional incompetence which resulted from the governance by rigid hierarchical bureaucracies. Structurally, it was the selectivity of the political-administrative process that filtered the contacts of welfare state services to the rest of society, and made them more sensitive to the signals of politics than to anything else in society. To a considerable degree, the stifling of progress in those cultural fields was the price paid for tight coupling to administrative politics. Privatization means not only unleashing of market forces, but also unleashing of professional energies in diverse fields that had been blocked by the political-administrative process.

After privatization, the internal rationalities of research, education, health, art, are becoming liberated from their tight coupling to party politics and administrative bureaucracies. But they do not usually devolve into autonomous regimes of their own. Rather, under the predominant logics of privatization, tight structural links to politics have been replaced by similarly tight links to the economy. Again, their operational autonomy—this needs to be stressed—is not touched upon. But their contacts to the rest of society' are filtered through economic mechanisms. The institutions governing public services are transformed into economic enterprises, guided by monetary mechanisms and exposed to market competition.

Here is the irony. Having fought against the inefficient

<sup>26</sup> For this debate see B. Mitnick, *The Political Economy of Regulation: Creating, Designing and Removing Regulatory Forms* (New York, 1980); J. Q. Wilson, *The Politics of Regulation* (New York, 1980); S. G. Breyer, *Regulation and Its Reform* (Cambridge, Mass., 1982).

Particularly O. Williamson, *The Economic Institutions of Capitalism: Firms, Markets, Relational Contracting* (New York, 1985); O. Williamson, 'Comparative Economic Organization: The Analysis of Discrete Structural Alternatives' (1991) 36 *Administrative Science Quarterly* 269-96; O. Williamson, *The Mechanisms of Governance* (Oxford, 1996).

mismatches of public provision and state-owned enterprises, the privatizers are now creating new mismatches between activities and their economically efficient regimes. While the new market regime liberates a whole set of socio-cultural activities that had been stifled within the old regime public service provision, in the long run privatization tends to create fatal mismatches with those socio-cultural activities that are economically non-viable, even if they are central to the full achievement of their proper rationality and normativity.

However, the creation of these new mismatches generates resistance from the inner dynamics of the public services themselves. In the long run, conflictual dynamics will emerge that raise the question whether institutional changes will respond to the new mismatches. What institutional responses will this provoke? My suggestion is that we should look for these along five different directions:

- (1) To what degree will the market regime change itself so as to 'tolerate' economically non-viable activities within privatized regimes? Historical experience with private universities, private science foundations, or private art institutions confirms that under certain institutional conditions the market regime is capable of developing flexible forms of economic action—displaying long-term rather than short term orientation, leaving spaces for cultural autonomy within economically efficient organizations, cross subsidizing non-profitable activities—which are able to adapt them up to a point to non-economic rationalities.
- (2) To what degree will the third sector of non-governmental and non-profit activities take over and create governance regimes that facilitate and cultivate social activities of a non-political and non-economic character (charities, not-for-profit organizations, donations, voluntary associations, leisure activities)?
- (3) To what degree will the public sector maintain or regain control over privatized activities in such a way as would further their autonomy and protect them against the market logic (traditional governmental administration, newly created regulatory agencies, quangos)?
- (4) To what degree will individual markets or the economy as

a whole develop a political system of their own which protects and facilitates non-economic activities (business associations, informal networks between large enterprises, professional associations).

- (5) To what degree will mixed regimes emerge that cut through the public/private divide and develop forms of co-ordination in which political and economic rationalities, hierarchies, and markets are closely intertwined.

Which of these alternative directions of possible development will be realized depends to a large degree on the specific production regimes, given today's 'varieties of capitalism'.<sup>28</sup> Along all directions, private law, the law of contract, property, tort, and associations, certainly has only a limited role to play. But it would be a new<sup>f</sup> and different role, neither responsive exclusively to the private autonomy of economic actors, nor a mere continuation of the policy-oriented private law of the interventionist state that has become dependent upon institutionalized politics. Rather it would be a private law acting under the constant challenge of new mismatches between public services and their economic regimes.

In this context it is misleading to identify mismatches with market failures if these are defined by reference to the results of an ideal market (zero transaction costs, perfect information, free entry and exit, fully internalized costs and benefits) which produces pareto efficient results. Even an ideal market is bound to produce mismatches in relation to the internal rationality of privatized public services. An economic analysis approach to legal regulation that only attempts to mimic an efficiently operating market is blind toward such mismatches.<sup>29</sup> But it is equally misleading to use the old public law standards of the welfare state services as a yardstick for distinguishing match/mismatch. This would be a

<sup>28</sup> See P. Hall and D. Soskice, *Varieties of Capitalism: The Challenges Facing Contemporary Political Economies* (1998) for an application to comparative law; G. Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Produces New Divergences' (1998) 61 *Modern Law Review* 11–32.

