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5 Quod Omnes Tangit: Globalization, Welfare Regimes and Entitlements*

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* Comments to the papers by Daphne Barak-Erez (II-III) and Zeev Rosenhek (IV), presented at the International Conference, "The Welfare State in an Era of Globalization", The Hebrew University, Mount Scopus, Jerusalem, June 18-19, 2001: http://www.humrts.mscc.huji.ac.il. My thanks go to Eyal Benvenisti and Georg Nolte for the kind invitation and to Miriam Aziz, Florian Hoffmann, Guy Mundlak, Gerry Neuman, Georg Nolte, and Sung-Kee Kim for very helpful comments. For the meaning of "quod omnes tangit" in Justinian's Code 5.59.5.2, ["…, omnibus tractari et approbari debet" – what touches upon everyone, must be heard and approved by everyone], *see, e.g.,* G. Post, "A Roman Theory of Consent;" A. Gouron, 'Aux origines médiévales de la maxime Quod Omnes Tangit,' 277 (describing that this "modest line" was, indeed, applied to manifold contexts in canon law as well as political theory); N. Luhmann, "Quod Omnes Tangit", 883 f. This contribution builds on previous work, see Peer Zumbansen, *Ordnungsmuster im modernen Wohlfahrtsstaat. Lernerfahrungen zwischen Staat, Gesellschaft und Vertrag*; *idem*, "Die vergangene Zukunft des Völkerrechts"; *idem*, "Spiegelungen von Staat und Gesellschaft: Governance-Erfahrungen in der Globalisierungsdebatte"; a more elaborated discussion of the issues touched upon in the present article can be found in my "The Province of Government: Towards A Private Law Understanding of Public Governance" (LL.M. Thesis, Harvard Law School 1998, unpublished manuscript, on file with author and Harvard Law School Library: orig. title: "The Private Ordering Paradigm and the Missing Basis of Contract Law").

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5.1 Introduction

While the dispute over the past or the future of the welfare state[1] has traditionally set off about the proper definition of what characterizes the welfare state,[2] today's attention is aimed at gaining a clearer focus on the reasons for its status as a severely endangered species. Paradoxically, the alleged reason of all worry – globalization – remains at best a vaguely defined phenomenon in continuing need of further analysis and exploration.[3]

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1 See, for an excellent overview of recent work, Pierson, "Investigating the Welfare State at Century's End", 1, 5 (defending the argument that, against the current interpretation, welfare states are not merely "protective reactions" against capitalism but, instead, an integral part of it); *cf.* Rieger/Leibfried, *Grundlagen der Globalisierung*; Berthold, Der Sozialstaat im Zeitalter der Globalisierung; *cf.* Habermas, "Die Krise des Wohlfahrtsstaates und die Erschöpfung utopischer Energien".

2 *See*, e.g., the Fourteenth Amendment to the US Constitution (http://www.uni-wuerzburg.de/law/gr00000_.html#A022_); see Art. 20 par. 1 and Art. 28 para. 1 German Basic Law (*Grundgesetz*), available at: http://www.uni-wuerzburg.de/law/gm00000_.html. See for a historical analysis: Stolleis, "Die Entstehung des Interventionsstaates und das öffentliche Recht", 129 ff.

3 See, e.g., Fligstein, Is Globalization the Cause of the Crises of the Welfare State?; Held/McGrew (eds.), The Global Transformations Reader; Sassen, Losing Control?; Sassen, Globalization and its Discontents; Boyer/Drache (eds.), States against Markets. The Limits of Globalization; Brunkhorst/Kettner (eds.), Globalisierung und Demokratie; Voigt (Hrsg.), Globalisierung des Rechts; Busch/Plümper (eds.), Nationaler Staat und Internationale Wirtschaft; Soskice, "Globalisierung und institutionelle Divergenz: die USA und Deutschland im Vergleich", 201 ff.; Habermas, "Der europäische Nationalstaat unter dem Druck der Globalisierung", 425 ff.; Habermas, "Die postnationale Konstellati-

While the different dimensions of the welfare state under pressure are only beginning to be grasped, we are witnessing a substantial widening of the research spectrum.[4] Analyses of the highs and lows of the welfare state were traditionally more-or-less connected with right and left politics that debated over the legitimate reach of state regulation of societal welfare ("non-market regulation of the market");[5] the European and global agendas replace these frames of reference. Complicating policy choices further, welfare politics have become an issue of international regulatory competition.[6] Recent work persuasively insists on the various comparative institutional advantages connected to particular systems of "embedded capitalism" which are responsible for different – more-or-less successful – models of welfare regimes.[7] In particular, the value of the "*varieties of capitalism*" research lies in its redirecting our attention to the different institutional settings of welfare systems and understanding them as vital elements of capitalist market regimes.[8] From this perspective, globalization might not be the only and eminent cause for the crisis of the welfare state; instead, the causal relationship appears to be much more complicated. We are forced to analyze developments related to changes in international

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on und die Zukunft der Demokratie", 91 ff.; Bonoli et al., European Welfare Futures, 51 ff., 52: "It is, however, globalization as ideology that excites most passion.".

4 See the recent contributions in Leibfried/Wagschal (eds.), Der deutsche Sozialstaat. Bilanzen – Reformen – Perspektiven; Berger, Der Umbau des Sozialstaates. Ansichten von Parteien und Wohlfahrtsverbänden zur Modernisierung des Staates; Kaufmann, Herausforderungen des Sozialstaates 14–20; Badura, "Der Sozialstaat."

5 For an account of the shift in the first half of the 19th century from "litigation" to "regulation" in the United States, *see* Glaser/Shleifer, "The Rise of the Regulatory State", 5, 11, referring to the inability of courts to adequately address the harm resulting from the "new economy" arising in the second half of the 19th century!

6 *See* Scharpf, "Negative and Postitive Integration in the Political Economy of European Welfare States", 158-9; Handler, "Questions About Social Europe by an American Observer", 440: '"The politics of social welfare are very different than the politics of capital; therefore, one should not assume that the institutional structures and political mobilization that secured Economic Europe are sufficient for Social Europe.".

7 Manow, Comparative Institutional Advantages of Welfare State Regimes, 146, 155; cf. Hall/Soskice, Introduction to Varieties of Capitalism.

8 Pierson, "Coping with Permanent Austerity. Welfare State Restructuring in Affluent Democracies", 410; Rieger/Leibfried, *Perspektiven des Wohlfahrtsstaates*, 15–18, 272–277.

trade as well as to economy and work on the nation-state level in its interplay with overarching and border-crossing developments. This observation increasingly informs literature on the welfare state[9] and, in particular, the papers by Daphne Barak-Erez and Zeev Rosenhek that I shall focus on in my comments. Both authors provide a concrete analysis of the workings of welfare law in the complex machinery of administrative practice and also testify to a continuing pursuit of strong beliefs and convictions regarding the value and societal importance, if not *symbolic*[10] relevance, of a prevailing welfare regime in times of crisis.[11]

5.2 The Citizen of the Welfare State

The questions raised by Barak-Erez regarding the quality of welfare entitlements and the relationship between the welfare state and its citizens as recipients of these benefits invite a closer inspection of the roles of both rule of law and citizenship *vis-à-vis* the welfare state. While the welfare state itself is sometimes understood as merely being an *aliud* to an allegedly pure, formalist model of the state, supposedly incarnated in the rule of law, the notion of the rule of law itself must be clarified.[12] The central fo-

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9 *See* Pierson (ed.), The New Politics of the Welfare State; Rieger/Leibfried, Perspektiven des Wohlfahrtsstaates; Welti, "Wandel der Arbeit und Reform von Sozialstaat und Sozialrecht", 69 ff.; Handler, "Questions about Social Europe from an American Observer", 438: "In the meantime, the foundations of the welfare State--a society of steady, well-paying jobs--are rapidly being displaced by major changes in both economic structures (low-paying, intermittent jobs, a large more-or-less permanently un- or under-employed group) and demographics (a declining proportion of workers as compared to retirees, an increasing proportion of mothers in the paid labor force, the rise of single parent families, the increase in immigration).".

10 Diller, "The Revolution in Welfare Administration", 1143.

11 *See*, for the Israeli case, *also* Hirschl, "Israel's Constitutional Revolution: The Legal Interpretation of Entrenched Civil Liberties in an Emerging Neo-Liberal Economic Order", 427 ff.

12 *See* Fallon, "'The Rule of Law' as a Concept in Constitutional Discourse", 1: "The Rule of Law is a historic ideal, and appeals to the Rule of Law remain rhetorically powerful. Yet the precise meaning of the Rule of Law is perhaps less clear than ever before.". *See already* Jones, "The Rule of Law and the Welfare State", 143: "How, if at all, can the values associated with the rule of law be achieved in today's welfare State?" and 143, Note 1: "[…] the general attributes of the rule of law itself […] will be discussed here only to the extent necessary to set the stage for realistic discussion of the impact of welfare State

cus of our present invocation of the rule of law can undoubtedly be seen in the procedural elements that are regularly attributed to the very ideal of the rule of law. Barak-Erez convincingly takes this perspective, which, admittedly, lies at the heart of a primarily legal critique of the present crisis in the welfare state. The question then becomes whether or not the welfare state is compatible with the procedural, in fact, litigative associations with the rule of law.[13]

I propose to look more closely at how we have learned to describe, model and conceptualize the "state" with regard to the wide-reaching spectrum of challenges in a heterogenic society, a decreasing trust in public governance due to implementation obstacles and the failure of state agencies to take adequate account of contextual demands and shifting interests. With this look at the genesis and the failures of "regulatory law", we might be able to better identify the historical institutional framework as well as the challenges and attacks formulated against this set of references. Descriptions of the state as an "interventionist state",[14] a "welfare state", a "regulatory state", or, to take a recent example, an "environmental state",[15] must be seen as attempts to manipulate what has always been the undefined "other" in relation to the ideal model of the state which has held sway since the nineteenth century under the construction "rule of law".[16]

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developments on the rule of law ideal.". See, for different perspectives this and that side of the Atlantic, e.g.: Charny, "The Employee Welfare State in Transition", 1640; Jones, "The Rule of Law and the Welfare State", 144 (describing the contrast between State power and the rule of law in the American understanding); *see* also Alesina et al., "Why Doesn't The US Have A European-Style Welfare State?" (ascribing the weakness of the American welfare State to racial heterogeneity and the general public's reluctance to support the poor which happens to be primarily colored); *see also* Karst, "The Coming Crisis of Work in Constitutional Perspective", 528: "The distribution of poverty in American society is not random. It falls most heavily on members of some racial and ethnic minorities, on women, on the young, and on people with limited educational opportunities." (citations omitted).

[13] *See* again Jones, "The Rule of Law and the Welfare State,' 145-6 (critically discussing the proposal put forward by Friedrich Hayek and others, that the welfare state is the end of the rule of law; *see* Hayek, "The Road to Serfdom" (1944) cited by Jones at 146.

[14] For a critique of the conflicting values at play in governmental intervention, *see e.g.* Adler, 'The Meanings of Permanence", 23–30.

[15] S*ee* Steinberg, Der ökologische Verfassungsstaat.

[16] *See* Stolleis, "Die Entstehung des Interventionsstaates und das öffentliche Recht", 129 ff.; Günther, "Der Wandel der Staatsaufgaben und die Krise des regulativen Rechts", 51 ff.