<sup>29</sup> E.g. the exclusively economic orientation to privatization in S. Lirtlechild, *Regulation of British Telecommunications' Profitability: Report to the Secretary of State* (London, 1983); S. Lirtlechild, *Economic Regulation of Privatised Water Authorities*. A Report Submitted to the Department of Environment (London, 1986).

similarly illegitimate privilege for institutionalized politics and their idiosyncratic perception of social conflicts and problems.

More recently, it has become common to distinguish between economic and social regulation or to develop a typology of several regulatory rationales—regulating of natural monopoly, regulation for competition, social regulation.<sup>30</sup> These formulas still seem to be trapped in the public/private divide. They assume a centralized political perception of the mismatches involved. In addition, the contrast between allocative and distributive policies which they are founded upon does not sufficiently grasp the crucial multi dimensionality of perspectives.<sup>1</sup> The distinction between economic and social regulation in itself seems to be a modern repetition of the old private/public divide, reconstructed from the perspectives of regulatory agencies. The polycontextuality of social sectors and their idiosyncratic perspectives appear only in a reductive economic or political translation. And it is telling that social regulation is itself sub-divided into governmental policies and consumer protection, which in its turn is the reappearance of the private/public divide in new disguises (note the antonym exchange: not government/citizen, but government/consumer).

As an alternative to this reconstitution of the old forms of public and private, we need to develop the criteria for regulation—to take up the famous formulation by Michael Walzer—within the diverse ‘spheres of justice’ themselves. It is in the structural sites, in the plurality of social sectors that their internal controversies and their conflicts about their proper identity in society take place. Their politics of reflection within different social worlds and the ‘politics of institutional contradiction’ in their relation to the larger public thematize the mismatches between activities and regimes.<sup>32</sup> It is to these conflicts within

<sup>30</sup> see Prosser, n. 2 above. 5 ft.

<sup>31</sup> Here, in spite of all its merits, lies the problem of the non-economic approach to regulation: R. B. Stewart, ‘Regulation and the Crisis of Legalization in the United States’, in T. Daintith (ed.), *Latv as Instrument of Economic Policy: Comparative and Critical Perspectives* (Berlin, 1998), 97; C. R. Sunstein, ‘Paradoxes of the Regulatory State’ (1990) 57 *University of Chicago Law Review* 40R

<sup>32</sup> For a similar perspective, under the heading of communitarianism, see Walzer, n. 21 above; under the title of inter-institutional conflicts, see Friedland and Alford, n. 9 above, at 256 ft.; using the formulation of deliberative polyarchy, see Cohen, n. 20 above; see Gerstenberg, n. 9 above, and Wilhelmsson, n. 9 above.

different social discourses that private law—in doctrine as well as in procedure—needs to develop a high degree of responsiveness. To be sure, the criteria cannot be derived from ready-made rationality principles in the social subsystems and then simply incorporated into private law. Rather they emerge as a result of conflicts between diverse social actors. Private law needs to participate in this definition of criteria for the conflict between social activities and economic regime.

#### IV. Colliding Rationalities

Of course, the mismatch between public service and its economic regime in the health sector will look different from that in education, research, or in the media. There is no general formula according to which the logics of economic action necessarily contradict the internal logics of other socio-cultural activities. However, there are some structural problems which repeat themselves in the binding arrangements which connect the service activities with the economy.<sup>33</sup> What are those structural conflicts that are exposed to private law after privatization? What are the inter-discursive tensions on the basis of which social conflicts are emerging some of which are brought to the courts and to which private law has to find an answer even at the price of changing its fundamental structures?

The search is not—to stress this point again—for conflicts between the political rationality of the good old public services and the economic rationality of their cynical privatized successors, rather to identify areas of conflict where the logics of the market collide with fundamental principles of the social subsystems involved. I shall deal with some of the most conspicuous conflicts in so far as they become a concern for private law in some detail while just mentioning some others.

(1) *Structural corruption*, in the dark corners of some of the most prestigious private universities in the Western world there are lurking so-called ‘pink’ and ‘super-pink’ students (children of alumni and generous donors who are a bit less gifted than their parents). They are said to occupy up to 15 (!) per cent of the avail-

<sup>33</sup> For a general formulation of colliding social systems, see N. Luhmann, *Die Gesellschaft der Gesellschaft* (Frankfurt, 1997), 1087 ff.



able admission slots in cases.<sup>34</sup> This is only one of the most drastic examples of structural corruption in private public services. It is structural because there is no personal corruption of university administrators or selectors involved; they are, of course, driven by noble motives of institutional patriotism. In this situation, educational standards of excellence, equality of admission, and meritocratic treatment are in sharp conflict with the legitimate concerns of rich families to perpetuate the *splendor familiae* and the equally legitimate concern of cost-conscious university managers to take advantage of these opportunities. However, the courts show a remarkable reluctance to interfere in the internal concerns of private universities, precisely because they are private?<sup>5</sup> The example shows quite drastically how inappropriate it is to work here with the private/public distinction. Fundamental principles of higher education stand in an orthogonal relation to the private/public divide. And these conflicts are not as easy to resolve as they seem at first sight; educational principles of equality have, of course, to be weighed against the advantages of cross-subsidizing poorer students from this source of revenue.