This rule of law, understood as a merely formal amalgam of rules and procedures, has served and still serves as the model by which the regularity, eventually also the domestication and curtailment of public power, was legitimized and institutionalized. In contrast, the welfare state is often portrayed as being a mere political program or a matter of choice whether or not to move beyond the allegedly *formal* framework of the rule of law. I identify this alleged tension between a formal view on the state as in the rule of law and a more political, normative perspective as is the common association with the welfare state to be the real concern of Barak-Erez' paper. Only a short-circuiting and fusing of the rights-and-rules approach of the rule of law with the political model of the welfare state can allow us to mobilize a notion of *citizenship* as a counterweight to administrative discretion. In discussing Barak-Erez' description of contemporary administrative practice, particular attention will be given to more general changes in administrative governance against the background of increasingly privatized welfare distribution and the discussion about a more recipient-oriented view of contractual public governance.[17] This will allow us to place her analysis in the wider context of public sector reform and the effects on public and private law interaction in the welfare state.

5.2.1 The Stakes of Welfare Politics

Barak-Erez paints a gloomy picture of the Israeli welfare state. She sees it situated between ambivalent legislative attempts to guarantee a good standard of general prosperity and equality on the one hand, and a political climate hostile to grand maneuvers in welfare politics, mainly resulting from the country's unending foreign policy struggle over its borders, territories, and identity, on the other. While a surprising number of recent legislative activity related to different areas of welfare politics can be noted, the effect is often diminished by extremely limiting interpretations given to the written law by both administrative agencies and courts. This recent welfare legislation "in the shadow of globalization" may be adequately explained

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[17] *See hereto* Kennedy, "Due Process in a Privatized Welfare System", 232: "After fighting so hard for greater authority over the welfare system, States seem strangely eager to pass the prize to private corporations.". Salamon, "The New Governance and the Tools of Public Action: An Introduction", 1612: "Where earlier government activity was largely restricted to the direct delivery of goods or services by government bureaucrats, it now embraces a dizzying array of loans, loan guarantees, grants, contracts, social regulation, economic regulation, insurance, tax expenditures, vouchers, and much more.".

plained by welfare supporting motives that have been developed and followed in Israel since the founding of the state. In contrast, the present erosion of entitlements by restrictive norm application within administrative discretion severely encroaches on the status of social protection attained so far.[18] This status is, as Barak-Erez argues, still trumpeted as an expression of the government's political will to maintain a strong welfare state. The prospects that heavily national-security oriented political attention in Israel will soon be replaced by more inward-directed processes of political deliberation seem quite bleak.[19]

5.2.2 A Sociological Perspective

A possible approach, and one also partially espoused by Barak-Erez, in analyzing the crisis of the welfare state focuses on the *reality* dimension of public services distribution and how it unfolds in people's lives. The welfare state is interpreted with a general skepticism *vis-à-vis* bureaucracy and juridification.[20] The analysis focuses thus on the democratic governance dimensions of the welfare bureaucracy from the claimant's or recipient's perspective. The older bureaucracy critique of the Eigthies has primarily viewed the welfare state as a unilaterally functioning distributing molloch of public funding. The normative justification for insurance, providence, and prevention with the idea of a solidarity community as developed at the times of the first insurance schemes seems almost ideological when confronted with the hard reality of inaccessible public agents and frequently arbitrary distributions. Recently, the analysis has been focusing on the *sov-*

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[18] *See* Kennedy, "Due Process in a Privatized Welfare System", 238: "Professional social workers ran the welfare bureaucracy and brought a generally compassionate and flexible approach to their work. On this model, the individual social worker was free of bureaucratic constraints to act in the best interests of the client. While professionals could abuse their discretion, welfare recipients at least encountered a measure of humanity in their dealings with the system." (Describing the situation in the nineteen-sixties) [citation omitted].

[19] *See hereto also* Hirschl, "Israel's Constitutional Revolution: The Legal Interpretation of Entrenched Civil Liberties in an Emerging Neo-Liberal Economic Order", 440-6 (arguing that adjudication by Israeli High Courts – Supreme and Labor – promoted a negative-freedom oriented understanding of welfare laws, thus restricting the range of individual and institutional welfare entitlements, with ill effects in particular for Arab-Israeli citizens).

[20] *See* Handler, "Constructing the Political Spectacle", 902; Pitschas, "Soziale Sicherung durch fortschreitende Verrechtlichung?", 150 ff.; *see also* Simon, "The Invention and Reinvention of Welfare Rights", 22.

ereignty of the recipient, the system's user – the *citizen* ultimately turning to his or her welfare state. Sociologists and social philosophers have shown that welfare regimes tend to produce both enabling and disabling effects on welfare recipients, and it is unclear how this surviving dynamic of the modern, complex welfare bureaucracy can be changed. The *inclusion* of the recipient in the welfare regime by dependence on public assistance eventually replaces former daily-life strategies with a whole new set of priorities, concerns, and aims. Like a hospital patient who puts on her nightgown the moment the bed is assigned early in the day, the set of references drastically changes for the person confronted with a non-transparent system of welfare whose services, she must think, she receives by way of charity rather than of entitlement.[21]

5.2.3 What Makes A Citizen?

Amidst the varied picture of the welfare state is the concrete, laborsome, truly unspectacular and Sisyphean dimension of welfare state law, practiced far from the legal ventures that make headlines and fortunes. As described by Barak-Erez, beyond the complex and emotionally loaded political debate about the welfare state, its costs, challenges, and chances, there lies another realm of inquiry into the machinery and workings of this system. This complex field of administrative practice reacts nervously to the poking and drilling of legal analysis, while otherwise hiding behind both a densely woven texture of norms, statutes, and political declarations, and a jurisprudence that, classically, has not been the most attractive legal field for lawyers to roam in. Lawyers concerned with social welfare law, employment law, restitution law, or other law related to what is regarded to be mere *marginalities* to our political economy have seldom stood in the spotlight, nor have they been able to count on much sympathy from their colleagues who spend their day drafting corporate contracts. Thus, in considerable distance from more popular fields of law, the social lawyer must, again and again, dig through rapidly changing norms and decrees[22] that – as Barak-Erez has so sharply illuminated – can only be adequately mobilized or attacked if there is constantly updated knowledge of how they are

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[21] *See* Luhmann, "Politische Theorie im Wohlfahrtsstaat" 22, 25 (1981), describing the phenomenon of *inclusion* through an overwhelmingly paternalistic welfare regime; *cf.* Pitschas, "Soziale Sicherung durch fortschreitende Verrechtlichung?" 150 f.

[22] *See* Schmidt/Weiss, "Job Creation Policies in Germany".

interpreted by the administrative bodies and the courts.[23] Otto Kahn-Freund's observation that, "A week is a long time in employment law" describes accurately the field of welfare law we are now considering. The constant information problem, the serious lack of information about concrete entitlements and rights,[24] aggravates the welfare recipient's position even further: while claiming welfare provisions already touches at deep-rooted issues of self-respect,[25] both the legislative exclusion of societal segments from entitlements[26] and the "patriarchal welfare state's" tendency to further already existing structures of social exclusion of women from active participation in political deliberation[27] split society and alienate many from their alleged role as citizens.

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[23] *See, e.g.*, Forbath, "Constitutional Welfare Rights", 1855-8 (describing the creation of a special welfare lawyers taskforce during the early Nixon administration). "Young LSO attorneys frequently compared themselves with older counterparts at the ACLU and NAACP Legal Defense Fund. Unlike the latter, LSO lawyers meant to combine litigation with mobilization. Thus, they embraced the craft of test-case litigation, which the Legal Defense Fund had perfected, but Legal Services lawyers strove to be more attentive to the most deeply felt grievances of welfare recipients themselves. So they set about exploring with grassroots leaders which legal challenges held out the most promise for mobilizing the rank and file." *Id*., at 1856.

[24] *See* Barak-Erez, "The Israeli Welfare State" (II, III, in this volume); *see also* Diller, "The Revolution in Welfare Administration", 1151 (discussing the recipients' lack of information with regard to applicable and extendable time limits).

[25] Donald Moon, "The Moral Basis of the Democratic Welfare State", 32 ff.

[26] *See* Barak-Erez, "The Israeli Welfare State" (in this volume), with regard to Arabs under Israeli welfare politics; with regard to welfare benefits the locus classicus is Ch. Reich, "The New Property;" but see Simon, "The Invention and Reinvention of Welfare Rights", 2 ff.

[27] *See*, e.g., Pateman, "The Patriarchal Welfare State", 235 (describing women as "social exiles"); Habermas, "Paradigms of Law", 775-6; "Law, Women, Work, Welfare, and the Preservation of Patriarchy", 1281: "Despite substantial formal support for the legal ideal that women be afforded equal access to traditionally male occupations, the welfare system discriminates against poor women in allocating jobs. Such discrimination is seen as justified by the need to preserve the stability of the traditional family. Thus, the welfare system operates to preserve and reinforce patriarchy by assuming that women should be dependent on men: when, and only when, male economic support is withdrawn favors men in the allocation of scarce jobs; by placing a formal work requirement on poor women the system declares that childcare is not legitimate work.".

5.2.4 Legislative Lawmaking and Administrative Discretion

Notably, but not only[28] in the field of social protection,[29] legislators embark on drafting framework laws that grant wide discretion to administrative agencies.[30] Thus, the law's scope is often only provided by its actual application through the administrative agency or judicial interpretation. While this latter development seems characteristic of contemporary, *reflexive* forms of lawmaking[31] in a dense public-private mix under ubiquitous "conditions of uncertainty",[32] its appropriateness in areas of individual entitlements for basic substantial and existential support is disputable.[33] Discretionary lawmaking aggravates the already high level of uncertainty among welfare recipients with regard to their rights[34], while, paradoxically,

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[28] *See* Treutner, Kooperativer Rechtsstaat, 36 ff. (describing extensive forms of public-private interaction in the fields of environmental protection, infrastructure planning, financing of cultural institutions etc.).

[29] *See, e.g.*, Diller, "The Revolution in Welfare Administration", 1127 (tying the turn to discretion to a general introduction of private management techniques into public administration); *see already* Handler, "Discretion in the Welfare State", 1272: "Discretion, in its lawful, positive sense […], implies, at the minimum, a discussion, a dialogue, a bargain of some sorts, a minimal sharing of power. But how are the poor, the really dependent poor, to participate in these decisions?".

[30] *See* Fallon, "'The Rule of Law' as a Concept in Constitutional Discourse", 3–4: "Politically, twentieth-century legislatures have vastly expanded the sweep of governmental regulation, and they have frequently relied on administrative agencies with vague mandates and a mixture of enforcement, rulemaking, and adjudicative powers to implement regulatory policies." [citations omitted]; but *see* Rubin, "Discretion and Its Discontents" (arguing to substitute the allegedly empty notion of discretion by "supervision" in order to describe more accurately contemporary administrative practice).

[31] *See* Teubner, Reflexives Recht, 13 ff.

[32] *See* Ladeur, The Theory of Autopoiesis as an Approach to a Better Understanding of Postmodern Law, 40-1; Treutner, *Kooperativer Rechtsstaat* (arguing that beyond the administrative State's financial distress there lies a whole realm of societal structural changes, "individualization", "risks" and "implementation problems of law" that call for a closer public-private interaction).

[33] Diller, "The Revolution in Welfare Administration," 1127: "Freeing oneself from welfare is presented as analogous to quitting smoking.".