Similar conflicts crop up in the recently privatized parts of the media where the logic of the market is structurally corrupting journalistic integrity. Again, once upon a time, when radio and television were public services, a similar structural corruption was endemic as party politics were tightly involved in their supervision under the cover of pluralistic representation. And the BSE saga has been a paradigm for a new public-private partnership in the structural corruption of research in the natural sciences. Selective funding of research projects, corporate influence on research priorities, lobby pressures on the interpretation of scientific findings, the discharge of over-zealous scientist employed by government, and, last not least, the secretive politics of European Community comitology—all these have been successfully to

<sup>34</sup> *Gossip* (1998).

<sup>35</sup> In the USA, there is a recent trend toward more judicial intervention in private universities: see the contrast between *Greene v. Howard University*, 271 F Supp. 609 (1967) and *Harvey v. Palmer College of Chiropractic*, 363 NW2d 443. For the British debate on judicial intervention in private associations, see J. Black, 'Constitutionalising Self-Regulation' (1996) 59 *Modern Law Review* 24; S. Swann, 'Private into Public Law: Fiduciary Power and Judicial Review', Paper at the Conference 'From Dissonance to Sense', Porvoo, Finland. 28-31 Aug. 1997.

exclude or to manipulate research and to compromise the integrity of the scholarly process.

It comes as a relief however, that structural corruption after privatization is a field where a modern public morality seems to coincide with autonomy-enhancing tendencies of private law. It has become an almost uncontested issue of contemporary moral consensus that the core rationality of a social domain like research, health, or education should not be allowed to be distorted by economic rationality. This is seen not only as a technical matter but as a moral issue. "Sabotaging binary codes has become a moral problem—corruption in politics and in law, doping in sports, purchasing love, or forging data of empirical research'.<sup>06</sup> Business ethics teach that the economy needs to respect the integrity of the methods of research, education, medical treatment, and other autonomous fields of knowledge if it is not to sacrifice long-term objectives to short-term advantages?<sup>7</sup> Systems sociology recommends that economic action needs to keep out of the specific *Eigenlogics* of diverse social systems and must resist the temptation offered to its decentralized decision structure to reap advantages via special deals?<sup>8</sup> Normative sociology urges economic action to be restrained, to be effectively channelled in its influence on different institutions in such a way that they can take over responsibility for their results?<sup>9</sup>

These ethics of boundaries coincide with the typical design of private law institutions—to create Chinese walls between different spaces of action, as in property law; to prohibit incompatibilities of roles, as in contract law; to establish spaces of autonomous decision-making, as in the law of associations. Safeguarding boundaries between different spaces of action can effectively be utilized against structural corruption in the media, in research, in the health sector after their privatization.

(2) *Social exclusion*: we can see daily in the newspapers a series of new conflicts in health, utilities, transport, social security, insurance, and telecommunication where the profit-driven privatized

<sup>36</sup> See Luhmann, n. 33 above, ar 1043.

<sup>37</sup> E.g. the programmatic statement by R. T. De George, 'The Status of Business Ethics: Past and Future' (1987) 6 *Journal of Business Ethics* 201.

<sup>38</sup> N. Luhmann, *Grundrechte als Institution: Ein Beitrag zur politischen Soziologie* (Berlin, 1965), 115.

<sup>39</sup> See Selznick, n. 21 above, at 289 ff.

services bluntly discriminate against poor, disabled, or homeless people or exclude them completely from their sendee. In principle, the economy is based on the rule of universal inclusion, no different from those other social systems. Each member of society is supposed to have access to their activities. But the specific conditions of universal inclusion are in sharp conflict. Under the old public regime, political inclusion via the general voting right had served as a relatively reliable guide for inclusion into public services, although one should keep in mind the degree to which discrimination on purely political grounds, in terms of voting blocks and interest group influence, has been the rule. The new economic regime discriminates sharply and visibly in terms of buying power, which creates one of the most conspicuous mismatches to inclusion claims to health, social security, or telecommunication.

The foreseeable reaction of private law to these conflicts of different inclusion conditions is to impose strict rules of universal service on profit-driven private regimes.<sup>40</sup> Against the market logic of freedom of contract, the counter-principle needs to be established right in the centre of private law regimes that guarantees—in the formulation of the Green Paper on telecommunication in the European Union—‘access to a defined minimum service of specified quality to all users at an affordable price based on the principles of universality, equality and continuity’.<sup>5 41</sup>

We are indeed witnessing a strange phenomenon. Under post-modern conditions a revival occurs of old, even medieval, common law duties. It is not by chance that duties from time immemorial on ferrymen and other common carriers, on common callings, on prime necessity, on business affected by a public interest had been discarded as ‘arcane’<sup>5</sup> in the England of the nineteenth century. It is no less by chance that contemporary law will treat private government regimes as the new ferrymen after their take over of the welfare state.<sup>4</sup> - In the production of these duties of

<sup>40</sup> See M. Mueller, ‘Universal Service in Telephone History: A Reconstruction’ (1993) 17 *Telecommunications Policy* 352; W. Sauter, ‘Universal Service Obligations and the Emergence of Citizens’ Rights in European Telecommunications Liberalisation’ (1996) 7 *Utilities Law Review* 104.