[34] *Id.*, 1134-48 (describing the rise of the "social work model" after the New Deal, placing high emphasis on agency discretion, its succession by the "legal bureaucratic model", introducing fixed rules and formal requirements and, finally, in the 1990s, the renaissance of wide agency discretion, fueled by legislation aiming at driving recipients out of welfare).

it can sometimes allow for a closer communication and cooperation between the agent and the recipient, often revealing, however, the agent's views with regard to poverty, self-sufficiency, and self-made misery.[35] The often vague and general formulae in welfare legislation, which grant wide discretion to welfare bureaucrats, the legislative tendency to underbudget certain areas or to shift budgetary positions in often quite non-transparent ways from one area to another, significantly distance the welfare state and its supposed beneficiaries.[36] Barak-Erez rightly underlines the negative effects of these dilemmata of lawmaking, in particular with regard to the weakening of the social services recipient's bargaining position towards the social bureaucracy. This scheme of administrative lawmaking seems to suggest an altogether negative view on the further weakening of the already highlighted fragile character of the law of the welfare state.[37] Standing somewhat outside the clearly demarcated sphere of the body of the rule of law, welfare law, often the first to bleed in governmental rebudgeting and, above all, seen as discretionary and subject to constant political changes, can hardly attain a firm stability. In this respect, the welfare state, in its bureaucratic reality dimension, is particularly sensitive to politics of-

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[35] Placing large discretion with welfare agents, the legislative aim is to convey a new "message" of welfare, driving recipients away from long-term subsistence to short-term support leading to new employment. *Id.* at 1166-7. *See, id.,* at 1129:

"By increasing the authority and discretion of ground-level administrators, reformers have re-envisioned the role of agency personnel as motivators, guides, and overseers of recipients, constantly promoting the message of self-sufficiency.". *See* Schmidt/Weiss, "Job Creation Policies in Germany" (describing fifteen-hour thresholds of weekly employment hours beyond which the formerly unemployed is considered "employed").

[36] There is overwhelming literature in this field; *see, e.g.*, Handler, "Discretion in Social Welfare: The Uneasy Position of the Rule of Law", 1272 ff. (describing the stigmatization and marginalization of poor people considered "deviant"); Handler, "Constructing the Political Spectacle: Interpretation of Entitlements, Legalization, and Obligations in Social Welfare History" (discussing the rise and fall of recipient-oriented "entitlements" to increasing "legalization" and ensuing intransparencies of welfare procedures); Schoen, "Working Welfare Recipients: A Comparison of the Family Support Act and the Personal Responsibility and Work Opportunity Reconciliation Act" (arguing that recent US-American welfare politics ["PRWORA"; "TANF"] shifts the welfare State's focus on education and training to improve the recipients' long-term perspectives to time-limited and curtailed measures of promoting often ill-defined employment).

[37] *See* Frankenberg, "Why care?", 1375.

ten increasing the already existing climate of volatility by which it is surrounded.[38]

However there is another, more positive perspective on changes in contemporary lawmaking and administrative law, even if the role that "new public governance" forms can play in the field of social welfare may be problematic with regard to the weak bargaining position of the welfare recipient.[39] Increasing administrative discretion and the turn to "contractual" forms of governance[40] suggest both the regulatory state's retreat from a long assumed role of a social engineer[41] as well as its experimenting with new and possibly more adequate institutional designs for public governance.[42] From the perspective of new governance challenges to the administrative state, the observation is, indeed, that the state, when extending discretionary power of administrative bodies and providing space for

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[38] This explains the recurrence of "due process" claims against the welfare State: *see, above all*, Reich's seminal article on the "New Property" and the Supreme Court's ruling in Goldberg v. Kelly (397 U.S: 254 [1970]); *see* hereto Handler, "Constructing the Legal Spectacle", 899 ff.; Diller, "The Revolution in Welfare Administration", 1139.

[39] *See* Treutner, Kooperativer Rechtsstaat, 93.

[40] *See*, e.g., Freeman, "The Contracting State", 155; Salamon, "The New Governance and the Tools of Public Action", 1619–1920 (describing the increased complexity of public governance with regard to mastering the new tools in relationship with various private actors); Zumbansen, Vertragsregimes im 'Dritten Sektor'; Diller, "The Revolution in Welfare Administration", 1127: "This combination of discretion and control is an outgrowth of a broad movement toward the use of private sector management techniques in public administration. In essence, this movement seeks to refashion instruments of government to resemble entrepreneurial organizations that strive to achieve results and customer satisfaction, rather than to improve the performance of particular administrative tasks.".

[41] *See* Schulze-Fielitz, "Staatsaufgabenentwicklung und Verfassung", 11 ff.

[42] *See* Freeman, "The Contracting State", 157; Freeman, "Collaborative Governance in the Administrative State"; Dorf/Sabel, "A Constitution of Democratic Experimentalism", 268 (arguing for a shift in perceiving of administrative action which should enhance information pooling among the different actors of civil society interacting with the agency); *see also* Schuppert, "Zur notwendigen Neubestimmung der Staatsaufsicht im verantwortungsteilenden Verwaltungsstaat", 299 ff.; Kippes, Bargaining. Informales Verwaltungshandeln und Kooperation zwischen Verwaltungen, Bürgern und Unternehmen; Zumbansen, The Province of Government (drawing extensively on U.S. legal realist critique, relational contract theory and German postwar private law theory).

administrative rulemaking and so-called "informal administrative action"[43], might not actually be in *retreat*, but instead that its modes of functioning are undergoing radical changes.[44] Obviously, what comes to mind are concerns with underlying principles such as the separation-of-powers doctrine or the regularity-as-legality principle of administrative action that is central to the rule of law.[45] In order to evaluate this two-dimensional development, which consists of an apparent loosening of formal requirements as well as an adaptation of the state's functioning to a pluralistic, fragmented, indeed heterarchic social reality,[46] we need to pinpoint our analytical frame of references and our normative associations.

5.2.5 The Changing Face of Public Administration

Some work done by French, American, and German administrative law scholars[47] invites us to take a less parliament-oriented perspective on public governance. Instead, it suggests adopting a more agency-oriented approach for both an adequate picture of public administration and even democratic theory. From a classical focus on the parliament as the primary

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[43] *See* Freeman, "The Contracting State", 159–160, describing the alien nature of a "governance by contract" concept in comparison with traditional, hierarchical understandings of administrative law and public governance; for the German example, *see, e.g.*, Krebs, "Verträge und Absprachen zwischen der Verwaltung und Privaten", 248 ff.

[44] *See* Di Fabio, "Verwaltung und Verwaltungsrecht zwischen gesellschaftlicher Selbstregulierung und staatlicher Steuerung", 235 ff.; Hoffmann-Riem, "Tendenzen in der Verwaltungsrechtsentwicklung", 433 ff.; Möllers, Reform des Verwaltungsrechts; Calliess/Mahlmann, "Der Staat der Zukunft".

[45] *See* Ackerman, "The New Separation of Powers", 709: "Separationism and the Rule of Law"; *see also* Lawson, "Delegation and Original Meaning".

[46] *See, e.g.*, Ladeur, The Theory of Autopoiesis as an Approach to a Better Understanding of Postmodern Law, 21 ff.

[47] *See, e.g.*, Chevallier/Lochak, Science Administrative; Debasch, Science Administrative; for the American example, *see* the landmark work by Landis, The Administrative Process; for the reception of Landis in American administrative law, *see* Horwitz, The Transformation of American Law: The Crisis of Legal Orthodoxy, 213–217; *see also* Stewart, "The Reformation of American Administrative Law"; Lepsius, Verwaltungsrecht unter dem Common Law; Schuppert, Verwaltungswissenschaft; Hoffmann-Riem, "Entwicklungstendenzen"; for the German interwar period, *see* Stolleis, Geschichte des öffentlichen Rechts in Deutschland, vol. 3, 211–234 (describing the surfacing of new fields "on the fringes" of administrative law and the naissance of contractual forms of public governance and the extension of executive discretion).

lawmaker in a democratic polity seems to follow an almost automatic skepticism towards administrative action and lawmaking.[48] However, in light of a growing awareness of informational gaps and implementation difficulties of regulatory law, administrative agencies can play a much more positive role in their close interaction with private actors. There is a lot to learn today from public lawyers, as they are innovative, fast-moving, and quite well-organized in conceptualizing, probing, and experimenting with new forms of public governance.[49] There already is a big body of public law work related to the conceptualization of "social regulation or steering" (*soziale Regulierung/Steuerung*), where detailed regulatory elements and environmental, technical, and procedural issues are carefully assessed.[50] The applicable standards of this form of public-private or *hybrid* regulation are developed within a complex scheme of state-industry cooperation and "partnership". This, in itself, certainly raises substantial questions of legitimacy, but they go well beyond what has so far been discussed under the formula of *capture*.[51] The state has been depending and continues to depend on widespread and dispersed private knowledge, and the forms of cooperation between regulatory agency and civil society are entirely escaping a black-and-white dichotomy of public/private. Public administration, thus, is changing fundamentally. At the same time, across Europe, we can hear sighs of resignation and frustration by public officials, including social welfare bureaucrats and numerous other employees in administrative bodies, who shudder at the thought of a *managerial* revolution of the administrative state.[52] Looking helplessly at their habitual coffee cup, they can only hope that the wave of controlling, quality management,

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[48] *See* Maus, "Entwicklung und Funktionswandel", 53-4; but *see* Rubin, "Discretion and Its Discontents", 1303-4 (arguing that the nature of the modern State is to be an administrative State).

[49] *See* Stewart, "The Discontents of Legalism"; *see, e.g.,* the insightful contributions to Hoffmann-Riem/Schmidt-Aßmann (eds.), Reform des allgemeinen Verwaltungsrechts and Hoffmann-Riem, "Öffentliches Recht und Privatrecht als wechselseitige Auffangordnungen"; *cf.* Zumbansen, *The Province of Government*.

[50] *See*, *e.g.*, the contributions in Hoffmann-Riem/Schmidt-Aßmann (eds.), Innovation und Flexibilität des Verwaltungshandelns; Salamon, "The New Governance and the Tools of Public Action", 1611 ff.

[51] *See hereto* Freeman, "The Private Role in Public Governance", 546: "The time has come, however, for the discipline of administrative law to grapple with private power.".

[52] *See, e.g.,* König, "Markt und Wettbewerb als Staats- und Verwaltungsprinzipien"; 239 ff.

and "new governance", including corporate accounting standards and consumer orientation, will pass them by unharmed.

If we look at the opening of public administration to civil society (and consumerism) in the context of a distant and alienated system of parliamentary deliberation, the consensual and cooperative administrative action appears, if not an alternative, then at least a supplementation to be reckoned with. The critique mounted against a parliament convening and agreeing in closed meetings – "committees" – and often enacting laws that are even incomprehensible to many members of the voting assembly, has always been accompanied by a deep skepticism against parliamentary rule as such.[53]

5.2.6 Learning from Private Law

Nevertheless, in some areas the change of public administrations towards a more *responsive* system of public-private interaction is already far advanced.[54] What experts in public governance have recently started to experiment with may be a promising avenue to follow. Public administration theorists and practitioners have been increasingly looking to private law for regulatory patterns. One of the promising instruments found is so-called "relational contracting", which is concerned with long-term contractual agreements between parties that go beyond a momentary exchange of goods or services against money.[55] Parties to a relational contract perceive of it as a space, a process in and by which amendments and alterations can be renegotiated and amended. The main characteristic of a relational con-

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[53] *See* Schmitt, Die geistesgeschichtliche Lage des heutigen Parlamentarismus; for a critique, *see, e.g.*, Mouffe, "Carl Schmitt and the Paradox of Liberal Democracy", 38 ff.; Kennedy, "Carl Schmitt und die Frankfurter Schule". "Deutsche Liberalismuskritik im 20. Jahrhundert", 380 ff.; Zumbansen, "Carl Schmitt und die Suche nach politischer Einheit", 63 ff.

[54] *See, e.g.,* Frankenberg, "Shifting Boundaries: The Private, The Public, and the Welfare State", 72 ff.; Whitfield, Public Services of Corporate Welfare, 141 (describing the U.K. Labour Party "Third Way Welfare State"); G.F. Schuppert, "Staat, Markt, Dritter Sektor – oder noch mehr?", 47 ff.; Schuppert, "Die öffentliche Verwaltung im Kooperationsspektrum staatlicher und privater Aufgabenerfüllung", 415 ff.

[55] *See*, Macneil, The New Social Contract; Macneil, "Contracts: Adjustment of Long-Term Economic Relations under Classical, NeoClassical, and Relational Contract Law", 854 ff.; Oechsler, "Wille und Vertrauen im privaten Austauschvertrag", 91 ff.

tract is its cooperative nature and process orientation.[56] The socio-normative basis for relational contracting, however, is not found in communitarian aspirations of bridging value conflicts through recourse to common cultural, ethnic, or religious background and heritage, but is often found in the informal contracting practices that exist in business communities.[57] After seminal studies conducted by contract lawyers and legal sociologists starting in the 1960s,[58] administrative scientists began to consider this form of governance for their own purposes.[59] What becomes obvious is that the problem lies less in the administrative turn to *contractual governance* as such than in connected issues of contractual design and entitlement. In a persisting gray zone of third-sector actors contracting with the state over market shares in welfare distribution, the (bargaining) position of the final recipient is largely obscure.[60] While this can be attributed to the agencies' focus on cost avoidance and a relatively weak system of contractual oversight with regard to the "ultimate consumer",[61] there is a strong public-private perspective guiding even private law interpretations of private contracts for a public good or concern.[62]

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[56] *See* Deakin/Lane/Wilkinson, "Contract Law, Trust Relations, and Incentives for Co-operation", 105 ff.; *cf.* Brownsword, "Contract Law, Co-operation, and Good Faith: The Movement from Static to Dynamic Market Individualism", 255 ff. It is, however, this focus on long-term adjustments within a continuing contractual relationship that common law courts find difficult to accept, given their original bias with regard to "discrete" contracting, *see* Macneil, The New Social Contract, 72–77; Charny, "The Employee Welfare State in Transition", 1633 note 109, 1634: "Conceptions of 'contract' are ill-suited to sorting out the legal consequences of breach of long-term implicit commitments. […] Rather, the cases deal with a set of insurance issues that, as courts often candidly acknowledge (and hope), will be resolved by political intervention rather than by a series of future contractual arrangements.".

[57] *See* Macaulay, "Non-contractual Relations in Business: A Preliminary Study", 55 ff.; Macneil, "Relational Contract: What we do and what we do not know", 483 ff.

[58] *See* Macaulay 1965 and Macneil 1980, *supra* notes 58 and 60.

[59] *See* Stewart, "The Discontents of Legalism", 655 ff.; for a recent overview and analysis, *see* Freeman, "The Contracting State", 157 ff.

[60] Freeman, "The Contracting State", 178 (finding scarce instants of case law where recipients are considered as "third party beneficiaries").

[61] *Id*., at 179.

[62] *See*, recently, the ruling of Germany's Federal Court of Justice of 26 June 2001 [Reg. No. X ZR 231/99], denying plaintiff a third party beneficiary claim for a contract between the Federal Banking Supervision Agency and a Private Consultant assessing plaintiff's banking qualifications, holding that while the con-

With regard to the noted difficulties of legislative lawmaking and administrative action on the one hand and the growing tendency to introduce contractual governance into administrative practice on the other, two aspects have become determinative. First, it is quite clear that there is seldom a one-to-one application of a legislative norm *as it stands* by the administrative agent. The concrete application takes place, as Professor Rakoff recently remarked, in a variety of situations that "is so vast that the process of application will inherently go beyond formal characterization, and instead will require judgments of policy."[63] Second, the rise in contracting-out of public services as well as the cooperation between administrative agencies and private parties does not automatically solve fundamental questions regarding entitlements and procedural rights of welfare recipients in their confrontation with welfare bureaucrats! While in continental legal orders one related aspect is that of assigning the contractual relationships to either public or private law and its corresponding branches of the judiciary, the described problems with regard to the recipient's standing and bargaining position in a contractualized administrative state are more pressing. Based on this experience in public governance, we need to assess the increasing importance of contracting within the administrative state. There is a need for intensified exchange between public and private lawyers with regard to the specific learning experiences in the respective fields. While the notion of the "consumer" is relatively new to the field of administrative law, tendencies to create competitive markets, even in the field of welfare distribution, are ubiquitous and the extensive private law experience should be considered here. The never-ending dispute among private lawyers over the intrinsic value of the notion of the consumer[64] is a rich source of arguments for the science of the contractual administrative state to draw upon. While prominent case law regarding issues of unequal

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tract directly affected plaintiff's rights towards the Agency, the contract exclusively served public purposes in safeguarding a functioning banking system. *See* hereto Kannowski, Federal Court of Justice and Expert Liability Towards Third Parties; Kannowski/Zumbansen, "Gemeinwohl und Privatinteresse – Expertenhaftung am Scheideweg", 3102.

63 Todd, Rakoff, "Th*e* Choice between Formal and Informal Modes of Administrative Regulation", 161.

64 *See, e.g.*, Medicus, Abschied von der Privatautonomie im Schuldrecht?; Reich, "Das Phantom "Verbraucherrecht' – Erosion oder Evolution des Privatrechts?" 609 ff.; for a brillant account and analysis, *see* Damm, "Privatautonomie und Verbraucherschutz", 129 ff.

bargaining power[65] has stirred scholars' imagination considerably early,[66] we are only at the beginning of a fruitful exchange between contract lawyers and administrative lawyers.

5.2.7 Limits to Contractualization

A caveat, however, is called for regarding tendencies of overinterpreting the consensual character of new administrative action based on the primary focus on business or infrastructure building cooperation between agencies and corporate actors.[67] The efficiency drive has entered public administration[68] but is often restricted to areas in which private actors already have a strong enough hand with which to effectively knock on the doors of administrators. Most importantly, corporate actors often offer a deal to the public agency when the financing of an infrastructure project is concerned or the communal effort of modernizing institutions in form of public-private partnerships is a venue. Clearly, *this* dimension of cooperation between administration agencies and the citizen is not the reality Barak-Erez depicts. The bargaining position of welfare recipients can hardly be compared with that of a private financier, a bank, or a corporation offering its cooperation to the state, and this is only the tip of the iceberg of a structural problem. In addition, the introduction of contractual governance into administrative reform in the field of social welfare is still far from efficiently providing for workable relationships between agencies and private actors. The main reason herefore seems to be historical. As witnessed, for example, in the German welfare system, the "market for social services" has since its inception been populated by large corporate actors that function as intermediaries between the welfare bureaucracy and the recipient. While recent German legislation has attempted to introduce competition into this cartellized market, mainly by radically overhauling the financing mechanism and by introducing an extensive scheme of contractual governance into the web of welfare bureaucracy, service providers, and recipi-

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[65] Decisions of the Federal Court of Justice ("Bundesverfassungsgericht"), BverfGE 81, 242; BVerfGE 89, 214.

[66] See the study by Neumann, Freiheitsgefährdung im kooperativen Sozialstaat.

[67] *See, e.g.*, Bauer, "Verwaltungsrechtliche und verwaltungswissenschaftliche Aspekte der Gestaltung von Kooperationsverträgen bei Public Private Partnership", 89 ff.

[68] *See* the brillant monograph by Eidenmüller, Effizienz als Rechtsprinzip; Bieback, "Effizienzanforderungen an das sozialstaatliche Leistungsrecht", 127 ff.; Zavelberg, "Lean Management – ein methodischer Ansatz für mehr Effizienz und Effektivität in der öffentlichen Verwaltung?" 1040 ff.

ents, it is still too early to judge the actual spin-off for all actors involved.[69] The established actors are still very strong and leave room for small providers possibly only at the cost of reducing the welfare level. Consequently, the introduction of competition into this field, its development towards a "competitive market for social services", might be shortsighted to the degree that it risks sacrificing the level of welfare services for the reduction of overall costs. Notable, however, is the degree to which mediating schemes have been instituted within the nexus of service providers and welfare agencies in the form of arbitration institutions (*Schiedsstellen*).[70] The actual welfare recipient, however, is not present and so the model remains far from a truly self-regulatory, private law regime with its central focus on private autonomy and freedom of contract.

The current crisis of the American "employee welfare state", which rests on company-based welfare and pension provisions, can be read as a parallel experience with regard to dangers arising from contracting risks without a more comprehensive, collective risk allocation and spreading, and an efficient disentanglement of firm-oriented entitlements once the firm falls into crisis.[71]

5.2.8 From the Rule of Law to the Welfare State and Back

This leads us back to the basic critique raised by Barak-Erez as to the weak position of the welfare recipient when dealing with administrative agencies. Amidst the various openings that we have described with respect to a formerly exclusively hierarchical bureaucracy, we must still note that the focus in all the public administration reform has *not* been on the individ-

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[69] Zumbansen, Ordnungsmuster im modernen Wohlfahrtsstaat, 149 ff.; Zumbansen, Vertragsregimes im ‚Dritten Sektor' (discussing the history of social welfare providers and recent German legislative attempts to open this cartellized market to competition); *see* Treutner, Kooperativer Rechtsstaat, 93, for an earlier account.

[70] Zumbansen, *supra* note 69, 170–173; *see*, in particular, the Decision by the Federal Administrative Court (*Bundesverwaltungsgericht*), of 1 December 1998, reg. No. 5 C 17/97, published in: BVerwGE 108, 47 and NVwZ-RR 1999, 446.

[71] Charny, "The Employee Welfare State in Transition", 1611–1620, 1629: "…the fundamental risk-spreading deficiency of the current employee welfare scheme – i.e. its dependence on the prosperity of a particular firm or industry." The developments connected to Enron, Global Crossing and Worldcom, especially the critique of the 401(k) pension schemes, give a particular tragic turn to the earlier assessments, *see, e.g.,* The Economist, 17 August 2002, 11.

ual. The focus on an autonomous, self-determining citizen as contracting party does not only reiterate the same ideological assumptions prevalent in liberal market and classical private law theory but also appears to fully lose sight of the original reason for which much of the administrative reform began – the *citizen*. Against this background, we must take Barak-Erez' plea for a stronger citizenship concept of the welfare state seriously.