<sup>41</sup> COM(94)440 and COM(94)682.

<sup>42</sup> See Taggart, n. 2 above, at 257 ff.; for a comprehensive analysis of the common law duties on universal service, see C. M. Haar and D. W. Fessler, *The Wrong Side of the Tracks: A Revolutionary Rediscovery of the Common Law Tradition of Fairness in the Struggle Against Inequality* (New York, 1986).

universal service there is an interesting division of labour between regulatory agencies and the courts. Where regulation by the politically governed regulatory bodies is light-handed, the common law principles are reappearing in private litigation and the courts are challenged to spell out legal principles of universal service. Where the regulatory agencies take a more active approach, the courts tend to support these developments by incorporating universal service duties into their interpretation of contracts.<sup>43</sup>

Again, one should not misunderstand this as an intrusion of political into economic rationality. Rather it is the institutional rationality of the concrete social sector involved—health, telecommunication, social services—whose specific inclusion principle is in conflict with the economic inclusion principle. As a consequence private law is under the challenge to incorporate simultaneously contradictory logics of action. Private law needs to impose on profit-oriented transactions non-profit principles of *Kontrahierungszwang* and universal service, judicial rewriting of standard contracts, fair distribution of cross-subsidies between competitors, the establishment of non-profit organizations administering private funds, and non-economic, non-political but socio-cultural standards on profit-driven enterprises. Against the market logic and against the legal principle of contractual freedom it will have to impose systems of private taxes and cost subsidization in order to cover financial resources for the special inclusion principle of the social sector involved. And the institutional imagination of private law is asked for when it comes to shaping, interpreting and adjudicating on the constitutional law of profit-oriented private service providers and their rules of universal service.

(3) *Contracting privity*: privatization translates public services into the language of private contracts, with the result of an enforced bilateralism which cuts off broader social structures. A large public service project, for example, which requires the cooperation of diverse medical, social service, scientific, financial, and political skills will be organized by contracting and subcontracting schemes of diverse public and private organizations. If things go wrong and the courts have to apply contract law to these projects

<sup>43</sup> C. Scott, 'The Juridification of Regulatory Relations in the UK Utilities Sectors', in J. Black, P. Muchlinski, and P. Walker (eds.), *Commercial Regulation and Judicial Review* (Oxford, 1998).

they will of course follow the logic of market transactions and will tend to resolve conflicts by isolating in legal terms each of those individual contracts. Thus, they speak the language of economics, which translates the complex unity of a project into a multiplicity of bilateral economic transactions. Contract law resolves conflicts without taking into account that the artificial isolation of bilateral transactions is actually incompatible with the network structure of interdependent social, technical, and political relations. The new economic analysis of law which formulates normative criteria for the resolution of legal conflicts would drive this dependency of the law upon economic translation even further. The criteria—allocative efficiency and transaction cost reduction—translate the whole productive world of projects into the language of economic costs and benefits of bilateral transactions and—which is worse—make this translation binding for the law.

Hugh Collins has systematically exposed this distortion of social relation by their economic contractualization within four categories: (1) enforced bilateralization.; (2) highly selective performance criteria; (3) inadequate externalization of negative effects; (4) imposition of power relations.<sup>44</sup> It is an open question to what degree the contractualization of public services will lead, in addition, to a distortion of judicial review, especially when it comes to the representation of group interests in private litigation. Since contractualization introduces 'privity' of contract into complex, multilateral service relations, these relations might be constructed by the judiciary as a multitude of unrelated bilateral relations. To quote Mark Freedland:

Government by contract may involve a comparable network of contracts, so that there can be an interlocking of service procurement contracts on the one hand, and consumer or customer contracts with the service provider on the other. In such arrangements, the doctrine of privity of contract ensures that the consumer has no direct contractual relation with the service procurer. It would not be wholly surprising to find, by extension of this reasoning, there were many situations in which the citizen as consumer had no sufficient interest to seek judicial review of the actions or policies of the government department which had procured the service in question.<sup>45</sup>

<sup>44</sup> H. Collins, 'The Sanctimony of Contract', in Richard Rawlings (ed.), *Ljü*, *Society and Economy*, Centenary Essays for the London School of Economics and Political Science 1895-1995 (Oxford, 1997), 63.

<sup>45</sup> See Freedland, n. 1 above, at 100.

In a more optimistic perspective, this might create new pressures on private law to take seriously the network character of interrelated contracts and encourage public law to re-conceptualize the notion of sufficient interest for judicial review. The conflict between multilateral social networks and the bilateral economic transactions will in the long run force the law to account for third-party effects of contracting, even if this contradicts the sacred privity of contract, reduces allocative efficiency, and increases transaction costs.