5.3 Remembering the Choices Made in the Past

The dilemmatic imagery of the welfare state which is conveyed by Barak-Erez' paper corresponds with Rosenhek's plea to withstand the commonly held thesis of trade liberalization and economic debordering allegedly causing the inevitable decline in national welfare protection. Rosenhek's critique of the thesis that globalization marks the end of welfare states points to the unfoundedness of this overtly simplistic causality claim and calls for an engaged analysis of the developments within national polities and their different ways of responding to their transnational environment. It is clear to both Rosenhek and Barak-Erez that the relationship between the crisis of the welfare state on the one hand and globalization on the other deserves much closer inspection.

5.3.1 The Welfare State's Futile Struggle Against Unemployment

Rosenhek questions the connection between the development of the Israeli unemployment program and globalization. He rightly refutes the dominant simplistic claim of being either for or against globalization – as if that was a serious alternative at all! His account of the sharp discrepancy between a legislative curtailing of unemployment benefits on the one hand and the counteractive discretionary use of the "street level bureaucrat" on the other[72] strongly invites us to reflect on what underlies these phenomena.

A welfare state's struggle against unemployment, or, stated positively, *for* high employment, is deeply woven into the dense texture of the institu-

[72] *See also* Diller, "The Revolution in Welfare Administration", 1130: "It is difficult to conceive of an area in which the distance between grand policy decisions and ground-level implementation is as vast as in the welfare system.".

tional, political and legal settings of the national labor market.[73] That this labor market is changing under the influence of national programs with regard to family policy, vocational training policy, work conditions, inflation rates, and the specific state of the economy is rather obvious. This has direct impact on the definitions of work and, correlatively, of employment and unemployment. Another obvious influence can be observed with regard to the prominent actors that are active here. We see the state, public (and, increasingly, private[74]) employment offices, employers and employees and we see, in many countries, unions, however different their particular role and influence might be.[75] And in countries with a strong union heritage, this tripartite bargaining system between state, unions, and employers now eventually appears to be too rigid to adapt to a changing world of production and commercial exchange. We see rapidly evolving realities of what it means to be a worker, or rather "what work is".[76]

The inquiry into the connections between employment law and globalization thus deals with two variables, the first being a field of law whose intricacies we only lightly touched upon and the second being a globalization discourse in and by itself that has, as Rosenhek pointed out, almost become the denominational term to describe an inevitability, a quasi-natural force. He rightly argues that curtailments of the system are brought about by the political will of those who exercise power within national po-

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[73] *See*, for the German context, the report given in 2000 at the German Jurists Convention [Deutscher Juristentag] by G.Kleinhenz; *see* the analysis of recent programs by Schmidt/Weiss, "Job Creation Policies in Germany", 145 ff.

[74] Schmidt/Weiss, "Job Creation Policies in Germany", (describing the quantitative rise of private employment placing agencies after the break-up of the German Employment Office's monopoly by the European Court of Justice in 1991 – the success of these private actors has so far been meager).

[75] *See* Charny, "The Employee Welfare State in Transition", 1625-6 (describing the ambiguous bargaining position of American unions in firm and even plant specific renegotiation of contract terms with regard to welfare provisions); *see*, for the German case, Schmidt/Weiss, Labour Law and Industrial Relations in Germany, paras. 347–376.

[76] *See, e.g.*, Charny, "The Employee Welfare State in Transition"; Karst, "The Coming Crisis of Work in Constitutional Perspective"; Handler, "Questions About Social Europe by an American Observer", 447: "The nature of employment is shifting from full-time work for a single employer to various forms of part-time, temporary, contract, or contingent work.". For the German context, *see* Schmidt/Weiss, Labour Law and Industrial Relations in Germany, 99–112 (describing the law of fixed-term contracts and temporary work).

litical regimes.[77] This takes place, at the same time, in close relationship with a radical overhaul of state functions and governance modes. The bitter fight over entitlements to welfare benefits enters into new battles where the combatant is no longer just "administrative discretion" but, increasingly, privatization and the outsourcing of public services.[78]

Welfare Administration: Implementation and Policy

And yet, in light of the considerably reduced and real effects that recent legislative efforts have had towards an entrenchment of welfare benefits, it is not easy to predict whether or not a radical turning away from the core elements of the welfare state regime is occurring irreversibly. But, as Piore and Sabel wrote in their seminal book in 1984: "The times are troubled indeed when the good news is almost indistinguishable from the bad."[79] Their starting point was both an observation and an intuition: they suggested an analysis of the instruments and principled choices made in the past with regard to the governance of the political economy, because in just waiting for periodical economic upturns, we might or might not experience a slight momentary improvement, but we would soon have to see that our analytical categories fail to fully account for the structural reasons of both downturns and upturns.

Rosenhek's focus on how welfare legislation works on the agency level raises again the deep ambiguity of contemporary welfare administration with its increasing reliance on contractual and cooperative forms of governance. In this respect, Matthew Diller, a close observer of the American welfare state, has remarked:

> "First, clients are never referred to as having a 'right' to anything. Although clients may be provided with assistance in various ways, there is nothing to indicate that a client can demand anything. Instead, the client is expected to participate in a 'partnership' with a caseworker who has immense power and whose

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[77] This very much corresponds with the U.S. legislation of the late 1990's, sending out a new welfare message to welfare recipients, one of self-sufficiency, not of rights, one of responsibility, not of entitlements. *See, e.g.,* Diller, "The Revolution in Welfare Administration", 1166–1171.

[78] Diller, "The Revolution in Welfare Administration", 1182-3: "In essence, government cedes tremendous power over how a program will be administered, with the belief that competition and performance incentives will spur the contractor to produce the desired outcomes. Privatization becomes an attractive alternative when ends are viewed as more important than means and where the ends sought can be specified in advance and measured." (citations omitted).

[79] Sabel/Piore, The Second Industrial Divide, 3.

main objective is to get her off the benefit rolls. Clearly, the caseworker holds all the cards in this partnership. A client who makes demands of the agency or possesses a sense of entitlement, runs the risk of being judged a bad 'partner.'"[80]

The undeniable trend to private ordering as a form of "public" governance prompts us to seriously reassess our understanding of legitimacy and legalized governmental action. The central question appears to be whether or not we can apply our learned perceptions of democratic governance to this welfare state reality in light of an ongoing multiplication of images of the state and public governance. Our ways of understanding industrial production, labor politics, state intervention and, finally, the welfare state – either addressed in state-directed insurance regimes, indirect aid through consumer protection legislature, or a court-driven constitutional control of market contracting with the aim of impeding "structural imparity"[81] – build on model assumptions about "*the* state" and "*the* society" that are not entirely convincing. It has long become apparent that we need to take into account the various interrelations between the public and the private sphere in order to adequately describe and to normatively mobilize society's democratic potential, in all of society's differentiations, contexts, and spheres. However, the influence of our institutional experience is still strong. And so we face this institutional welfare state jungle inside of which many feel helpless and frustrated; some aspects we have learned to demonize as alienated bureaucracy and other aspects we hold dear as we may remember the long and hard struggles to get there. This framework occupies our mind and must intrude when we try to see things from an entirely different perspective. We tend to identify the attacks on the welfare state based on this particular experience of it.

The Conundrum of Cause and Effect

Let us briefly recollect these effects as pointed out by Rosenhek:

1. There is undoubtedly an erosion of the middle-class support basis for the welfare state due to the segmentation of employees into a full-time, skilled workforce in contrast to an unskilled, part time one. Even if it were true, as some authors suggest, that – quantitatively – full-time employment has not diminished in toto but that the impression of a higher

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[80] Diller, "The Revolution in Welfare Administration", 1169.

[81] *See*, e.g., Decision of the Federal Constitutional Court (FCC) of 16 October 1993, printed in: 89 BVerfGE 214; see the ensuing "marital contract cases", decided by the FCC in February and March 2001, hereto see Zumbansen, Public Values, Private Contracts.

ratio of part-time employment is due to married women moving into these positions, this would not disqualify the general assessment of a structural loss of long-term employment due to technical innovation and radical changes in industrial and post-industrial production.

2. Next, we are faced with the loss of a basis for an identity of interests, which was a central presupposition of a labor market populated by equally strong and organized bargaining parties and which now seriously erodes the grounds for collective action.

3. Finally, the states' respective impact on domestic welfare politics is not driven by a primary concern with their own constituency but by the alleged needs of "international capital". This observation is, indeed, at the outset of a critical assessment of the function of domestic antagonistic political discourse that Rosenhek has pointed to. Ensuing is a need to explore the particular arguments deployed by those wishing to dismantle the welfare state.

Rosenhek asks whether these changes can be attributed to the phenomenon of globalization and persuasively describes the fallacy consisting in a simple acceptance of what he calls "neo-liberal rhetoric" to describe the alleged effects of globalization on the welfare state. Indeed, we ought to halt for a minute and try to spell out this idea a little. Would it really be convincing to state that the structural changes that have occurred due to transitions from the reigning mass production industry types to service industry models and to flexible specialization market regimes are mere reactions to the change from national markets to international or global ones? Is it actually the case that the gradual but decisive switch from a *society of individuals* to a *society of organizations* and onwards to a *society of networks*[82] are mere reflexes on denationalized, globalized market constraints?

Market and State from a Denationalized Perspective

Analysis of the "information" or "knowledge" society[83] has illuminated the emergence of more societal actors than we have been focusing on in our

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[82] See generally Ladeur, Negative Freiheitsrechte und gesellschaftliche Selbstorganisation.

[83] See, e.g. Ladeur, Negative Freiheitsrechte und gesellschaftliche Selbstorgani*sation*; Ladeur, The Theory of Autopoiesis as an Approach to a Better Understanding of Postmodern Law, esp. 21 et seq.; Neef, The Knowledge Economy 2–3 (describing the extreme increase in high-skill employment, eventually replacing blue-collar positions in virtually every production sector and the ensuing practice of "electronic corporate globalization" allowing firms to outsource

political theory for a long time. The embrace of *pluralism*, *e.g.* in postwar Germany, as a sociologically informed answer to the bankruptcy of the democratic attempts of the Weimar Republic in the Third Reich centered on individuals, on democratic procedures, but most importantly on the *public sphere*.[84] The public sphere was, under the auspices of a social and political theory of pluralism, the place for the exchange of ideas, for the reinforcement of values, and for society's struggle with cohesion and conflict. The economic theory that had already begun to gain momentum at an earlier stage also inside legal discourse purported to replace Marxist ideas of state and society through an ordo-liberal understanding of the market. The beauty of the idea of a private law society (*Privatrechtsgesellschaft*) resided in the communion of political self-determination in a democratic rule of law with a market that was understood as being populated by *bourgeois-citoyens*. The focus of, say, Franz Böhm in Germany[85] or Roscoe Pound in the USA[86] on private power shed light on the structural corruption inherent in a model that placed a political state above a non-political society and attempted to justify this hierarchical relationship by normatively upgrading the market as not being so non-political after all. The bottom line of this state-market dualism, however, was that the market activities were understood as natural, good, and *efficient* and that the state's role mainly consisted in providing an adequate framework. In 1932, the theoretically highly ambivalent lawyer Carl Schmitt consoled the worried minds of German industry with the conception allegedly held by the National Socialists of a *strong State* and a *healthy Economy*.[87]

Today, we must ask ourselves whether the New Economy has really discarded all these assumptions. Critics in the 1960s and 1970s have shown that the individualist assumptions about the state and the market, which were also still prevalent under the sign of postwar pluralism, fail to account for the structural power rifts between groups and individual actors in society and that a liberal, individualist perspective risked remaining blind

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IT jobs to poorly paid experts in India that get the work done overnight at a fraction of domestic labor costs); Charny, "The Employee Welfare State in Transition", 1621.

[84] *See* Koselleck, Kritik und Krise; Fraenkel, "Der Pluralismus als Strukturelement der freiheitlich-rechtsstaatlichen Demokratie",; Habermas, The Structural Transformation of the Public Sphere; for the American case, *see* Stewart, "The Reformation of American Administrative Law"; Shapiro, "Administrative Law Unbounded: Reflections on Government and Governance", 369, 372 (2001).

[85] Böhm, "Das Problem der privaten Macht".

[86] Pound, "The New Feudal System".

[87] Schmitt, "Gesunde Wirtschaft im starken Staat".

blind to contextual differentiations and the emergence of *new* societal actors. These new but partially also older actors such as corporations, unions, business conglomerates, and other associations eventually moved into the gray zone between state and market and it became a great challenge in legal and social theory to assess their political, legal, and social quality.[88] Whether actors in this corporatist field, or "third sector", are "public" or "private" can only seemingly be answered with regard to their political quality.[89] At the same time, this was always done with reference to their association with either state or society, with either the public (political) or private (market) sphere.[90] These mixed, *hybrid* beings inhabiting this zone *between* state and society escape this analytical framework. Corporatism and the more recent assessments of neo-corporatism, subsidiarity, third sector, and civil society have gradually effaced and blurred the boundaries central to the conceptual perspective as such.[91] Consequently, whether we describe these phenomena from a state-perspective or from a society point of view, whether we see privatization of welfare as a promise or a curse, we now naturally seem to build on this experience with the demystification of the state as the omnipotent political, central actor and the shrinking of the public-private divide. We are informed and influenced by a strong *heritage* whose connected semantics and learning experiences will continue to shape our perceptions and arguments for quite a while. Both heritage and path-dependencies are not only a burden, but with respect to the historical and contemporary struggles for political and social rights we should be aware of the normative dimension of this particular experience. And we ought to ask how to realize this experience both in its historical dimension and in its fragile normative aspiration.

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[88] *See, e.g.*, Grimm, "Verbände und Verfassung", 241; Böckenförde, "Die politische Funktion wirtschaftlich-sozialer Verbände und Interessenträger in der sozialstaatlichen Demokratie", 223; Mayntz, "Interessenverbände und Gemeinwohl", 11.

[89] *See* Charny, "The Employee Welfare State in Transition", 1640 (recognizing a specific understanding in the U.S. of the particular, centralist public welfare provision scheme, which is allegedly owed to a "greater sophistication of the European political tradition", i.e. to a intricate mix of strong leftist politics and non-governmental societal actors that engage with the State in close consensus seeking bargaining).

[90] *See*, *e.g.*, Kaldor, "Public or Private Enterprise"; Castells, The Rise of the Network Society, 155-6; Charny, "The Employee Welfare State in Transition", 1603 (describing the „unique pattern" of wide-ranging, firm-based welfare provisions in the United States and their endangerment due to changes in market structures).

[91] *See* Schmitter, "Still the century of corporatism?".

5.3.2 Remembering

What we might do in order to be able to spell out our political aspirations against the neoliberal, supposedly apolitical and matter-of-fact globalization semantics that Rosenhek so sharply identifies, is to remember the background against which we politically have been learning, hoping, aspiring, for better or for worse. Remembering does not have to be directed exclusively at chronology and the historiographical reconstruction of the past but should instead embrace specific experiences, outspoken and unspoken hopes, aspirations, and shared utopia and what has become of them.[92] We can then begin to assess under which particular conditions we have developed our understanding of institutions, public and private ordering, individual bargaining and collective action. Welfare regimes are deeply embedded in specific historical and institutional settings that have come under pressure from the inside and the outside. In order to develop the democratic potential in and around these settings, we need to search for modes of democratic re-entries into the different levels of welfare state regimes. We ought to take the *memory* of the rule-of-law, which was already prevalent in Barak-Erez' inquiry into welfare state citizenship, and use it to reformulate the welfare state perspectives that we have learned to adopt. We then might be able to reconcile the formal and the substantive understandings of the state and see the inherent interdependency of political and social rights.[93]

5.3.3 In the Presence of Irony

Discussing the medieval formula of "quod omnes tangit", Niklas Luhmann writes in his comments on *Between Facts and Norms* that "Habermas naturally knows that a discourse with all involved is not possible in any legal process. He therefore does not demand that one should postpone the decision until the last person affected has been born, grown up, and heard."[94] Habermas finds a "solution" by referring to a situation of rational discourse in which all potentially affected persons "could" agree on certain norms that would, in turn, be considered valid.[95] Luhmann pinpoints the virtuality of this discourse, which he sees reflected in the word "could" and

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92 *See* Yerushalmi, *Zakhor*.

93 *See* Habermas, Between Facts and Norms, ch. III; Habermas, "Paradigms of Law".

94 Luhmann, "Quod Omnes Tangit", 890-1.

95 *Id.*, at 891.

by which he finds that Habermas "hides" the problem of not being able to lay down the conditions under which this rational discourse "could" be possible. Luhmanns thus observes: "The master and the invisible hand will not be replaced. But who determines, and how does he do so, what could define rational agreement? How does this decisive operation, on which everything in the post-metaphysical age depends, become juridified?"[96] He remains unsatisfied – to say the least – with Habermas' ensuing transfer of the pressing legitimacy problem into the legal process. He finds Habermas' "escape" into the law merely "astonishing" because for Luhmann to try to answer the claim to legitimacy – which Luhmann coins with the "quod omnes tangit" formula – by drawing a distinction between legality and legitimacy in which the latter can be no more than a legal fiction does not make the paradox – that the conditions for legitimacy remain in the conjunctive ("could") – go away. Habermas' repeated concession that "free and equal access of all to processes which are so structured that they can represent a reasonable experience – whether this be agreement or understanding based on compromise (freedom and equality; once more)" – is greeted by Luhmann's observation of total absence of "any trace of irony, and thus any distance from the project."[97]

It is this admittedly intriguing plea for irony that "could" inform the debate on the welfare state, but it doesn't most of the time.[98] It seems to be for the same reasons that Luhmann finds it absent in Habermas' democratic theory. While, against the background of competing validity claims within a highly fragmented society, there are indeed good reasons to adapt ironical approaches to comprehensive legitimacy claims, the very turn to irony *vis-à-vis* one's own convictions proves much more difficult. Sociological observation inevitably leads us to the insight that most of our normative aspirations regarding a "good life", a "free society", or a "just law" are futile and that we had better adopt a more ironical view, and we end up asking: "And then what?" Even irony can only provide a heartbreaking answer to this question, a question as inevitable as the paradox of legitimacy and legality.

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[96] *Id.*

[97] *Id.*, at 896.

[98] But *see* Willke, Ironie des Staates; see also Whitfield, Public Services of Corporate Welfare.

Bibliography

Ackerman, Bruce, "The New Separation of Powers", in: 113 Harv. L. Rev. 633 (2000).

Adler, Libby S., "The Meanings of Permanence: A Critical Analysis of the Adoption and Safe Families Act of 1997", in: 38 Harvard Journal on Legislation 1–36 (2001).

Alesina, Alberto/Glaeser, Edward/Sacerdotte, Bruce, "Why Doesn't The US Have A European-Style Welfare State?" HIER [Harvard Institute of Economic Research] Discussion Paper Nr. 1933, Cambridge, MA, November 2001.

Badura, Peter, "Der Sozialstaat", in: Die öffentliche Verwaltung 1989, 491–499.

Bauer, Hartmut, "Verwaltungsrechtliche und verwaltungswissenschaftliche Aspekte der Gestaltung von Kooperationsverträgen bei Public Private Partnership", in: Die öffentliche Verwaltung (DÖV) 1998, 89–97.

Berger, Rainer, Der Umbau des Sozialstaates. Ansichten von Parteien und Wohlfahrtsverbänden zur Modernisierung des Staates (Opladen. Westdeutscher Verlag 1999).

Berthold, Norbert, Der Sozialstaat im Zeitalter der Globalisierung (Tübingen: Mohr 1997).

Bieback, Karl-Jürgen, "Effizienzanforderungen an das sozialstaatliche Leistungsrecht", in: Wolfgang Hoffmann-Riem/Eberhard Schmidt-Aßmann (eds.), Effizienz als Herausforderung an das Verwaltungsrecht (Baden-Baden: Nomos 1998), 127–173.

Böckenförde, Ernst-Wolfgang, "Die politische Funktion wirtschaftlich-sozialer Verbände und Interessenträger in der sozialstaatlichen Demokratie", in: Wilhelm Hennis/Peter Graf Kielmannsegg/ Ulrich Matz (eds.), Regierbarkeit. Studien zu ihrer Problematisierung, vol. 1, (Stuttgart 1977), 223–254.

Böhm, Franz, "Das Problem der privaten Macht" (1928), in: Franz Böhm, Reden und Schriften (Karlsruhe: C.F. Müller 1960), 25–45.

Bonoli, Giuliano/George, Vic/Taylor-Gooby, Peter, European Welfare Futures. Towards A Theory of Retrenchment (Cambridge: Polity Press 2000).

Boyer, Robert/Drache, Daniel (eds.), States against Markets. The Limits of Globalization (London: Routledge 1996).

Brownsword, Roger, "Contract Law, Co-operation, and Good Faith: The Movement from Static to Dynamic Market Individualism", in: Deakin, Simon/ Michie, Jonathan (eds.), Contracts, Co-operation, and Competition (Oxford/

New York: Oxford University Press 1997), 255–284.

Busch, Andreas/Plümper, Thomas (eds.), Nationaler Staat und Internationale Wirtschaft (Baden-Baden: Nomos 1999).

Calliess, Gralf-Peter/Mahlmann, Matthias, "Der Staat der Zukunft. Eine Einleitung", in: Calliess, Gralf-Peter/Mahlmann, Matthias (eds.), Der Staat der Zukunft (Vorträge der 9. Tagung des Jungen Forum Rechtsphilosophie in der IVR, 27.–29. April 2001 an der FU-Berlin), ARSP Beiheft 83 (Stuttgart: Steiner 2002).

Calliess, Gralf-Peter, Prozedurales Recht (Baden-Baden: Nomos 1999).

Castells, Manuel, The Rise of the Network Society (Vol. 1 of "The Information Age") (Cambridge, MA/Oxford: Blackwell 1996).

Charny, David, "The Employee Welfare State in Transition", in: 74 Texas Law Review 1601–1643 (1996).

Chevallier, Jacques/Lochak, Daniele, Science Administrative (Paris: LGDJ 1978).

Damm, Reinhard, "Privatautonomie und Verbraucherschutz. Legalstruktur und Realstruktur von Autonomiekonzepten", in: Versicherungsrecht 1999, 129–141.

Deakin, Simon/Lane, Christel/Wilkinson, Frank, "Contract Law, Trust Relations, and Incentives for Co-operation: A Comparative Study", in: Deakin, Simon/Michie, Jonathan (Hrsg.), Contracts, Co-operation, and Competition, Oxford, New York 1997, 105–139.

Debasch, Charles, Science Administrative: Administration Publique (Paris: Dalloz 1976).

Di Fabio, Udo, "The Present and Future Meaning of the State and the Role of the Federal Constitutional Court", Interview, in: 2 German Law Journal No. 9 (1 June 2001), available at: http://www.germanlawjournal.com.