(4) *Limits to monetarization*-. privatization re-ignites an old conflict about the limits of what money can buy. Historically, the emergence of Protestantism and the outbreak of religious wars had a lot to do with the intrusion of the money mechanism into traditionally sacred fields. Dr Martin Luther protested fiercely against commercializing personal salvation and public offices which succeeded finally in their social definition as *res extra commercium*. Today, when we read the shock news in the newspapers that a certain—*nomen est omen*—Dr Seed is going to privatize the production of human clones, it is mainly the privatization of the health sector and the commercialization of biomedical research that provoke the old conflict about the limits of economic colonialism anew. And again, some of these conflicts will inevitably be fought out in private litigation, where courts will have to be prepared to deal with them in the general clauses of contract law. It will be by private law principles that the courts—with or without the support of the legislator—will have to decide about the limits of their commercialization.<sup>46</sup>

(5) *Dumbing down*: in the arts and culture especially, but also in the media and even in the universities, heated controversies about the decline of professional quality have emerged that put the blame on market mechanisms.<sup>47</sup> Witness the controversy on BBC and BskyB where one and the same person, now Media Professor at Oxford, has forcefully advocated both extreme positions! Have

<sup>46</sup> For the use of private law for public purposes see J. Wightman, 'Private Law and Public Interest', in T. Wilhelmsson and S. Hurri (eds.). *From Dissonance to Sense: Welfare State-expectations, Privatisation and Private Law* (Aldershot, 1998).

<sup>47</sup> See the recent study by J. Hogan, 'Publish and Be Damned! Independent Producers and Democratic Accountability', Working Paper 14/97, LSE Department of Sociology, 1997.

you recently listened to Radio 3 and Classic FM and discovered first-hand what happened to classical Austro-German music under the influence of competition? The famous Anglo-Austrian Friedrich von Hayek would have to call this competition a discovery process! Corrective institutional imagination is putting its hopes on market independent standards and assessment procedures, in all kinds of auditing practices,<sup>48</sup> in the creation of professional and cultural reputation which would be incorporated in private law standards, in the establishment of a right to diversity,<sup>49</sup> and the pluralization of financial sources which would create a certain autonomy of standards.<sup>50</sup>

(6) *Perverse selectivity*: the remarkable evolutionary success of 'fat cats' in the privatized utilities is only one indicator of the tendency of the economic system towards perverse selectivity: small distinctions create huge inequalities. These inequalities not only contradict the popular culture of envy, more importantly, they contradict the publicly perceived differences of achievement in the different sectors of public services and undermine successfully the meritocratic claims of the new private governance regimes. Can private law litigation successfully fight the reproduction of such strange beasts in social evolution? Pink students probably yes, fat cats probably no.

## V. Reaction I: Fragmenting Private Law

Can one anticipate structural patterns that will appear in private law after privatization? Since legal evolution depends to a large degree on the direction that the privatization process as a whole will take must one think in alternative scenarios? What are possible scenarios for the reaction of private law to these structural conflicts? I would suggest distinguishing two main scenarios: one is fragmentation, the other hybridization. Borrowing the distinction between tight and loose coupling from organizational sociology.

<sup>48</sup> For discussion of diverse aspects of the 'audit society', see M. Power, *The Audit Society: Rituals of Verification* (Oxford, 1997).

<sup>49</sup> R. B. Stewart, 'Regulation in a Liberal State: The Role of Non-Commodity Values' (1983) 92 *Yale Law Journal* 1537.

<sup>50</sup> For the pluralization argument, see T. Kealy, 'It's Us Against Them', *Guardian*, 1 May 1997, 7, concerning the freedom of science, and C. Graber and G. Teubner, 'Art and Money: Constitutional Rights in the Private Sphere' (1997) 11 *Oxford Journal of Legal Studies*, 61-74, concerning the freedom of art.

we could say that private law patterns would differ according to the intensity of the services' structural coupling to the economy.<sup>51</sup> In cases where they are loosely coupled to economic processes, fragmentation will be private law's reaction to the emergence of a multitude of social autonomies, while hybridization would be its response when faced with situations of tight economic coupling. Ironically, in both scenarios it is privatization itself which dashes the hopes of legal doctrine for a renewed unity of private law under the market regime. It is privatization that drives private law into higher and higher degrees of differentiation where increasingly special areas of private law incorporate specific rationalities of different spheres of justice that are non-economic in their character.

Of course, fragmentation of private law is a long-term historical process which has taken on many forms and is due to many causes. And many modern phenomena of fragmented private law, for example labour law, consumer law, law of intellectual property, environmental law, are not at all related to privatization. It is not clear what the underlying factors for this multiple fragmentation are: the dominance of particular social groups, the emergence of special professions, the prominence and political urgency of policy arenas, the pressure of social problems, the internal requirements of specialized legal doctrines, or the establishment of special court jurisdictions. However, there is one crucial criterion for genuine fragmentation of private law into an externally induced autonomous area: spontaneous norm formation in a social field which is used as a source of law. Whenever the autonomy of a social system expresses itself in the existence of a machinery of norm production—agreements, formal organization, standardization—a field of special private law emerges with accompanying juridification.

The paradigmatic case of this can be seen in developments in the new law of intimate relations.<sup>52</sup> The dramatic transformations that traditional family law is undergoing can be seen to be connected to a peculiar privatization of private life. Today, people

<sup>51</sup> K. E. Weick, 'Educational Organizations as Loosely Coupled Systems' (1976) 21 *Administrative Science Quarterly*; C. Perrow, *Normal Accidents: Living with High-Risk Technologies* (New York, 1984).

<sup>52</sup> For recent developments, see T. Allert, *Die Familie: Fallstudien zur Unverwüstlichkeit einer Lebensform* (Berlin, 1998).



are choosing a bewildering variety of intimate relations and idiosyncratic lifestyles outside the traditional forms of family law (non-formalized partnerships, same-sex relations, loosely organized forms of life sharing, group living, new forms of child raising, enlarged families). Withdrawing reluctantly from the monopoly of heterosexual marriage and other regulations of intimate life, the State responds increasingly to a radical contractualization of family law. The traditional regulation of marriage and family retreats to merely framing the autonomy of self-regulation in intimate life, and providing for conflict resolution in case of crisis. Here we have an exemplary case where the law relies on a private autonomy which is not at all based on profit-oriented economic exchanges under market conditions, but on a long-term personal-intimate relation which stabilizes itself on the instabilities of mutual affection. The rationality of intimate life to which the law responds is no longer the old economic subsistence (role of the *oikos*) nor is it political (family as the smallest cell of the society or the object of population policies); rather its rationality is unique: to provide the only space in contemporary life where the person as a whole in all its role aspects finds its legitimate expression. And the rules and principles of the new family law are responding almost exclusively to such an extravagant rationality of intimate life and its spontaneous norm formation.

Can we expect parallel developments of privatization in other social subsystems where a highly developed rationality of a non-economic character governs? Is there a future for an elaborate 'private' education law, research law, health law, art law which will reflect their genuine rationality in relative distance to both political and economic rationality? How would such a law look which has to deal with governance structures that some observers of the privatization process describe as 'functionally specified problem solving-units. These units are neither conventionally public since they operate independently from state command and control, nor conventionally private because they do exercise a problem-solving function and have reflexive capacities concerning the interests of society as a whole'.<sup>53</sup>

This might be a somewhat over-optimistic view of their capacities of reflexive monitoring. But in each of these fields

<sup>53</sup> See Gerstenberg, n. 9 above, at 352.

there exist elaborate mechanisms of spontaneous norm-formation that play a constitutive role similar to that played by the market transaction in the law of commercial contracts. If, for example, an ongoing practice of contracting with private not-for-profit educational institutions is exposed to extensive litigation and legislative lobbying, the resulting law of educational contracting will differ enormously from classical contract law. The contractual freedom of the educational institution to choose its pupils will be sharply limited by educational principles of academic merit, strict prohibition of discrimination, and positive rules of equal treatment that will in the long run lead to the extinction of the species of pink students. Internal relations would be governed by a broad 'educational judgement rule', which would be subjected to judicial scrutiny whether or not, in the exercise of professional discretion, educational principles have actually governed the decision. And the rights of choice for parents, pupils, and teachers would be defined in a legal process that concretizes them, combining due process with pedagogical principles.<sup>54</sup> As Philip Selznick notes, educational institutions, after their privatization, have the constitutional obligation 'to take into account of public concerns, including, among much else, the quality of basic education, teacher preparation, equality of opportunity, racial integration, care for the handicapped, education for civic responsibility'.<sup>55</sup>

The extent to which such autonomous fragments of private law emerge depends crucially on the direction that the politics of privatization will take. The open question is whether they result in a tight or loose coupling with market processes and in what proportions. There are numerous methods of privatization.<sup>56</sup> Some of the former public services have actually been reorganized in the non-profit sector, in charities, foundations, trusts, and voluntary organizations. Others have been handed over to the family and the so-called community. The more privatization will

<sup>54</sup> For a context-sensitive unfolding of due process, see K. Winston, 'Self-Incrimination in Context: Establishing Procedural Protections in Juvenile and College Disciplinary Proceedings' (1975) 48 *Southern California Law Review* 813; and see n. 21 above, at 516 ft.

<sup>53</sup> See Selznick, n. 21 above, at 517.

<sup>30</sup> See A. Stark, 'Privatisation in a Gender and Economic Perspective', Paper presented to the Conference 'From Dissonance to Sense', Porvoo, Finland, 28-31 Aug. 1997.

result in the transfer of social activities to the non-profit sector the more private law will fragment into autonomous fields. There is a direct correlation between the growth of a private non-profit sector and the growth in private law fragmentation.