Di Fabio, Udo, "Verwaltung und Verwaltungsrecht zwischen gesellschaftlicher Selbstregulierung und staatlicher Steuerung", in: Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer [VVDStRL] 56 (1996) (Berlin/New York: Walter de Gruyter 1997), 235–282.

Diller, Matthew, "The Revolution in Welfare Administration: Rules, Discretion and Entrepreneurial Government", in: 75 New York University Law Review 1121–1220 (2000).

Dorf, Michael C./Sabel, Charles F., A Constitution of Democratic Experimentalism, in: 98 Columbia L. Rev. 267 (1998).

Eidenmüller, Horst, Effizienz als Rechtsprinzip (Tübingen: Mohr 1996).

Ewald, François, “A Concept of Social Law”, in: Gunther Teubner (ed.), Dilemmas of Law in the Welfare State (Berlin/New York: Walter de Gruyter 1986), 40–75.

Ewald, François, L’Etat providence (Paris: Grasset 1986).

Fallon, Richard H. Jr., “‘The Rule of Law’ as a Concept in Constitutional Discourse”, in: 97 Columbia Law Review 1–56 (1997).

Fligstein, Neil, Is Globalization the Cause of the Crises of the Welfare State?, EUI Working Paper SPS 98/5, European University Institute, Florence 1998.

Forbath, William E., “Constitutional Welfare Rights: A History, Critique and Reconstruction”, in: 69 Fordham L. Rev. 1821 (2001).

Fraenkel, Ernst, “Der Pluralismus als Strukturelement der freiheitlich-rechtsstaatlichen Demokratie”, Lecture given at the 45th Convention of German Lawyers [Deutscher Juristentag], München 1964, B 1–29.

Frankenberg, Günter,”Why Care? The Trouble With Social Rights”, 17 Cardozo L. Rev. 1365–1390 (1996).

Frankenberg, Günter, “Shifting Boundaries: The Private, The Public, and the Welfare State”, in: Michael B. Katz/Christoph Sachße (eds.), The Mixed Economy of Social Welfare 72–94 (Baden-Baden: Nomos 1996).

Freeman, Jody, “The Contracting State”, 28 Florida State University Law Review (Fla. St. U. L. Rev.) 155 (2000).

Freeman, Jody, “The Private Role in Public Governance”, 75 New York University Law Review (N.Y.U.L. Rev.) 543 (2000).

Freeman, Jody, “Collaborative Governance in the Administrative State”, 43 University of California at Los Angeles Law Review (UCLA L. Rev.) 1 (1997).

Glaser, Edward L. /Shleifer, Andrei, “The Rise of the Regulatory State”, Harvard Institute of Economic Research [HIER] Discussion Paper Number 1934, Harvard University, Cambridge, November 2001, available at: http://www.ssrn.com.

Gouron, André, “Aux origines médiévales de la maxime Quod Omnes Tangit”, in: Histoire du droit social. Mélanges en hommage à Jean Imbert (Paris: Presses Universitaires de France 1989), 277–286.

Grimm, Dieter, “Verbände und Verfassung”, in: Dieter Grimm, Die Zukunft der Verfassung (Frankfurt: Suhrkamp 1991), 241–265.

Günther, Klaus, “Der Wandel der Staatsaufgaben und die Krise des regulativen Rechts”, in: Dieter Grimm (Hrsg.), Wachsende Staatsaufgaben – sinkende Steuerungsfähigkeit des Rechts, Baden-Baden 1990, 51–68.

Habermas, Jürgen, “Der europäische Nationalstaat unter dem Druck der Globalisierung”, in: Blätter für deutsche und internationale Politik 1999, 425–436.

Habermas, Jürgen, "Die postnationale Konstellation und die Zukunft der Demokratie", in: J.Habermas, Die postnationale Konstellation 91–169 (Frankfurt: Suhrkamp 1998).

Habermas, Jürgen, "Paradigms of Law", in: 17 Cardozo Law Review (Cardozo L. Rev.) 771–784 (1996).

Habermas, Jürgen, The Structural Transformation of the Public Sphere (Cambridge: Polity Press 1989).

Habermas, Jürgen, "Die Krise des Wohlfahrtsstaates und die Erschöpfung utopischer Energien", in: Habermas, Die neue Unübersichtlichkeit 141 (Frankfurt: Suhrkamp 1985).

Habermas, Jürgen, Between Facts and Norms [Transl. W. Rehg] (M.I.T. Press 1996).

Handler, Joel F., "Questions about Social Europe from an American Observer", in: 18 Wisconsin International Law Journal [Wis. Int'l. L.J.] 437–476 (2000).

Handler, Joel F., "Constructing the Political Spectacle: Interpretation of Entitlements, Legalization, and Obligations in Social Welfare History", in: 56 Brooklyn Law Review 899–973 (1990).

Handler, Joel, F., "Discretion in Social Welfare: The Uneasy Position of the Rule of Law", 92 Yale Law Journal 1270–1286 (1983).

Hall, Peter A./Soskice, David, Varieties of Capitalism. The Institutional Foundations of Comparative Advantages (Oxford: O.U.P. 2001).

Held, David/McGrew, Anthony G. (eds.), The Global Transformations Reader. An Introduction to the Globalization Debate, (Malden, MA: Polity Press 2000).

Hirschl, Ran, "Israel's Constitutional Revolution: The Legal Interpretation of Entrenched Civil Liberties in an Emerging Neo-Liberal Economic Order", in: American Journal of Comparative Law [Am. J. Comp. L.] 427–452 (1998).

Hoffmann-Riem, Wolfgang, "Tendenzen in der Verwaltungsrechtsentwicklung", in: Die öffentliche Verwaltung 1997, 433–442.

Hoffmann-Riem, Wolfgang, "Öffentliches Recht und Privatrecht als wechselseitige Auffangordnungen – Systematisierung und Entwicklungsperspektiven ", in: Wolfgang Hoffmann-Riem/Eberhard Schmidt-Aßmann (Hrsg.), Öffentliches Recht und Privatrecht als wechselseitige Auffangordnungen (Baden-Baden: Nomos 1996), 261–336.

Hoffmann-Riem, Wolfgang/Schmidt-Aßmann, Eberhard (Hrsg.), Innovation und Flexibilität des Verwaltungshandelns (Baden-Baden: Nomos 1994).

Hoffmann-Riem, Wolfgang/Schmidt-Aßmann, Eberhard/Schuppert, Gunnar Folke (Hrsg.), Reform des Allgemeinen Verwaltungsrechts (Baden-Baden: Nomos 1993).

Horwitz, Morton, The Transformation of American Law 1870–1960: The Crisis of Legal Orthodoxy (New York/Oxford: Oxford U. Press 1992).

Jones, Harry W., "The Rule of Law and the Welfare State", in: 58 Columbia Law Review 143–156 (1958).

Kaldor, Nicholas, "Public or Private Enterprise – The Issues to be Considered", in: William J. Baumol (ed.), Public and Private Enterprise in a Mixed Economy (London/Basingstoke 1980), 1–12.

Kannowski, Bernd, "Federal Court of Justice and Expert Liability Towards Third Parties: Public Safeguard and Private Interest ", in: 2 German Law Journal No. 13, 1 August 2001 (available at: http://www.germanlawjournal.com/past_issues.php?id=71).

Kannowski, Bernd/Zumbansen, Peer, "Gemeinwohl und Privatinteresse – Expertenhaftung am Scheideweg?" in: Neue Juristische Wochenschrift (NJW) 2001, 3102–3103.

Karst, Kenneth, "The Coming Crisis of Work in Constitutional Perspective", in: 82 Cornell Law Review 523–571 (1997).

Kaufmann, Franz-Xaver, Herausforderungen des Sozialstaates (Frankfurt: Suhrkamp 1997).

Kennedy, David J., "Due Process in a Privatized Welfare System ", 64 Brooklyn Law Review 231–306 (1998).

Kennedy, Ellen, "Carl Schmitt und die 'Frankfurter Schule'. Deutsche Liberalismuskritik im 20. Jahrhundert ", in: 12 Geschichte und Gesellschaft 1986, 380–419.

Kippes, Stephan, Bargaining. Informales Verwaltungshandeln und Kooperation zwischen Verwaltungen, Bürgern und Unternehmen (Köln u.a.: Heymann 1993).

Kleinhenz, Gerhard, "Welche arbeits- und ergänzenden sozialrechtlichen Regelungen empfehlen sich zur Bekämpfung der Arbeitslosgkeit?" Report given in 2000 at the 63rd German Jurists Convention [63. Deutscher Juristentag] (Munich: C. H. Beck 2000).

König, Klaus, "Markt und Wettbewerb als Staats- und Verwaltungsprinzipien ", in: Deutsches Verwaltungsblatt 1997, 239–248.

Koselleck, Reinhart, Kritik und Krise. Eine Studie zur Pathogenese der bürgerlichen Welt (Frankfurt: Suhrkamp 1973), first ed. Freiburg: Alber 1959.

Krebs, Walter, "Verträge und Absprachen zwischen der Verwaltung und Privaten", in: Veröffentlichungen der Vereinigung deutscher Staatsrechtslehrer (VVDStRL) 52 (1992) (Berlin/New York: Walter de Gruyter 1993), 248–284.

Ladeur, Karl-Heinz, Negative Freiheitsrechte und gesellschaftliche Selbstorganisation (Tübingen: Mohr 2000).

Ladeur, Karl-Heinz, The Theory of Autopoiesis as an Approach to a Better Understanding of Postmodern Law. From the Hierarchy of Norms to the Heterarchy of Changing Patterns of Legal Inter-relationships, EUI Working Paper Law No. 99/3 (European University Institute, Florence 1999).

Landis, James M., The Administrative Process (New Haven, CT: Yale University Press 1938).

Law, Sylvia A., "Women, Work, Welfare, and the Preservation of Patriarchy ", in: 131 University of Pennsylvania Law Review 1249–1339 (1983) [131 U. Penn. L. Rev. 1249–1339 (1983)].

Lawson, Gary, "Delegation and Original Meaning", in: 88 Virginia L. Rev. 327 (2002).

Leibfried, Stephan/Wagschal, Uwe (eds.), Der deutsche Sozialstaat. Bilanzen – Reformen – Perspektiven (Frankfurt/New York: Campus 2000).

Leibfried, Stephan/Pierson, Paul, "Semisovereign Welfare States: Social Policy in a Multi-tiered Europe", in: Leibfried/Pierson (eds.), European Social Policy. Between Fragmentation and Integration (Washington: Brookings 1995), 43–77.

Lepsius, Oliver, Verwaltungsrecht unter dem Common Law: amerikanische Entwicklungen bis zum New Deal (Tübingen: Mohr 1997).

Luhmann, Niklas, "Quod Omnes Tangit: Remarks on Jürgen Habermas' Legal Theory ", in: 17 Cardozo L. Rev. 883–899 (1996).

Luhmann, Niklas, Politische Theorie im Wohlfahrtsstaat (München/Wien: Olzog 1981).

Macaulay, Stewart, "Non-contractual Relations in Business: A Preliminary Study", 28 American Sociological Review 55 (1963).

Macneil, Ian, "Relational Contract: What we do and what we do not know", 1985, in: Wisconsin Law Review 483–525.