But private law<sup>7</sup> is not merely the dependent variable in this context. Much depends on the conceptual readiness of the law to take advantage of the opportunities offered by social structures: is the private law<sup>7</sup> of contract, association, property, and tort capable of constructing legal forms that are systematically open to opportunities for a third sector, for the institutionalization of non economic rationalities? The more private law offers regimes of non-profit organization for formerly public services, the greater the chances that political pressures will exploit structural tensions between their inner rationality<sup>7</sup> and economic rationality and attempt to move them into the non-profit sector.

## VI. Reaction II: Hybridization

But for many, if not most, public services, privatization today means tight structural coupling with the economy. How<sup>7</sup> then will private law react when social services have fully 'commercialized' their spontaneous norm formation, transformed their special agreements into commercial contracts, their service institutions into profit-oriented business organizations, their standardization procedures into market standards?

In such a situation, when adjudicating disputes in private law, the courts will have only a narrow view of privatized services. Through the filter of contract law, they receive information about these activities almost exclusively as cost-benefit calculations. Private litigation is exposed to a typical asymmetry in the structural links between the law<sup>7</sup>, the economy, and the social system involved. The situation is very nearly a repetition of the former dominant position of institutionalized politics in relation to the old public services. Every element of the service itself, whether research, education, technology, art, or medicine, will be first filtered into the market dimension of economic calculations, allocative efficiency, and transaction costs and presented to the law for conflict resolution in this form. For private litigation this creates a serious distortion of social relations because a lot of information about the social system

involved will inevitably be lost owing to its reconstruction in economic terms.

A corrective change in private law would amount to restructuring the links with its non-economic environment. Private law needs to perceive the newly privatized services fully in their hybrid character. They are hybrids, not in the usual sense of a mixed private law-public law regimes,<sup>57</sup> or of political and economic aspects. The idea of polycontextuality leads to a different sense of hybridization. Privatized public services are simultaneously part of two social systems, the economic system and the social system, where they realize their services. Private law has to break the monopoly of structural linkages to the economy on both sides, and instead establish direct links with the concrete social field involved. In practice this means enforcing by law its non-economic aspects against the logic of economic calculation.

The sources of private law would no longer to be found exclusively in economic contracting, organization, and standardization, but actually in two parallel and often contradictory processes of spontaneous norm-formation. The terms of a legal contract will be based on two equally important mechanisms of social self-regulation—(1) an economic transaction, and (2) a productive agreement. Contract law will reconstruct contracting not only as an entrepreneurial project, as a profit-seeking monetary transaction under more or less competitive market conditions which produces economic expectations on both sides. Of equal importance will be its legal reconstruction as a ‘productive’ project in one of the many social worlds, either in distribution, production, services, engineering, science, medicine, journalism, sports, tourism, education, or in art, which produces normative expectations of a different kind. And the co-ordination of this conflict will not be left automatically to the cost/benefit language of the monetary transaction but would be a matter of contract law. It is probably a euphemism to speak of a balancing of two different rationalities.

<sup>57</sup> See Black, n. 35 above, who defines the hybridity of self-regulatory agencies in terms of private/public, but expresses doubts about the viability of this distinction: ‘rather we should perhaps start by looking at type of function being exercised, asking what duties and responsibilities should accompany the exercise of such functions and to whom they should be owed, what degree of autonomy should those exercising them have and what degree of judicial supervision should be exercised over them’.

Rather, in view of the self-enforcing dynamics of economic calculation, it means that private law takes a partisan stance for the 'other', the diverse social rationalities involved, and imposes their standards on economic action. In this context I can only mention, but not elaborate on, the concept of Discourse Rights which would serve as an authoritative legal basis.<sup>58</sup> These are impersonal rights of certain spheres of communication, founded in constitutional law and directed in a horizontal direction against the intrusions of any social system with hegemonic tendencies.

What is different in this about the post-privatization legal regime? How does it differ from modern private law, the law of mixed economies which aims to correct market failures via policy interventions—consumer protection, public policy clauses, expansion of good faith? The differences are twofold. First, it is no longer the more or less marginal *post hoc* correction of an essentially economic transaction. Instead, from the very beginning, contract is seen as constituted by two equally important social dynamics and law's job is not just correction but a thoroughgoing balancing of conflicts. Secondly, the non-economic aspects of the private law relation are no longer filtered and distorted by the political process, and in this distorted form translated into legal policies, as tended to be common practice in the private law of the welfare state. Rather, private law would turn directly to the spontaneous norm production in the social field involved. It would count on a division of labour between the dynamics in the social field involved and the dynamics of private law litigation which could be described as learning by mutual anticipation.<sup>59</sup>

Similarly, the law of private associations would perceive private organizations not just in economic terms with some marginal corrections in terms of governmental policies. Where non-economic associations are in tight coupling with the market regime, the task of private law is to co-ordinate *ab initio* the requirements of two different social systems. The role of private

<sup>53</sup> For an elaboration, see G. Teubner, 'Contracting Worlds: The Invocation of Discourse Rights in Private Governance Regimes', in D. Cornell and J. McCahery (eds.), *Complicating Rights* (Oxford, 1998), and Kealy, n. 50 above. The idea of impersonal discourse rights is an extension of the systemic theory of constitutional rights, see n. 38 above; see also H. Willke, *Stand und Kritik der neueren Grundrechtstheorie: Schritte zu einer normativen Systemtheorie* (Berlin, 1975).