Macneil, Ian, "Contracts: Adjustment of Long-Term Economic Relations under Classical, NeoClassical, and Relational Contract Law ", in: 72 Northwestern. U. Law Rev. 72 (1978), 854–905.

Macneil, Ian, The New Social Contract. An Inquiry into Modern Contractual Relations (New Haven: Yale University Press 1980).

Manow, Philip, “Comparative Institutional Advantages of Welfare State Regimes and New Coalitions in Welfare State Reforms ”, in: Pierson (ed.), The New Politics of the Welfare State (Oxford: Oxford U. Press 2001), 146–164.

Maus, Ingeborg, “Entwicklung und Funktionswandel der Theorie des bürgerlichen Rechtsstaates ”, in: Maus, Rechtstheorie und Politische Theorie im Industriekapitalismus (München: Fink 1986), 11–82.

Mayntz, Renate, “Interessenverbände und Gemeinwohl ”, in: Renate Mayntz (ed.), Verbände zwischen Mitgliederinteressen und Gemeinwohl (Gütersloh: Bertelsmann 1992), 11–35.

Medicus, Dieter, Abschied von der Privatautonomie im Schuldrecht? (Köln: Heymanns 1996).

Möllers, Christoph, Reform des Verwaltungsrechts – Möglichkeiten und Grenzen eines wissenschaftlichen Diskurses in Deutschland, EUI Working Paper Law No. 2001/10, European University Institute, Florence 2001.

Mouffe, Chantal, “Carl Schmitt and the Paradox of Liberal Democracy ”, in: Mouffe, Chantal (ed.), The Challenge of Carl Schmitt (London/New York: Verso 1999), 38–53.

Neef, Dale, The Knowledge Economy (Woburn, MA: Butterworth Heinemann 1998).

Neumann, Volker, Freiheitsgefährdung im kooperativen Sozialstaat (Köln u.a.: Heymanns 1992).

Nolte, Georg, “Kosovo und Konstitutionalisierung: Zur humanitären Intervention der NATO-Staaten ”, in: 59 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 941–960 (1999).

Oechsler, Jürgen, “Wille und Vertrauen im privaten Austauschvertrag. Die Rezeption der Theorie des Relational Contract im deutschen Vertragsrecht in rechtsvergleichender Kritik ”, in: RabelsZ 60 (1996), 91–124.

Pierson, Paul, “Investigating the Welfare State at Century’s End”, in: The New Politics of the Welfare State (Pierson, Paul ed.), 1–14 (2001).

Pierson, Paul (ed.), The New Politics of the Welfare State (Oxford: Oxford U. Press 2001).

Pierson, Paul, “Coping with Permanent Austerity. Welfare State Restructuring in Affluent Democracies ”, in: Pierson (ed.), The New Politics of the Welfare State (Oxford: Oxford U. Press 2001), 410–456.

Pitschas, Rainer, “Soziale Sicherung durch fortschreitende Verrechtlichung?” in: Rüdiger Voigt (Hrsg.), Verrechtlichung, (Königstein: Athenäum 1980), 150–169.

Post, Gaines, “A Roman Legal Theory of Consent, Quod Omnes Tangit, in Medieval Representation ”, 1950 Wisconsin Law Review 66.

Pound, Roscoe, “The Rule of Law and the Modern Welfare State”, in: 7 Vanderbilt Law Review 1 (1953).

Pound, Roscoe, “The New Feudal System ”, in: 35 Commercial Law Journal 397–403 (1930).

Todd, Rakoff, “The Choice between Formal and Informal Modes of Administrative Regulation”, 52 Admin. L. Rev. 159 (2000).

Reich, Charles S. “The New Property ”, in: 73 Yale L. Journal 733–787 (1964).

Reich, Norbert, “Das Phantom. ‘Verbraucherrecht’ – Erosion oder Evolution des Privatrechts?” in: Juristenzeitung 1997, 609–610.

Rieger, Elmar/Leibfried, Stephan, Grundlagen der Globalisierung. Perspektiven des Wohlfahrtsstaates (Frankfurt: Suhrkamp 2001).

Rubin, Edward, “Discretion and Its Discontents“, in: 72 Chi-Kent L. Rev. 1299 (1997).

Sabel, Charles F./Piore, Michael S., The Second Industrial Divide (New York: Basic Books 1984).

Salamon, Lester M., “The New Governance and the Tools of Public Action: An Introduction ”, in: 28 Fordham Urban Law Journal 1611–1674 (2001).

Sassen, Saskia, Losing Control? Sovereignty in an Age of Globalization (New York: Columbia U. Press 1996).

Sassen, Saskia, Globalization and its Discontents. Essays on the new mobility of people and money (New York: New Press 1998).

Scharpf, Fritz, “Negative and Postitive Integration in the Political Economy of European Welfare States ”, in: Martin Rhodes and Yves Mény (eds.), The Future of European Welfare 155–177 (London: Macmillan 1998).

Schmidt, Marlene/Weiss, Manfred/, “‘Job Creation Policies in Germany: The Role of Labour Law, Social Security Law, and Industrial Relations ”, in: Marco Biagi (ed.), Job Creation and Labour Law (The Hague: Kluwer 2000), 145–168.

Schmidt, Marlene/Weiss, Manfred/, Labour Law and Industrial Relations in Germany. Third Edition. (The Hague: Kluwer 2000).

Schmitt, Carl, “Gesunde Wirtschaft im starken Staat ”, Hauptvortrag vor der Mitgliederversammlung des Vereins zur Wahrung der gemeinsamen wirtschaftlichen Interessen in Rheinland und Westfalen am 23. November 1932, Düsseldorf 1932, 13–32.

Schmitt, Carl, Die geistesgeschichtliche Lage des heutigen Parlamentarismus (1926), 7. ed. (Berlin: Dunker & Humblot 1993).

Schmitter, Philippe C. "Still the century of corporatism?" in: 36 Review of Politics 85–131 (1974).

Schoen, Lindsay Mara, "Working Welfare Recipients: A Comparison of the Family Support Act and the Personal Responsibility and Work Opportunity Reconciliation Act ", in: 24 Fordham Urban Law Journal 635–662 (1997).

Schulze-Fielitz, Helmut, "Staatsaufgabenentwicklung und Verfassung ", in: Dieter Grimm (Hrsg.), Wachsende Staatsaufgaben – sinkende Steuerungsfähigkeit des Rechts (Baden-Baden: Nomos 1990), 11–47.

Schuppert, Gunnar Folke, Verwaltungswissenschaft (Baden-Baden: Nomos 2001).

Schuppert, Gunnar Folke, "Zur notwendigen Neubestimmung der Staatsaufsicht im verantwortungsteilenden Verwaltungsstaat ", in: Schuppert, (Hrsg.), Jenseits von Privatisierung und "schlankem" Staat (Baden-Baden: Nomos 1999), 299–329.

Schuppert, Gunnar Folke, "Die öffentliche Verwaltung im Kooperationsspektrum staatlicher und privater Aufgabenerfüllung: Zum Denken in Verantwortungsstrukturen ", in: 31 Die Verwaltung 415–447 (1998).

Schuppert, Gunnar Folke, "Staat, Markt, Dritter Sektor – oder noch mehr?" in: Thomas Ellwein/Joachim Jens Hesse/Renate Mayntz/Fritz W. Scharpf (Hrsg.), Jahrbuch zur Staats- und Verwaltungswissenschaft, Band 1, 47–87 (Baden-Baden: Nomos 1987).

Shaffer, Gregory, "WTO Blue-Green Blues: The Impact of U.S. Domestic Politics on Trade-Labor, Trade-Environment Linkages for the WTO Future", 24 Fordham International Law Journal 608–651 (2000).

Shapiro, Martin, "Administrative Law Unbounded: Reflections on Government and Governance", in: 8 Ind. J. Global Leg. Studies 369 (2001).

Simon, William H., "The Invention and Reinvention of Welfare Rights", in: 44 Maryland Law Review 1–37 (1985).

Soskice, David, "Globalisierung und institutionelle Divergenz: die USA und Deutschland im Vergleich", in: 25 Geschichte und Gesellschaft 201–225 (1999).

Steinberg, Rudolf, Der ökologische Verfassungsstaat (Frankfurt: Suhrkamp 1998).

Stewart, Richard B., "The Discontents of Legalism: Interest Group Relations in Administrative Regulation ", in: 1985 Wisconsin Law Review 655 (1985).

Stewart, Richard B., "The Reformation of American Administrative Law ", in: 88 Harvard Law Review 1667–1813 (1975).

Stolleis, Michael, "Die Entstehung des Interventionsstaates und das öffentliche Recht ", in: Zeitschrift für neuere Rechtsgeschichte (ZNR) 1989, 129–147.

Stolleis, Michael, Geschichte des öffentlichen Rechts in Deutschland, vol. 3 (München: C. H. Beck 1998).

Teubner, Gunther, Reflexives Recht, in: ARSP 1982, 13–59.

Treutner, Erhard, Kooperativer Rechtsstaat. Das Beispiel Sozialverwaltung (Baden-Baden: Nomos 1998).

Voigt, Rüdiger (Hrsg.), Globalisierung des Rechts (Baden-Baden: Nomos 1999/2000).

Welti, Felix, "Wandel der Arbeit und Reform von Sozialstaat und Sozialrecht", in: Sozialer Fortschritt 2001, 69–79.

Whitfield, Dexter, Public Services of Corporate Welfare. Rethinking the Nation State in the Global Economy (London: Pluto 2001).

Willke, Helmut, Ironie des Staates. Grundlinien einer Staatstheorie polyzentrischer Gesellschaft (Frankfurt: Suhrkamp 1992).

Yerushalmi, Yosef Hayim, Zakhor. Jewish History and Jewish Memory (Seattle and London: Washington U. Press 1982).

Zavelberg, Heinz Günter, "Lean Management – ein methodischer Ansatz für mehr Effizienz und Effektivität in der öffentlichen Verwaltung?", in: Die öffentliche Verwaltung 1994, 1040-1042.

Zumbansen, Peer, Vertragsregimes im ‚Dritten Sektor', in: Hein Kötz et al. (eds.), 2 Non-Profit Yearbook (2003), *forthcoming*.

Zumbansen, Peer, Public Values, Private Contracts and the Colliding Worlds of Family and Market, in: 11 Feminist Legal Studies 73-87 (2003).

Zumbansen, Peer, The Province of Government: Towards a Private Law Understanding of Public Governance, LL.M. Thesis Harvard Law School 1998, forthcoming 2003.

Zumbansen, Peer, "Spiegelungen von Staat und Gesellschaft: Governance-Erfahrungen in der Globalisierungsdebatte", in: Globalisierung als Problem der Steuerungsfähigkeit des Rechts und der Gerechtigkeit (Michael Anderheiden, Stefan Huster, Stephan Kirste eds.), ARSP Beiheft No. 79, Stuttgart 2001, 13–40.

Zumbansen, Peer, "Die vergangene Zukunft des Völkerrechts ", in: 34 Kritische Justiz (KJ) 46–68 (2001).

Zumbansen, Peer, Ordnungsmuster im modernen Wohlfahrtsstaat. Lernerfahrungen zwischen Staat, Gesellschaft und Vertrag (Baden-Baden: Nomos 2000).

Zumbansen, Peer, “Carl Schmitt und die Suche nach politischer Einheit ”, in: 30 Kritische Justiz (KJ), 63–79 (1997).