<sup>59</sup> See G. Teubner, 'Ist das Recht auf Konsens angewiesen?', in H.-J. Giegel (ed.), *Kommunikation und Konsens* (Frankfurt, 1992), 197.

law would then be to constitutionalize spaces of professional autonomy within those organizations, ring-fencing them against direct intrusions of the market.

Finally, standardization would no longer be seen as a process in which private law follows economic calculation by weighing the costs of prevention against the expected costs of damage discounted by its probability. Instead, it would be institutionalized as a process in which the law reconstructs the emergence of professional standards according to the logics of action of the public service involved.

Altogether post-privatization private law will no longer accept at face value the economic reconstruction of social relations; rather it will perceive them as genuinely hybrid relations. This would change the two main methods of law-making in private law—perturbation and mimicking.

The perturbations of private law's environment, which trigger the development of new rules, would not just come from the market mechanisms via economic transactions. Law would directly observe and juridify intrinsic standards and agreements in the social field involved (expansion of good faith as mandatory rules, advancing non-economic criteria of negligence as against the economic Learned Hand formula).

Legal simulation is a technique used in the formula of hypothetical contracting and the reasonable person. The point would be not only to use the market test as mimicking the outcomes likely to be produced by an efficient market, as legal economics recommend, but a social discourse test which develops concrete standards would, by simulating micropolitical processes in one of the many 'spheres of justice' involved.

#### VH. Re-importing conflicts?

The problem for this analysis is, where are the social dynamics that could possibly irritate private law to undergo such far-reaching structural changes? To a considerable degree, the dynamics of privatization itself threaten to produce these *effets pervers* in the form of certain self-defeating tendencies. If it is true that the previous expansion of welfare state services liberated the market

<sup>60</sup> R. Boudon, *Effets pervers et ordre social* (Paris, 19/7).

from political conflicts, absorbing them more or less successfully into the political-administrative system,<sup>61</sup> then it can be expected that privatization has the effect of re-importing these conflicts into the economic arena. Paradoxical as it sounds, after privatization, political conflicts about public services are indeed increasing. As one observer of the privatization process in Britain summarizes: 'the structures adopted for nationalisation had never required a resolution of the problems of conflicting regulatory rationales, but privatisation and the creation of new regulators flushed this question out into the open'.<sup>62</sup>

Privatization has created a new conflictuality which has sought recourse to private litigation as one arena for conflict resolution.<sup>63</sup> Explosive political conflicts that were formerly absorbed within the diverse regimes of public law do not vanish after privatization, as if by a gracious gesture of the invisible hand. After the take over by the market these conflictual energies re-emerge in new forms, and the new private regimes of governance have to cope with them. They will not be resolved by market mechanisms alone. In their turn, the privatized services will be driven into a new politicization. And this repoliticization is not necessarily limited to the establishment of public law regulatory agencies, but entails in addition the politicization of private governance itself, its different modes of self-regulation, and conflict resolution via private litigation.

The sources of this conflictuality can be identified in those privatized public services themselves that have to bear the structural tensions between their proper rationality and economic calculation, and here on both sides professionals as well as clients who suffer from those tensions. Here, in the resistance of social practices to their new economic regime is the source of all kinds of new quasi-political conflicts which now take place within the 'private' spheres. A good indicator for this change is the growing intensity of political fights between regulatory agencies, consumer groups, regulated companies, and their shareholders which we are experiencing today.<sup>64</sup> Another gauge of this new conflictuality is

<sup>61</sup> J. Habermas, *Legitimation Crisis* (Boston, Mass., 1975).

<sup>62</sup> See Prosser, n. 2 above, at 3.

<sup>63</sup> See Wilhelmsson, n. 9 above, who makes this argument with particular reference to tort law.

<sup>64</sup> See Prosser, n. 2 above.

the extent to which protest movements and other forms of civic resistance are switching their targets from political to economic institutions. And there is the strange alliance between civic protest movements and the mass media, speaking up in the name of ethics against a comprehensive economization of public services which damages their integrity. For the future of private law it is crucial that not just its doctrinal-conceptual structures are prepared for such conflicts. Also different litigation procedures, among other rules of standing for groups, collective representation, multilateralization of the adversary two-party process, and elements of public interest litigation, would need to be introduced to make private law responsive to the new conflictuality caused by privatization itself/<sup>5</sup>

<sup>65</sup> A recent account of public interest litigation is H.-W. Micklitz and N. Reich, *Public Interest Litigation Before European Courts* (Baden-Baden, 1996).